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1918

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——*S.* 63—Limitation Act (1908), S. 10
Trusts Act
—Beneficiary can take necessary steps to place trust property in hands of trustee 464*c*
——*S.* 63—Trustee acting in violation of trust Beneficiaries can sue for possession 400*b*
——*Ss.* 82 *and* 85—Civil P. C. (1908), O. 21, R. 16—Assignment of decree benami — Execution by benamidar is valid—Case is governed by Trusts Act 74*a*
——*S.* 87—Debtor becoming executor—Debt payable becomes part of assets of deceased testator in his hands 526*b*
——*S.* 87—Executor indebted to estate, renouncing office or dying without having acted or obtaining probate—Executor is stranger debtor—Limitation to recover debt is three years 526*c*
——*S.* 87—Executor indebted to estate is liable to pay interest 526*h*
——*S.* 88—Contract Act (1872), Ss. 212 and 215—Inchoate contract which, if completed, would bar execution of decree, does not operate as bar to execution 396*b*
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——*S.* 25—Regulation framed under Act — Regulations of Madras University Nos. 64 and 96 (3) and (8)—Senate is Legislative and Syndicate is executive body—Syndicate must exercise its function in conformity with regulations—Right of Government to veto and of Fellows to protest under Regn. 64 is not taken away if proposals are Regulations 763*a*
——*S.* 25—Regulations framed under Act — Madras University, Regn. 64 — Regn. 64, so far as it purports to extend right of protest to resolution other than resolution under S. 25, is ultra vires of Senate 763*b*

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——*S.* 25—Syndicate is amenable to jurisdiction of Specific Relief Act (1877), S. 45 763*c*
——*S.* 25—Regulations framed under Act are to be read as supplementing Act 763*j*
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——*S.* 1—"Workman"—Supervisor of coolies is not workman 281*a*
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TABLE No. I

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N. B.—Column No. 1 denotes pages of others JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

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ILR	A I R			ILR	A I R			ILR	A I R			ILR	A I R			ILR	A I R		
1	1918	*M*	31	225	1918	*M*	515	435	1918	*M*	407	620	1918	*M*	60	849	1918	*M*	26
4	"	"	675	233	"	"	656	440	"	"	702	622	"	"	120	855	"	*PC*	74
18	"	"	492	237	"	"	560	442	"	"	379	624	"	"	362	861	1919	*M*	1034
23	"	"	640	241	"	"	389	446	"	"	238	629	1919	"	1106	871	"	"	140
26	"	"	451	246	"	"	555	454	"	"	37	637	1918	"	29	886	"	"	598
30	"	"	206	251	"	"	620	458	"	"	578	641	"	"	370	904	"	"	784
33	"	"	414	256	"	"	1256	465	1919	"	587	644	1919	"	889	923	"	"	957
40	"	"	661	259	1919	"	1164	467	"	"	581	650	1918	"	19	939	"	"	950
44	"	"	1346	265	1918	"	127	469	1918	"	504	659	1919	"	911	943	"	"	626
75	"	"	469	286	"	"	143	471	"	"	504	685	"	"	879	955	1918	"	92
102	"	"	724	296	1917	*PC*	190	474	1919	"	1014	691	"	"	590	959	1919	"	322
109	1919	"	990	307	1918	*M*	680	488	1918	"	288	701	"	"	1071	980	"	"	755
115	1918	"	719	316	"	"	511	503	"	"	348	709	"	"	1053	982	"	"	847
118	"	"	84	319	"	"	624	510	1919	"	755	721	"	"	1062	985	"	"	738
121	"	"	594	323	"	"	413	513	1918	"	103	724	"	"	1096	998	1918	*PC*	97
124	"	"	464	325	"	"	554	528	"	"	366	727	1918	"	371	1012	"	"	169
136	1919	"	1175	327	"	"	442	533	1919	"	583	731	1919	"	848	1022	"	*M*	296
151	1918	"	391	334	"	"	647	535	1918	"	491	733	"	"	1059	1026	"	"	319
156	"	"	136	353	"	"	482	538	"	"	264	743	"	"	1044	1033	1919	"	202
169	"	"	213	357	1919	"	1182	554	"	"	191	749	"	"	798	1043	"	"	59
182	"	"	281	365	1918	"	119	561	1919	"	1046	778	1918	*PC*	81	1053	"	"	607
188	"	"	484	370	"	"	557	577	"	"	1159	787	1919	*M*	1132	1060	"	"	483
197	"	"	444	374	"	"	1	582	"	"	1173	792	1918	"	62	1068	"	"	769
205	"	"	274	403	1917	*PC*	121	589	1918	"	150	813	1919	"	1144	1071	"	"	831
208	"	"	588	412	"	"	179	604	1919	"	1077	815	"	"	616	1075	"	"	677
211	"	"	722	418	1918	*M*	123	612	1918	"	421	824	"	"	690	1078	"	"	854
213	"	"	711	427	1919	"	1140	616	1919	"	647	840	"	"	965				

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MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1917	*PC*	146	145	1919	*M*	931	279	1918	*M*	368	396	1918	*M*	120	473	1919	*M*	682
12	"	"	201	156	"	"	1014	282	"	"	444	397	1919	"	1062	479	"	"	623
17	1918	*M*	123	167	1918	"	370	291	1917	*PC*	188	399	1918	"	60	488	1918	"	219
24	"	"	143	170	1919	"	1106	295	1918	*M*	274	400	1919	"	1159	494	"	"	62
32	"	"	258	177	"	"	1102	298	1917	*PC*	95	404	"	"	1132	515	"	"	126
41	"	"	238	184	"	"	1113	305	"	"	101	408	1918	"	167	517	1919	"	1039
48	1917	*PC*	181	193	1918	"	288	309	1918	*M*	191	412	1919	"	1173	524	1918	"	554
63	"	"	179	206	"	"	72	315	"	"	29	419	"	"	1096	526	1919	"	848
67	"	"	196	210	1919	"	868	319	"	"	659	421	1918	"	862	528	1918	"	19
71	1919	*M*	1029	213	1918	"	379	323	"	"	296	425	1919	"	1064	536	1919	"	1059
79	1918	"	331	217	1919	"	879	327	1917	*PC*	105	431	"	"	1097	545	1918	*PC*	3
84	"	"	442	223	"	"	1152	342	1918	*M*	364	439	1918	"	88	551	1919	*M*	941
87	1919	"	1077	229	1918	"	487	344	"	"	183	446	1919	"	590	553	1918	"	341
97	1917	*PC*	197	234	"	"	44	358	"	"	160	454	1918	"	348	558	"	"	25
104	1918	*M*	1	253	1919	"	889	361	1917	*PC*	111	460	"	"	119	561	"	"	163
128	"	"	84	258	1918	"	272	369	1918	*M*	371	463	1917	*PC*	121	563	1919	"	798
130	1917	*PC*	190	263	"	"	578	373	1919	"	1140	470	1919	*M*	1144	590	"	"	1044
139	1919	*M*	990	271	"	"	37	381	"	"	1046					597	1918	"	236

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MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1918	*PC*	34	180	1919	*M*	728	317	1919	*M*	854	454	1919	*M*	610	608	1919	*M*	951
5	"	"	37	184	"	"	483	335	"	"	738	459	1918	*PC*	70	609	1918	"	837
11	1919	*M*	758	189	"	"	883	347	1918	*PC*	41	467	1919	*M*	818	614	"	*PC*	249
23	"	"	715	194	"	"	969	355	1919	*M*	607	468	1918	"	319	625	1919	*M*	38
27	"	"	1071	196	"	"	598	361	"	"	870	473	1919	"	690	632	"	"	510
35	"	"	140	214	1918	*PC*	8	364	"	"	706	489	"	"	322	639	"	"	100
46	1918	*PC*	35	219	1919	*M*	902	368	"	"	655	507	"	"	938	644	1918	*PC*	217
51	1919	*M*	1110	229	"	"	831	372	"	"	698	509	"	"	677	647	1919	*M*	886
57	"	"	911	231	1918	"	26	375	"	"	964	512	"	"	865	650	"	"	777
83	"	"	827	236	1919	"	784	377	1918	"	162	518	"	"	851	652	"	"	650
87	"	"	950	251	"	"	796	380	"	"	61	525	1918	*PC*	45	657	"	"	540
90	"	"	616	253	"	"	198	382	1919	"	747	531	1919	*M*	947	661	"	"	943
96	"	"	772	256	"	"	646	387	"	"	752	533	"	"	566	665	"	"	653
99	1917	*PC*	128	258	1918	"	18	392	1918	*PC*	81	541	"	"	669	666	"	"	879
110	1919	*M*	626	259	1919	"	190	401	1919	*M*	839	547	"	"	588	667	"	"	847
120	"	"	121	262	1917	*PC*	116	402	"	"	769	552	"	"	709	669	"	"	829
124	"	"	849	272	1919	*M*	1034	405	"	"	614	555	"	"	833	673	"	"	434
127	"	"	751	281	1918	"	419	407	"	"	823	559	"	"	907	684	"	"	937
129	"	"	897	284	1919	"	1038	410	"	"	47	565	"	"	679	686	"	"	620
138	1918	*PC*	74	287	"	"	819	414	"	"	59	571	"	"	816	692	"	"	367
144	1919	*M*	793	294	1918	"	279	422	1918	*PC*	11	575	"	"	929	698	"	"	95
150	"	"	647	296	1919	"	473	441	1919	*M*	798	579	"	"	792	707	1918	*PC*	102
153	"	"	736	304	1918	"	82	442	"	"	848	581	"	"	957	728	"	"	85
157	"	"	892	309	1919	"	1082	443	"	"	733	595	1918	*PC*	77	733	"	"	168
159	"	"	965	312	"	"	888	450	"	"	779	604	1919	*M*	869	736	1919	*M*	24
169	1918	*PC*	53	313	1918	"	490	451	"	"	776	605	"	"	948	740	"	"	781
177	"	*M*	92	315	1919	"	875												

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MLT	AIR			MLT	AIR			MLT	AIR			MLT	AIR			MLT	AIR		
1	1918	*M*	143	101	1917	*PC*	179	203	1917	*PC*	101	255	1918	*M*	162	319	1918	"	136
7	"	"	638	106	1918	*M*	103	206	1918	*M*	321	258	"	"	276	320	1919	"	1053
9	1919	"	1014	117	1917	*PC*	181	208	"	"	147	261	1919	"	1140	337	"	"	1064
24	1918	"	17	127	1918	*M*	348	210	"	"	97	266	"	"	1046	341	"	"	1039
26	1917	*PC*	197	1 7	1919	"	923	213	"	"	279	278	1918	"	160	346	"	"	590
31	"	"	196	142	1917	*PC*	95	215	"	"	29	280	1919	"	1102	352	1918	"	360
36	"	"	207	147	"	"	111	218	1917	*PC*	105	285	"	"	1132	353	"	"	256
44	1918	*M*	1	154	1918	*M*	93	228	"	"	188	288	1918	"	366	355	1919	"	894
67	"	"	509	156	"	"	370	231	1918	*M*	310	291	1919	"	1097	357	1918	"	62
70	"	"	578	158	"	"	284	233	"	"	165	297	1918	"	42	372	1919	"	1044
78	"	"	319	159	1919	"	868	235	1919	"	1152	300	1919	"	1082	376	1917	*PC*	173
81	"	"	314	161	1918	"	44	240	"	"	879	302	"	"	1173	382	"	"	197
84	"	"	163	178	1919	"	1106	245	1918	"	178	307	1918	"	323	384	1918	"	8
85	"	"	82	183	1918	"	222	248	"	"	72	312	1919	"	1067	388	"	"	3
89	1919	"	1029	187	"	"	183	251	"	"	191	316	"	"	1159	392	1917	"	128
94	1917	*PC*	190	198	1917	*PC*	121									400	"	"	116

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MLT	AIR		MLT	AIR		MLT	AIR		MLT	AIR		MLT	AIR	
1	1919	*M* 798	92	1918	*PC* 84	207*a*	1918	*M* 18	305	1918	*PC* 37	440	1919	*M* 95
16	"	" 1128	95	1919	*M* 1043	207*b*	"	" 92	311	"	*M* 78	447	"	" 951
17	"	" 1185	96	"	" 353	209	1919	" 883	315	1919	" 322	448	"	" 679
18	"	" 1144	101	"	" 768	212	"	" 795	330	1918	*PC* 11	453	"	" 778
20	"	" 1143	102	"	" 877	214	"	" 845	345	"	" 84	454	"	" 779
22	1918	" 19	104	"	" 849	216	"	" 690	346	1919	*M* 752	455	"	" 566
28	1919	" 1110	106	"	" 595	227	"	" 728	351	"	" 669	461	"	" 434
32	1918	" 100	110	1918	*PC* 53	231	1918	*PC* 74	356	"	" 546	469	"	" 886
34	1919	" 1071	115	1919	*M* 911	236	"	" 70	358	"	" 47	471	1918	" 589
35	1918	" 312	133	"	" 818	242	"	*M* 334	361	1918	*PC* 87	472	1919	" 320
38	1919	" 140	134	1918	" 26	244	1919	" 446	370	1919	*M* 59	473	"	" 100
46	"	" 1071	137	1919	" 784	246	"	" 646	376	"	" 113	477	"	" 798
51	"	" 616	149	"	" 473	247	"	" 1034	389	1918	*PC* 1	478	"	" 781
56	1918	" 219	155	"	" 626	254	"	" 223	392	1919	*M* 829	482	"	" 869
60	"	" 296	163	"	" 598	256	"	" 20	396	"	" 610	483	"	" 929
62	"	*PC* 35	175	1918	" 341	260	"	" 367	400	"	" 833	486	"	" 709
66	"	" 41	179	1919	" 758	264	"	" 825	403	"	" 865	489	"	" 312
72	1919	*M* 1059	180	"	" 1075	267	"	" 555	407	1918	*PC* 112	495	"	" 840
77	"	" 892	181	"	" 755	271	1918	*PC* 4	416	1919	*M* 813	498	"	" 677
79	1918	" 285	182	"	" 1163	276	"	" 81	420	"	" 200	500	"	" 312
81	1919	" 1193	183	"	" 854	282	"	" 25	424	"	" 8	501	"	" 792
82	"	" 847	197	"	" 738	292	"	" 45	429	1918	*PC* 49	502	"	" 43
83	"	" 827	205	"	" 597	297	"	" 20	434	"	" 77	505	"	" 24
86	1917	*PC* 169												

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MLW	AIR		MLW	AIR		MLW	AIR		MLW	AIR		MLW	AIR	
1	1919	*M* 1152	124	1919	*M* 1129	269	1918	*M* 284	406	1918	*M* 136	524	1918	*M* 366
8	1918	" 295	131	1918	" 499	271	"	" 93	407	1919	" 612	528	1919	" 889
10	"	" 665	133	1917	*PC* 80	274	1919	" 879	411	1918	" 314	533	"	" 1132
16	1919	" 1001	140	1918	*M* 416	280	1918	" 76	415	1919	" 1067	537	1918	" 88
22	1917	*PC* 190	143	"	" 370	284	"	" 121	420	1918	" 103	543	1919	" 1159
28	1918	*M* 400	146	1917	*PC* 196	287	"	" 351	435	"	" 334	547	"	" 1173
30	"	" 333	149	"	" 197	291	1919	" 1106	438	"	" 356	552	"	" 1140
32	"	" 81	156	"	" 179	298	1918	" 127	440	"	" 160	557	1918	" 78
33	"	" 360	159	1919	*M* 1014	315	1917	*PC* 111	543	"	" 213	563	1919	" 1071
36	1919	" 1117	178	1918	" 419	323	"	" 188	454	1919	" 1046	564	"	" 1038
58	1918	" 504	194	1919	" 1135	326	1919	*M* 868	468	1918	" 310	566	1918	" 279
62	1917	*PC* 201	201	1918	" 74	328	1918	" 340	471	"	" 222	568	1919	" 1096
66	"	" 58	206	"	" 348	330	1917	" 1	477	1919	" 923	571	"	" 1163
72	1919	*M* 1077	210	"	" 82	332	1918	" 328	482	"	" 1097	573	1918	" 280
81	1918	" 490	215	"	" 119	335	"	" 272	490	1918	" 183	574	"	" 285
83	"	" 350	218	"	" 101	339	"	" 194	503	1919	" 1128	577	1917	*PC* 101
85	1919	" 1182	221	"	" 29	361	1917	*PC* 105	505	"	" 1185	581	"	" 95
90	1917	*PC* 163	225	"	" 337	372	1918	*M* 42	508	1918	" 191	586	1918	*M* 62
94	"	" 146	229	"	" 331	376	"	" 312	513	"	" 256	604	1919	" 1039
104	1918	*M* 578	234	"	" 123	380	"	" 44	516	"	" 294	610	"	" 187
114	1919	" 1161	241	"	" 491	403	"	" 143	518	"	" 163	612	"	" 1144
119	1918	" 509	243	"	" 1	404	"	" 36	520	"	" 371	614	"	" 1026

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MLW	AIR		MLW	AIR		MLW	AIR		MLW	AIR		MLW	AIR	
1	1917	*PC* 167	130	1918	*PC* 37	206	1919	*M* 597	324	1918	*PC* 22	436	1919	*M* 714
4	"	" 173	136	1919	*M* 595	208	"	" 823	328	"	" 77	438	"	" 322
12	1919	*M* 590	140	"	" 768	212	1918	*PC* 70	335	1919	*M* 793	455	"	" 706
19	1918	" 147	142	"	" 849	219	1919	*M* 795	340	"	" 140	460	1918	" 18
21	1919	" 755	145	"	" 1071	221	"	" 825	350	"	" 20	461	1919	" 633
24	"	" 1156	152	"	" 653	225	"	" 353	354	"	" 646	470	"	" 546
28	1918	" 19	154	"	" 1110	233	1918	*PC* 30	357	"	" 731	473	"	" 359
37	1919	" 1059	160	"	" 1143	240	1919	*M* 784	369	"	" 752	480	"	" 854
44	1918	" 285	163	1918	*PC* 35	253	"	" 892	374	1918	" 162	497	"	" 792
46	"	" 341	167	"	" 74	256	"	" 845	377	"	" 166	499	1918	" 589
53	1917	*PC* 116	171	1919	*M* 877	259	1918	" 100	379	"	" 336	501	"	" 317
62	1919	*M* 911	175	"	" 818	261	1919	" 626	382	1919	" 798	503	1919	" 829
84	1918	" 236	176	1918	*PC* 3	271	"	" 827	400	"	" 988	507	"	" 813
88	"	" 25	179	"	" 53	275	"	" 835	405	"	" 59	512	"	" 865
91	1919	" 1034	186	"	" 41	281	"	" 473	413	"	" 939	517	"	" 779
100	"	" 121	192	1919	*M* 728	289	1918	" 92	416	1918	" 219	519	"	" 929
103	"	" 1044	197	1918	" 26	292	1919	" 738	422	1919	" 610	522	"	" 833
109	"	" 897	202	"	" 296	301	"	" 598	427	1917	*PC* 121	526	"	" 709
118	1918	" 288	205	1919	" 948	317	"	" 616	432	1919	*M* 47			

8 Madras Law Weekly=All India Reporter—(*Concld.*)

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
530	1919	*M*	690	558	1919	*M*	839	581	1919	*M*	1075	592	1919	*M*	869	621	1919	*M*	777
543	"	"	781	559	"	"	669	582	"	"	798	594	"	"	816	622	"	"	183
548	1918	*PC*	20	565	"	"	483	583	"	"	950	599	"	"	130	625	"	"	951
551	1919	*M*	8	570	1918	*PC*	25	586	1918	*PC*	45	614	"	"	551	626	"	"	846

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MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
1	1918	*M*	606	194	1918	*M*	279	340	1918	*M*	222	547*a*	1919	*M*	948	751	1919	*M*	633
4	"	"	669	195	"	"	147	345	"	"	136	547*b*	1918	"	276	756	"	"	865
7	1917	*PC*	201	197	"	"	36	346	1919	"	923	551	1919	"	835	761	"	"	679
9	"	"	136	198	1919	"	971	350	1918	"	1	555	1918	"	56	764	"	"	813
16	"	"	146	199	1918	"	143	371	"	"	219	561	1919	"	795	768	"	"	848
23	1918	*M*	123	200	1919	"	1106	376	"	"	285	562	"	"	223	769	"	"	781
28	1917	*PC*	86	205	1918	"	370	378	1919	"	1043	564	"	"	825	772	"	"	379
37	1918	*M*	164	207	"	"	284	379	1918	*PC*	8	567	"	"	597	779	"	"	95
38*a*	"	"	286	208	1919	"	1077	382	"	"	3	569	"	"	598	786	"	"	575
38*b*	"	"	278	214	"	"	1001	384	1917	"	94	580	"	"	359	792	"	"	709
40	"	"	502	219	"	"	1135	386	"	"	128	586	"	"	843	794	"	"	1143
41	"	"	333	224	1918	"	310	394	"	"	169	587	1917	*PC*	105	796	"	"	957
42	1919	"	952	226	"	"	74	399	1919	*M*	1053	595	1919	*M*	731	806	"	"	829
44	1918	"	101	230	"	"	163	406	1918	*PC*	35	598	"	"	738	809	"	"	792
46	"	"	419	231	"	"	82	409	1919	*M*	1059	606	"	"	752	811	"	"	322
51	1919	"	1161	235	"	"	509	414	1918	"	62	611	1918	*PC*	22	824	"	"	610
54	1918	"	504	238	"	"	162	427	"	"	78	614	1919	*M*	1034	827	1918	"	371
55	1919	"	1175	239	"	"	334	431	"	*PC*	37	621	1918	*PC*	74	830	1919	"	1038
65	1918	"	431	242	1917	"	1	435	1917	"	173	625	1919	*M*	854	831	1918	*PC*	25
69	"	"	32	244	1918	"	76	440	1919	*M*	255	638	1918	*PC*	77	840	"	"	20
75	1919	"	1188	246	"	"	319	441	1918	*PC*	41	643	1919	*M*	113	842	1919	*M*	823
81	1918	"	136	249	1919	"	1082	446	1917	"	188	655	"	"	498	844	"	"	893
89	"	"	272	251	1918	"	103	448	1918	*M*	19	658	"	"	728	846	"	"	886
92	"	"	143	262	"	"	331	454	1919	"	1039	661	"	"	1063	847	"	"	777
98	"	"	288	265	1919	"	1046	458	"	"	827	662	"	"	965	849	"	"	551
106	"	"	499	274	1918	"	314	461	"	"	911	666	"	"	902	853	"	"	469
107	"	"	407	276	1919	"	1064	477	"	"	877	672	"	"	847	856	"	"	24
110	"	"	300	280	"	"	1132	479	"	"	595	673	"	"	831	859	1918	*PC*	169
121	1919	"	1014	283	"	"	1159	482	1918	"	296	675	"	"	47	870	1919	*M*	907
129	1918	"	350	285	"	"	1140	484	1919	"	892	678	"	"	939	874	"	"	840
130	"	"	416	289	1918	"	294	486	"	"	847	680	"	"	988	877	"	"	816
132	"	"	17	291	"	"	100	487	"	"	473	683	"	"	8	880	1918	*PC*	45
134	"	"	336	292	1919	"	1123	493	"	"	879	688	"	"	784	885	"	"	84
136	1919	"	1156	293	"	"	1185	497	"	"	1071	699	1918	"	26	886	1919	*M*	581
139	1918	"	121	295	1917	*PC*	111	502	"	"	1144	703	"	"	323	887	"	"	864
141	"	"	351	300	"	"	207	503	"	"	768	709	"	*PC*	70	888	"	"	479
143	1919	"	888	305	"	"	197	505	"	"	818	715	1919	*M*	951	892	1918	"	178
144	1918	"	61	306	"	"	95	506	"	"	1096	716	"	"	869	896	1919	"	304
146	1919	"	1117	310	"	"	121	507	"	"	123	717	"	"	778	898	"	"	100
163	1917	*PC*	197	313	"	"	187	514	"	"	1044	718	"	"	779	902	"	"	63
167	1918	*M*	97	315	"	"	101	518	1918	*PC*	34	719	"	"	833	906	1917	*PC*	179
171	"	"	93	318	1919	*M*	1173	520	1919	*M*	758	721	"	"	690	908	1919	*M*	620
173	"	"	311	323	1917	*PC*	196	521	"	"	883	732	1918	*PC*	173	913	"	"	540
175	"	"	166	324	"	"	167	524	"	"	647	739	1919	*M*	706	917	"	"	59
177	"	"	317	327	1918	*M*	191	526	"	"	353	742	"	"	669	922	1918	*PC*	81
179	"	"	183	331	"	"	160	535	1918	*PC*	53	746	"	"	546	926	1919	*M*	968
188	"	"	312	333	1919	"	1071	540	1919	*M*	626	748	"	"	929	928	"	"	312
191	"	"	42	334	"	"	1097									929	"	"	30

TABLE No. II

Showing seriatim the pages of ALL INDIA REPORTER, 1918 MADRAS, with corresponding references of other REPORTS, JOURNALS and PERIODICALS.

N. B.—Column 1 denotes pages of the ALL INDIA REPORTER, 1918 MADRAS.
Column 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1918 Madras=Other Journals.

A.I.R.	Other Journals
1	44 *I C* 699
FB	23 *M L T* 44
	34 *M L J* 104
	7 *M L W* 243
	41 *Mad* 374
	1918*M W N* 350
17	43 *I C* 79
	33 *M L J* 750
	23 *M L T* 24
	1918*M W N* 132
18 (1)	47 *I C* 646
	35 *M L J* 258
	24 *M L T* 207
	8 *M L W* 460
	42 *Mad* 32
18 (2)	47 *I C* 657
	19 *Cr L J* 933
19	45 *I C* 867
	34 *M L J* 528
	8 *M L W* 28
	24 *M L T* 22
	1918*M W N* 448
	41 *Mad* 650
23	45 *I C* 460
	33 *M L J* 682
24	44 *I C* 813
	40 *Mad* 1171
25	47 *I C* 543
	34 *M L J* 558
	8 *M L W* 88
26	47 *I C* 1000
FB	24 *M L T* 134
	35 *M L J* 231
	8 *M L W* 197
	41 *Mad* 849
	1918*M W N* 699
29	45 *I C* 419
	7 *M L W* 221
	34 *M L J* 315
	23 *M L T* 215
	41 *Mad* 637
31	45 *I C* 430
	41 *Mad* 1
32	43 *I C* 679
	33 *M L J* 665
	1918*M W N* 69
36	45 *I C* 417
	1918*M W N* 197
	7 *M L W* 404
37	43 *I C* 9
	6 *M L W* 708
	1917*M W N* 805
	22 *M L T* 527
	34 *M L J* 271
	41 *Mad* 454
39	43 *I C* 860
	33 *M L J* 740
42	45 *I C* 474
	1918*M W N* 191
	7 *M L W* 372
	23 *M L T* 297
44	44 *I C* 894
	23 *M L T* 161

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44	34 *M L J* 234
	7 *M L W* 380
56 (1)	43 *I C* 1008
56 (2)	48 *I C* 897
	1918*M W N* 555
60	45 *I C* 95
	34 *M L J* 399
	41 *Mad* 620
61	44 *I C* 572
	1918*M W N* 144
	35 *M L J* 380
62	46 *I C* 86
F B	7 *M L W* 586
	34 *M L J* 494
	23 *M L T* 357
	1918*M W N* 414
	41 *Mad* 792
72	44 *I C* 580
	34 *M L J* 206
	23 *M L T* 248
	19 *Cr L J* 356
74	43 *I C* 801
	7 *M L W* 201
	1918*M W N* 226
76	44 *I C* 551
	7 *M L W* 280
	1918*M W N* 244
78	45 *I C* 969
	7 *M L W* 557
	1918*M W N* 427
	24 *M L T* 311
81	43 *I C* 15
	1917*M W N* 867
	7 *M L W* 32
82	44 *I C* 523
	23 *M L T* 85
	7 *M L W* 210
	1918*M W N* 231
	35 *M L J* 304
84	43 *I C* 757
	6 *M L W* 570
	1917*M W N* 784
	34 *M L J* 128
	41 *Mad* 118
85	44 *I C* 566
	1917*M W N* 816
86	43 *I C* 50
	22 *M L T* 419
	1917*M W N* 864
	33 *M L J* 753
88	45 *I C* 638
	34 *M L J* 439
	7 *M L W* 537
92	47 *I C* 692
	24 *M L T* 207
	35 *M L J* 177
	8 *M L W* 289
	41 *Mad* 955
93	44 *I C* 519
	23 *M L T* 154
	7 *M L W* 271
	1918*M W N* 171
94	43 *I C* 6

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94	33 *M L J* 463
	6 *M L W* 696
	1917*M W N* 822
97	44 *I C* 500
	1918*M W N* 167
	23 *M L T* 210
100	45 *I C* 13
	1918*M W N* 291
	24 *M L T* 32
	8 *M L W* 259
101	43 *I C* 76
	1918*M W N* 44
	7 *M L W* 218
103	44 *I C* 753
	23 *M L T* 106
	1918*M W N* 251
	7 *M L W* 420
	41 *Mad* 513
111	43 *I C* 605
	19 *Cr L J* 189
119	45 *I C* 35
	7 *M L W* 215
	34 *M L J* 460
	41 *Mad* 365
120	45 *I C* 98
	34 *M L J* 396
	41 *Mad* 622
121	44 *I C* 447
	1918*M W N* 139
	7 *M L W* 284
123	43 *I C* 935
FB	22 *M L T* 532
	34 *M L J* 17
	1918*M W N* 23
	7 *M L W* 234
	41 *Mad* 418
126	44 *I C* 889
	34 *M L J* 515
127	43 *I C* 539
FB	22 *M L T* 461
	33 *M L J* 707
	1917*M W N* 882
	7 *M L W* 298
	41 *Mad* 265
136 (1)	44 *I C* 885
	7 *M L W* 406
	23 *M L T* 319
	1918*M W N* 345
136 (2)	43 *I C* 578
FB	6 *M L W* 794
	33 *M L J* 729
	1918*M W N* 81
	41 *Mad* 156
	19 *Cr L J* 162
142	44 *I C* 864
143 (1)	44 *I C* 863
	1918*M W N* 199
	7 *M L W* 403
143 (2)	43 *I C* 566
FB	34 *M L J* 24
	23 *M L T* 1
	1918*M W N* 92
	41 *Mad* 286

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147	44 *I C* 852
	23 *M L T* 208
	1918*M W N* 195
	8 *M L W* 19
148	45 *I C* 333
	33 *M L J* 696
150	43 *I C* 593
	19 *Cr L J* 177
	41 *Mad* 589
160	44 *I C* 815
	34 *M L J* 358
	23 *M L T* 278
	1918*M W N* 331
	7 *M L W* 440
162	45 *I C* 11
	23 *M L T* 255
	1918*M W N* 238
	35 *M L J* 377
	8 *M L W* 374
163	44 *I C* 319
	23 *M L T* 84
	1918*M W N* 230
	7 *M L W* 518
	34 *M L J* 561
164	43 *I C* 95
	1918*M W N* 37
	19 *Cr L J* 63
165	45 *I C* 24
	23 *M L T* 233
166	44 *I C* 367
	1918*M W N* 175
	8 *M L W* 377
167	45 *I C* 86
	34 *M L J* 408
169	44 *I C* 419
	6 *M L W* 769
	22 *M L T* 523
172	43 *I C* 385
178	44 *I C* 605
	23 *M L T* 245
	1918*M W N* 892
180	45 *I C* 608
183	44 *I C* 630
	23 *M L T* 187
	1918*M W N* 179
	34 *M L J* 344
	7 *M L W* 490
191	45 *I C* 471
	34 *M L J* 309
	23 *M L T* 251
	7 *M L W* 508
	1918*M W N* 327
	41 *Mad* 554
194	44 *I C* 483
	7 *M L W* 339
206	45 *I C* 67
	41 *Mad* 30
207	44 *I C* 839
212	45 *I C* 257
	40 *Mad* 977
	19 *Cr L J* 497
213 **FB**	44 *I C* 805

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AIR	Other Journals		
213	33	*M L J*	566
FB	41	*Mad*	169
	7	*M L W*	443
219	45	*I C*	437
	34	*M L J*	488
	1918	*M W N*	371
	24	*M L T*	56
	8	*M L W*	416
222	44	*I C*	663
	23	*M L T*	183
	7	*M L W*	471
	1918	*M W N*	340
225	45	*I C*	52
	22	*M L T*	474
231	45	*I C*	261
	33	*M L J*	121
	22	*M L T*	69
	6	*M L W*	175
	40	*Mad*	976
	19	*Cr L J*	501
236	47	*I C*	552
	34	*M L J*	596
	8	*M L W*	84
238	44	*I C*	466
	34	*M L J*	41
	41	*Mad*	446
242	43	*I C*	833
	33	*M L J*	759
256	45	*I C*	664
	23	*M L T*	353
	7	*M L W*	513
257	43	*I C*	1
	1917	*M W N*	815
	6	*M L W*	757
258	44	*I C*	428
	34	*M L J*	32
262	45	*I C*	701
263	43	*I C*	850
	33	*M L J*	787
264 (1)	45	*I C*	727
264 (2)	44	*I C*	308
	41	*Mad*	538
272	43	*I C*	560
	22	*M L T*	538
	1918	*M W N*	89
	34	*M L J*	258
	7	*M L W*	335
274	45	*I C*	703
	41	*Mad*	205
	34	*M L J*	295
276	44	*I C*	834
	23	*M L T*	258
	1918	*M W N*	547
278	43	*I C*	677
	1918	*M W N*	38
279	44	*I C*	849
	35	*M L J*	294
	23	*M L T*	213
	7	*M L W*	566
	1918	*M W N*	194
280	45	*I C*	782
	7	*M L W*	573
281	43	*I C*	787
	33	*M L J*	607
	22	*M L T*	435
	19	*Cr L J*	211
	6	*M L W*	745
	1917	*M W N*	825
	41	*Mad*	182
284	44	*I C*	251
	23	*M L T*	158
284	7	*M L W*	269
	1918	*M W N*	207
285	45	*I C*	656
	1918	*M W N*	376
	7	*M L W*	574
	8	*M L W*	44
	24	*M L T*	79
	45	*I C*	758
	1918	*M W N*	38
286	43	*I C*	625
	22	*M L T*	543
	1918	*M W N*	98
288	34	*M L J*	193
	41	*Mad*	488
	8	*M L W*	118
	45	*I C*	239
	1918	*M W N*	289
	7	*M L W*	516
294	44	*I C*	248
	7	*M L W*	8
295	45	*I C*	644
	34	*M L J*	323
	24	*M L T*	60
	8	*M L W*	202
	1918	*M W N*	482
296	41	*Mad*	1022
	45	*I C*	401
	1917	*M W N*	779
	6	*M L W*	717
	22	*M L T*	512
297	43	*I C*	760
	22	*M L T*	391
	33	*M L J*	631
	6	*M L W*	722
	1918	*M W N*	110
300	45	*I C*	653
	23	*M L T*	231
	1918	*M W N*	224
	7	*M L W*	468
310	44	*I C*	479
	1918	*M W N*	173
	45	*I C*	406
	1918	*M W N*	188
	7	*M L W*	376
311	24	*M L T*	35
	44	*I C*	299
	23	*M L T*	81
	7	*M L W*	411
	1918	*M W N*	274
312	45	*I C*	649
	45	*I C*	22
	1918	*M W N*	177
	8	*M L W*	501
314	44	*I C*	293
	41	*Mad*	1026
	35	*M L J*	468
	23	*M L T*	78
	1918	*M W N*	246
316	45	*I C*	671
	23	*M L T*	206
317	43	*I C*	673
	33	*M L J*	410
	45	*I C*	535
	23	*M L T*	307
	1918	*M W N*	703
319	45	*I C*	435
	7	*M L W*	332
	43	*I C*	711
	33	*M L J*	757
321	44	*I C*	132
	34	*M L J*	79
322	7	*M L W*	229
	1918	*M W N*	262
323	43	*I C*	714
	7	*M L W*	30
	1918	*M W N*	41
328	45	*I C*	507
	24	*M L T*	242
	7	*M L W*	435
	1918	*M W N*	239
329	19	*Cr L J*	603
331 (1)	44	*I C*	120
	19	*Cr L J*	264
331 (2)	43	*I C*	697
	8	*M L W*	379
	1918	*M W N*	134
332	45	*I C*	62
	7	*M L W*	225
	35	*M L J*	609
340	44	*I C*	56
	7	*M L W*	328
341	45	*I C*	485
	34	*M L J*	553
	8	*M L W*	46
	24	*M L T*	175
343	43	*I C*	403
	19	*Cr L J*	115
344	45	*I C*	186
345	43	*I C*	379
348	44	*I C*	15
	41	*Mad*	503
	34	*M L J*	454
	23	*M L T*	127
	7	*M L W*	206
350	43	*I C*	616
	7	*M L W*	83
	1918	*M W N*	129
	19	*Cr L J*	200
351	44	*I C*	242
	7	*M L W*	287
	1918	*M W N*	141
353	45	*I C*	109
	40	*Mad*	1009
356 (1)	45	*I C*	76
	7	*M L W*	438
356 (2)	43	*I C*	532
	6	*M L W*	663
357	43	*I C*	654
358	43	*I C*	124
	1917	*M W N*	868
360 (1)	47	*I C*	858
	23	*M L T*	352
360 (2)	43	*I C*	515
	22	*M L T*	516
	7	*M L W*	33
362	45	*I C*	164
	41	*Mad*	624
	34	*M L J*	421
364	45	*I C*	161
	34	*M L J*	342
365	43	*I C*	352
	32	*M L J*	484
366	45	*I C*	414
	23	*M L T*	288
	7	*M L W*	524
	41	*Mad*	528
368	45	*I C*	468
	34	*M L J*	279
370	44	*I C*	110
	41	*Mad*	641
	34	*M L J*	167
	7	*M L W*	143
370	23	*M L T*	156
	1918	*M W N*	205
371	45	*I C*	517
	7	*M L W*	520
	34	*M L J*	369
	19	*Cr L J*	613
	41	*Mad*	727
	1918	*M W N*	827
373	41	*I C*	770
	1917	*M W N*	794
377	43	*I C*	956
379	42	*I C*	860
	1917	*M W N*	792
	22	*M L T*	432
	34	*M L J*	213
	41	*Mad*	442
381	43	*I C*	173
	33	*M L J*	591
383	40	*I C*	581
	33	*M L J*	370
387	43	*I C*	217
	33	*M L J*	509
	6	*M L W*	742
389	41	*I C*	341
	1917	*M W N*	602
	6	*M L W*	526
	41	*Mad*	241
391	43	*I C*	214
FB	22	*M L T*	330
	33	*M L J*	515
	6	*M L W*	617
	1917	*M W N*	785
	41	*Mad*	151
393	42	*I C*	948
	33	*M L J*	596
395	40	*I C*	205
	32	*M L J*	439
	6	*M L W*	22
396	43	*I C*	537
398	41	*I C*	305
	32	*M L J*	402
	1917	*M W N*	303
	6	*M L W*	364
	18	*Cr L J*	785
400	43	*I C*	164
	1917	*M W N*	906
	7	*M L W*	28
401	42	*I C*	671
	1917	*M W N*	788
	6	*M L W*	775
402	40	*I C*	535
	33	*M L J*	63
407	43	*I C*	905
	1918	*M W N*	107
	41	*Mad*	435
409	40	*I C*	846
	1917	*M W N*	306
411 (1)	43	*I C*	551
411 (2)	42	*I C*	502
	6	*M L W*	277
	22	*M L T*	146
	33	*M L J*	379
	1917	*M W N*	710
413	43	*I C*	592
	19	*Cr L J*	176
	41	*Mad*	323
414	40	*I C*	352
SB	32	*M L J*	494
	5	*M L W*	735
	1917	*M W N*	423

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AIR	Other Journals		
414	SB 41	*Mad*	33
416	43	*I C*	634
	7	*M L W*	140
	1918	*M W N*	130
418 (1)	42	*I C*	504
418 (2)	43	*I C*	624
	19	*Cr L J*	208
419	43	*I C*	643
	22	*M L T*	530
	1918	*M W N*	46
	7	*M L W*	178
	35	*M L J*	281
420	42	*I C*	505
	6	*M L W*	760
421	43	*I C*	651
	6	*M L W*	750
	33	*M L J*	705
	41	*Mad*	612
422	40	*I C*	170
	5	*M L W*	507
	32	*M L J*	520
424	43	*I C*	405
	19	*Cr L J*	117
425	40	*I C*	841
	32	*M L J*	442
	21	*M L T*	401
	40	*Mad*	1111
428	40	*I C*	976*n*
430	37	*I C*	753
	40	*Mad*	1118
431	42	*I C*	331
	33	*M L J*	449
	22	*M L T*	293
	6	*M L W*	536
	1918	*M W N*	65
	18	*Cr L J*	971
435	40	*Mad*	389
FB	32	*M L J*	233
	1917	*M W N*	383
	5	*M L W*	789
	40	*I C*	975
439	38	*I C*	976
	21	*M L T*	118
	5	*M L W*	414
	18	*Cr L J*	416
	40	*Mad*	880
442	43	*I C*	187
	6	*M L W*	762
	1917	*M W N*	872
	34	*M L J*	84
	41	*Mad*	327
443	42	*I C*	365
	6	*M L W*	448
444	41	*I C*	783
	6	*M L W*	42
	34	*M L J*	282
	41	*Mad*	197
448	42	*I C*	337
449	43	*I C*	122
450	42	*I C*	683
	1917	*M W N*	851
	22	*M L T*	496
451	41	*Mad*	26
	33	*M L J*	60
	22	*M L T*	17
	6	*M L W*	246
	1917	*M W N*	558
	41	*I C*	286
453	42	*I C*	268
	33	*M L J*	512
	6	*M L W*	491
455 (1)	40	*I C*	289
	18	*Cr L J*	641
455 (2)	42	*I C*	241
	33	*M L J*	295
	6	*M L W*	633
	1917	*M W N*	722
456	43	*I C*	167
	33	*M L J*	536
	6	*M L W*	758
457	38	*I C*	768
	18	*Cr L J*	384
458	42	*I C*	265
	1917	*M W N*	634
460 (1)	38	*I C*	468
460 (2)	42	*I C*	608
	6	*M L W*	283
	18	*Cr L J*	992
461	42	*I C*	677
	33	*M L J*	476
464	41	*Mad*	124
	33	*M L J*	357
	6	*M L W*	666
	22	*M L T*	218
	42	*I C*	366
468	40	*I C*	82
	6	*M L W*	108
	1917	*M W N*	584
469	41	*Mad*	75
FB	33	*M L J*	387
	1917	*M W N*	653
	22	*M L T*	275
	6	*M L W*	542
	42	*I C*	245
481	40	*I C*	291
	18	*Cr L J*	643
482	41	*Mad*	353
	33	*M L J*	627
	22	*M L T*	458
	6	*M L W*	753
	1917	*M W N*	843
	42	*I C*	934
483	38	*I C*	367
	32	*M L J*	258
	1917	*M W N*	288
484	41	*Mad*	188
FB	33	*M L J*	699
	22	*M L T*	484
	6	*M L W*	784
	1917	*M W N*	847
	42	*I C*	929
487	42	*I C*	939
	34	*M L J*	229
	22	*M L T*	498
	6	*M L W*	765
	1917	*M W N*	854
	40	*Mad*	1173
	44	*I C*	847
489	43	*I C*	126
	35	*M L J*	313
490	7	*M L W*	81
	1917	*M W N*	853
	43	*I C*	983
	41	*Mad*	535
491	7	*M L W*	241
	41	*Mad*	18
	33	*M L J*	35
492	6	*M L W*	192
	41	*I C*	807
	38	*I C*	441
494	18	*Cr L J*	329
	42	*I C*	512
495	33	*M L J*	471
	41	*I C*	828
496	18	*Cr L J*	860
	42	*I C*	789
497	33	*M L J*	612
	22	*M L T*	371
	6	*M L W*	445
	1917	*M W N*	677
499	43	*I C*	985
	7	*M L W*	131
	1918	*M W N*	106
500	42	*I C*	827
	6	*M L W*	703
	1917	*M W N*	674
502 (1)	43	*I C*	995
	1918	*M W N*	40
502 (2)	45	*I C*	30
	6	*M L W*	436
503	38	*I C*	327
	18	*Cr L J*	295
504 (1)	41	*Mad*	471
FB	33	*M L J*	724
	22	*M L T*	552
	7	*M L W*	58
	1918	*M W N*	54
	42	*I C*	911
504 (2)	41	*Mad*	469
FB	33	*M L J*	693
	42	*I C*	943
505	42	*I C*	724
	22	*M L T*	211
	6	*M L W*	428
	1917	*M W N*	682
	18	*Cr L J*	996
509	43	*I C*	989
	23	*M L T*	67
	7	*M L W*	119
	1918	*M W N*	235
511	41	*Mad*	316
	22	*M L T*	162
	1917	*M W N*	669
	42	*I C*	836
512	42	*I C*	897
	1917	*M W N*	859
513	40	*Mad*	1127
	40	*I C*	608
	22	*M L T*	20
	6	*M L W*	290
	33	*M L J*	533
514	40	*Mad*	1028
	40	*I C*	709
	18	*Cr L J*	709
515	41	*Mad*	225
	40	*I C*	851
516	42	*I C*	697
	22	*M L T*	151
	33	*M L J*	415
	1917	*M W N*	729
524	40	*I C*	347
	1917	*M W N*	344
	5	*M L W*	721
526	41	*I C*	605
	33	*M L J*	195
	6	*M L W*	85
530	42	*I C*	288
	6	*M L W*	692
531	40	*I C*	118
	32	*M L J*	364
	5	*M L W*	544
	1917	*M W N*	355
	21	*M L T*	408
531	40	*Mad*	1122
533	38	*I C*	172
	32	*M L J*	259
	21	*M L T*	91
	5	*M L W*	323
	1917	*M W N*	278
535	41	*I C*	527
537	42	*I C*	554
	6	*M L W*	518
538	39	*I C*	980
	40	*Mad*	1130
	33	*M L J*	366
	22	*M L T*	42
	5	*M L W*	763
	1917	*M W N*	566
	18	*Cr L J*	612
540	39	*I C*	1000
	18	*Cr L J*	632
541	42	*I C*	609
	6	*M L W*	712
	1917	*M W N*	879
543	41	*I C*	536
	33	*M L J*	459
	1917	*M W N*	707
545	42	*I C*	421
	6	*M L W*	272
	1917	*M W N*	495
548	41	*I C*	581
	33	*M L J*	46
551	40	*I C*	655
	6	*M L W*	80
554 (1)	41	*I C*	640
554 (2)	41	*Mad*	325
	34	*M L J*	524
	42	*I C*	555
555	41	*Mad*	246
	41	*I C*	990
	18	*Cr L J*	878
557	41	*Mad*	370
	33	*M L J*	618
	43	*I C*	78
558	42	*I C*	349
	33	*M L J*	679
	6	*M L W*	296
560	41	*Mad*	237
	33	*M L J*	173
	1917	*M W N*	740
	41	*I C*	745
562	39	*I C*	562
	5	*M L W*	537
	1917	*M W N*	413
	18	*Cr L J*	622
563	42	*I C*	464
	33	*M L J*	355
	6	*M L W*	443
564 (1)	41	*I C*	585
	6	*M L W*	147
	1917	*M W N*	583
564 (2)	40	*I C*	826
568	42	*I C*	357
569	41	*I C*	122
	33	*M L J*	548
	6	*M L W*	142
572	42	*I C*	438
	33	*M L J*	316
	6	*M L W*	588
574 (1)	41	*I C*	137
	18	*Cr L J*	761
574 (2)	42	*I C*	231
	33	*M L J*	302
	22	*M L T*	206

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A.I.R.	Other Journals		
574	(2)6	*M L W*	421
	1917	*M W N*	670
578	41	*Mad*	458
	34	*M L J*	263
	23	*M L T*	70
	7	*M L W*	104
	44	*I C*	471
580	40	*Mad*	1069
FB	33	*M L J*	130
	22	*M L T*	139
	6	*M L W*	203
	1917	*M W N*	712
	42	*I C*	294
586	39	*I C*	995
	1917	*M W N*	720
	18	*Cr L J*	627
587	(1)41	*I C*	661
	6	*M L W*	287
	1917	*M W N*	494
	18	*Cr L J*	837
587	(2)42	*I C*	230
588	41	*Mad*	208
	33	*M L J*	448
	6	*M L W*	140
	1917	*M W N*	501
	41	*I C*	384
589	42	*I C*	235
	33	*M L J*	472
	8	*M L W*	499
	24	*M L T*	471
	1917	*M W N*	878
590	41	*I C*	167
594	(1)39	*I C*	309
	18	*Cr L J*	469
594	(2)41	*Mad*	121
	33	*M L J*	599
	42	*I C*	951
595	41	*I C*	184
SB	5	*M L W*	835
600	42	*I C*	290
601	41	*I C*	664
FB	40	*Mad*	1030
	33	*M L J*	113
	22	*M L T*	163
	6	*M L W*	126
	1917	*M W N*	589
	18	*Cr L J*	840
605	41	*I C*	41
	32	*M L J*	487
	5	*M L W*	646
606	42	*I C*	219
	33	*M L J*	468
	6	*M L W*	520
	1918	*M W N*	1
607	42	*I C*	282
	33	*M L J*	543
	6	*M L W*	675
	1917	*M W N*	845
608	41	*I C*	24
	22	*M L T*	345
	6	*M L W*	572
	1917	*M W N*	571
618	42	*I C*	344
	33	*M L J*	455
	6	*M L W*	408
620	41	*Mad*	251
	33	*M L J*	219
	22	*M L T*	115
	1917	*M W N*	502
620	41	*I C*	701
622	38	*I C*	100
624	41	*Mad*	319
	22	*M L T*	388
	6	*M L W*	523
	1917	*M W N*	651
	42	*I C*	544
626	41	*I C*	629
	33	*M L J*	300
	1917	*M W N*	587
627	33	*M L J*	545
	22	*M L T*	208
	6	*M L W*	241
	39	*I C*	1004
	18	*Cr L J*	636
628	42	*I C*	275
632	40	*I C*	680
	33	*M L J*	481
	6	*M L W*	12
	1917	*M W N*	414
634	42	*I C*	706
	6	*M L W*	630
	1917	*M W N*	778
635	(1)41	*I C*	392
635	(2)40	*I C*	769
	6	*M L W*	114
	1917	*M W N*	419
636	42	*I C*	718
	6	*M L W*	292
638	(1)39	*I C*	988
	22	*M L T*	68
	18	*Cr L J*	620
638	(2)42	*I C*	961
	23	*M L T*	7
	1917	*M W N*	870
640	41	*Mad*	23
	5	*M L W*	704
	39	*I C*	863
642	41	*I C*	408
	33	*M L J*	207
	22	*M L T*	91
	6	*M L W*	184
	1917	*M W N*	569
644	(1)39	*I C*	1006
	40	*Mad*	789
	18	*Cr L J*	838
644	(2)40	*I C*	889
	5	*M L W*	644
645	(1)40	*I C*	893
	6	*M L W*	44
	1917	*M W N*	447
645	(2)40	*I C*	670
	33	*M L J*	539
	6	*M L W*	361
	1917	*M W N*	498
647	41	*Mad*	334
	33	*M L J*	430
	22	*M L T*	262
	6	*M L W*	600
	1917	*M W N*	894
	42	*I C*	977
	19	*Cr L J*	17
656	41	*Mad*	233
	41	*I C*	429
	22	*M L T*	149
657	40	*I C*	358
	5	*M L W*	593
659	34	*M L J*	319
	22	*M L T*	233
	6	*M L W*	530
	1917	*M W N*	679
659	42	*I C*	540
661	41	*Mad*	40
	22	*M L T*	320
	1917	*M W N*	490
	39	*I C*	928
663	33	*M L J*	217
	22	*M L T*	119
	6	*M L W*	404
	1917	*M W N*	505
	41	*I C*	612
665	22	*M L T*	480
	7	*M L W*	10
	1917	*M W N*	808
	42	*I C*	972
668	33	*M L J*	601
	22	*M L T*	386
	6	*M L W*	701
	1917	*M W N*	782
	42	*I C*	975
669	33	*M L J*	382
	22	*M L T*	257
	1918	*M W N*	4
	42	*I C*	953
671	32	*M L J*	447
	40	*I C*	620
672	42	*I C*	552
	1917	*M W N*	861
673	42	*I C*	523
	6	*M L W*	568
674	33	*M L J*	58
	6	*M L W*	115
	1917	*M W N*	533
	39	*I C*	867
675	41	*Mad*	4
	33	*M L J*	26
	6	*M L W*	195
	1917	*M W N*	552
	42	*I C*	22
680	41	*Mad*	307
	33	*M L J*	474
	6	*M L W*	706
	1917	*M W N*	776
	42	*I C*	674
681	40	*Mad*	365
FB	21	*M L T*	385
	33	*M L J*	575
	5	*M L W*	797
	40	*I C*	429
693	(1)41	*I C*	684
	22	*M L T*	232
	6	*M L W*	281
	1917	*M W N*	721
693	(2)40	*I C*	830
	33	*M L J*	203
	22	*M L T*	39
	6	*M L W*	188
695	42	*I C*	496
	22	*M L T*	260
	6	*M L W*	250
697	(1)40	*I C*	449
	6	*M L W*	25
697	(2)42	*I C*	498
699	41	*I C*	281
	6	*M L W*	1
	1917	*M W N*	719
700	40	*I C*	126
	32	*M L J*	392
	21	*M L T*	324
	5	*M L W*	598
702	41	*Mad*	440
	6	*M L W*	694
702	1917	*M W N*	857
	42	*I C*	525
703	39	*I C*	975
	1917	*M W N*	362
704	42	*I C*	507
705	40	*I C*	414
	5	*M L W*	615
	1917	*M W N*	417
706	41	*I C*	224
	6	*M L W*	417
708	40	*I C*	36
709	39	*I C*	309
	18	*Cr L J*	469
710	42	*I C*	513
	6	*M L W*	284
711	41	*Mad*	213
	33	*M L J*	499
	6	*M L W*	368
	41	*I C*	937
716	42	*I C*	509
	6	*M L W*	222
719	41	*Mad*	115
	6	*M L W*	243
	33	*M L J*	177
	42	*I C*	514
720	40	*I C*	549
	1917	*M W N*	359
722	41	*Mad*	211
	6	*M L W*	288
	42	*I C*	517
723	39	*I C*	504
	1917	*M W N*	273
724	41	*Mad*	102
	33	*M L J*	309
	40	*I C*	664
728	33	*M L J*	577
	6	*M L W*	401
	1917	*M W N*	585
	42	*I C*	519
730	40	*I C*	145
	5	*M L W*	374
731	42	*I C*	998
	1917	*M W N*	875
	19	*Cr L J*	38
733	41	*I C*	738
	1917	*M W N*	595
738	22	*M L T*	373
	6	*M L W*	677
	1917	*M W N*	831
	42	*I C*	989
	19	*Cr L J*	29
743	41	*I C*	361
751	40	*I C*	820
	1917	*M W N*	327
756	42	*I C*	228
	32	*M L J*	627
757	37	*I C*	436
	4	*M L W*	402
759	41	*I C*	556
FB	1917	*M W N*	645
763	40	*Mad*	125
	31	*M L J*	634
	38	*I C*	847
786	42	*I C*	483
	6	*M L W*	239
787	39	*I C*	948
	33	*M L J*	553
	1917	*M W N*	565
788	40	*Mad*	69
FB	39	*I C*	289

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A.I.R	Other Journals		
788	FB 18	*Cr L J*	449
791	40	*I C*	715
	33	*M L J*	78
	18	*Cr L J*	715
794 (1)	42	*I C*	539
794 (2)	40	*Mad*	846
	41	*I C*	546
	6	*M L W*	253
804	37	*I C*	394
	4	*M L W*	371
	1916-2	*M W N*	240
805	40	*Mad*	824
	21	*M L T*	251
	5	*M L W*	270
	39	*I C*	254
807	40	*I C*	779
811	38	*I C*	26
	31	*M L J*	870
	20	*M L T*	520
	1917	*M W N*	143
814	40	*I C*	752
	18	*Cr L J*	752
815	40	*I C*	733
	18	*Cr L J*	733
816	38	*I C*	695
	5	*M L W*	672
821	38	*I C*	730
	18	*Cr L J*	346
825	40	*Mad*	341
	32	*M L J*	553
	21	*M L T*	225
	5	*M L W*	538
	1917	*M W N*	280
	38	*I C*	117
827	40	*Mad*	410
FB	32	*M L J Sup*	1
	40	*I C*	909
884	37	*I C*	354
SB	4	*M L W*	101
	1916-2	*M W N*	118
887	38	*I C*	651
	1916-2	*M W N*	324
888	40	*I C*	70
	5	*M L W*	339
	1917	*M W N*	289
889	40	*Mad*	871
	33	*M L J*	277
	1917	*M W N*	201
	39	*I C*	263
898	41	*I C*	208
	21	*M L T*	351
911	40	*Mad*	964
	32	*M L J*	532
	21	*M L T*	121
	5	*M L W*	269
	38	*I C*	297
913	40	*I C*	238
	5	*M L W*	708
914	37	*I C*	348
916	40	*Mad*	743
	41	*I C*	510
917	40	*I C*	235
	5	*M L W*	706
918	40	*Mad*	591
	31	*M L J*	837
	39	*I C*	294
	18	*Cr L J*	454
919	41	*I C*	268
	32	*M L J*	455
921 (1)	38	*I C*	772
	5	*M L W*	264

A.I.R.	Other Journals		
921 (2)	40	*I C*	811
	5	*M L W*	725
927	38	*I C*	415
	5	*M L W*	596
	1917	*M W N*	420
928	40	*I C*	590
932	41	*I C*	788
	33	*M L J*	84
942	38	*I C*	655
	1917	*M W N*	275
945 (1)	40	*Mad*	589
	41	*I C*	655
	18	*Cr L J*	831
945 (2)	38	*I C*	840
	21	*M L T*	30
	5	*M L W*	211
	1917	*M W N*	78
949	37	*I C*	404
	21	*M L T*	315
	5	*M L W*	740
956	40	*Mad*	268
	31	*M L J*	483
	20	*M L T*	323
	5	*M L W*	170
	1917	*M W N*	292
	39	*I C*	337
958	32	*M L J*	323
	21	*M L T*	329
	5	*M L W*	392
	1917	*M W N*	185
	38	*I C*	513
964	40	*Mad*	752
	32	*M L J*	449
	39	*I C*	429
967	38	*I C*	184
	5	*M L W*	659
	1917	*M W N*	336
969	40	*Mad*	58
FB	32	*M L J*	411
	21	*M L T*	337
	5	*M L W*	817
	1917	*M W N*	376
	39	*I C*	193
974	40	*I C*	50
	32	*M L J*	85
	21	*M L T*	62
	5	*M L W*	690
980	37	*I C*	1
	31	*M L J*	354
	4	*M L W*	168
	1916-2	*M W N*	180
982	39	*I C*	425
	5	*M L W*	330
	1917	*M W N*	339
984 (1)	41	*I C*	672
	18	*Cr L J*	848
984 (2)	40	*Mad*	745
	32	*M L J*	24
	40	*I C*	531
988	32	*I C*	906
	5	*M L W*	467
	1917	*M W N*	318
990	31	*M L J*	479
	20	*M L T*	308
	4	*M L W*	332
	1916-2	*M W N*	242
	37	*I C*	374
992	38	*I C*	309
	18	*Cr L J*	277
995	40	*Mad*	1004
	32	*M L J*	528

A. I .R.	Other Journals		
995	21	*M L T*	233
	38	*I C*	233
997	38	*I C*	813
	1916-2	*M W N*	263
998 (1)	37	*I C*	83
	1916-2	*M W N*	117
998 (2)	40	*Mad*	1
FB	32	*M L J*	221
	5	*M L W*	580
	1917	*M W N*	367
	39	*I C*	439
1006	42	*I C*	474
	6	*M L W*	134
1010	38	*I C*	300
	21	*M L T*	88
	5	*M L W*	204
1011	37	*I C*	229
	21	*M L T*	297
	5	*M L W*	124
1012	32	*M L J*	347
	1917	*M W N*	166
	39	*I C*	405
1016	40	*I C*	627
	32	*M L J*	271
1026	40	*Mad*	594
FB	32	*M L J*	110
	21	*M L T*	245
	5	*M L W*	617
	1917	*M W N*	195
	39	*I C*	741
1030	40	*Mad*	968
FB	33	*M L J*	211
	6	*M L W*	450
	1917	*M W N*	752
	42	*I C*	352
1033	37	*I C*	456
	20	*M L T*	295
	4	*M L W*	477
	1916-2	*M W N*	288
1038	40	*I C*	418
1039	40	*Mad*	687
	38	*I C*	617
	31	*M L J*	269
1044(1)	39	*I C*	427
	5	*M L W*	120
1044(2)	38	*I C*	608
	4	*M L W*	349
1045	39	*Mad*	997
FB	31	*M L J*	530
	20	*M L T*	375
	4	*M L W*	415
	1916-2	*M W N*	306
	37	*I C*	429
1049	40	*Mad*	243
FB	32	*M L J*	195
	5	*M L W*	767
	1917	*M W N*	346
	40	*I C*	210
1054	38	*I C*	937
	31	*M L J*	247
1055(1)	39	*I C*	371
	5	*M L W*	266
	1917	*M W N*	148
1055(2)	40	*I C*	159
1060	31	*M L J*	827
	5	*M L W*	472
	38	*I C*	373
1066	39	*I C*	448
	31	*M L J*	234
1068	38	*I C*	210
1069	39	*I C*	167

A.I.R.	Other Journals		
1069	1917	*M W N*	3
1070	38	*I C*	818
	21	*M L T*	77
	5	*M L W*	168
1071	38	*I C*	133
	6	*M L W*	9
	1917	*M W N*	550
1072	40	*Mad*	925
	32	*M L J*	119
	5	*M L W*	603
	40	*I C*	518
1078	32	*M L J*	47
	1917	*M W N*	16
	38	*I C*	164
1080	38	*I C*	213
	1917	*M W N*	14
1082	40	*Mad*	759
SB	40	*I C*	192
	33	*M L J*	51
1083	40	*Mad*	1083
	22	*M L T*	57
	40	*I C*	896
1090	40	*Mad*	949
	32	*M L J*	621
	21	*M L T*	257
	5	*M L W*	648
	38	*I C*	136
1093	40	*I C*	611
	32	*M L J*	434
	21	*M L T*	229
	1917	*M W N*	234
1095	40	*Mad*	955
	32	*M L J*	374
	21	*M L T*	377
	5	*M L W*	519
	1917	*M W N*	284
	38	*I C*	778
1099	39	*I C*	911
	5	*M L W*	542
	1917	*M W N*	422
1100	31	*M L J*	772
	20	*M L T*	303
	1916	*M W N*	280
	38	*I C*	823
1103	39	*I C*	893
1111	40	*Mad*	767
	21	*M L T*	71
	5	*M L W*	664
	1917	*M W N*	20
	38	*I C*	986
	18	*Cr L J*	426
1115	40	*I C*	247
	32	*M L J*	541
	21	*M L T*	271
	1917	*M W N*	309
1122	40	*Mad*	791
	21	*M L T*	281
	5	*M L W*	501
	38	*I C*	447
	18	*Cr L J*	335
1122	38	*I C*	169
	5	*M L W*	222
1124	32	*M L J*	146
	40	*I C*	526
1128	38	*I C*	645
	4	*M L W*	654
1129	39	*I C*	144
1131	40	*Mad*	941
	33	*M L J*	348
	5	*M L W*	419

A. I. R. 1918 Madras=Other Journals.—(*Concld.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1131	1917	*M W N*	389	1183	5	*M L W*	349	1260	21	*M L T*	382	1309	1917	*M W N*	321
	38	*I C*	528		18	*Cr L J*	148	1262	38	*I C*	231		5	*M L W*	682
1135	38	*I C*	188	1186	39	*Mad*	928	1262	37	*I C*	964	1314	38	*I C*	295
	5	*M L W*	228		38	*I C*	963		1917	*M W N*	89		1917	*M W N*	308
1137	39	*I C*	160		18	*Cr L J*	403	1264	37	*I C*	897		5	*M L W*	718
	5	*M L W*	207	1187	40	*Mad*	989		1917	*M W N*	141	1315	39	*I C*	358
1140	38	*I C*	152	**FB**	31	*M L J*	513	1264	38	*I C*	221	**FB**	32	*M L J*	180
1142	39	*I C*	46		1916-2	*MWN*	296	1265	40	*Mad*	939		1917	*M W N*	171
	32	*M L J*	489		20	*M L T*	391		38	*I C*	237		5	*M L W*	425
	21	*M L T*	299		4	*M L W*	507		5	*M L W*	157		40	*Mad*	338
	1917	*M W N*	222		37	*I C*	741	1266	37	*I C*	607		22	*M L T*	300
1145	40	*Mad*	31	1195	22	*M L T*	169	**SB**	1916-2	*MWN*	497	1322	37	*I C*	900
FB	32	*M L J*	422		5	*M L W*	237		4	*M L W*	625		31	*M L J*	820
	1917	*M W N*	353		37	*I C*	521		32	*M L J*	151		20	*M L T*	538
	39	*I C*	220		18	*Cr L J*	153		39	*Mad*	1164		5	*M L W*	354
1146	40	*Mad*	18	1197	38	*I C*	448		18	*Cr L J*	239	1325	37	*I C*	875
FB	32	*M L J*	304		18	*Cr L J*	336		21	*M L T*	190		5	*M L W*	375
	5	*M L W*	776	1198	37	*I C*	642	1278	40	*Mad*	612	1327	38	*I C*	240
	1917	*M W N*	393		1916-2	*MWN*	325	**FB**	32	*M L J*	597		5	*M L W*	111
	40	*I C*	185		4	*M L W*	441		41	*I C*	589		21	*M L T*	105
1152	39	*I C*	91	1200	38	*I C*	720		1917	*M W N*	429		32	*M L J*	263
	4	*M L W*	286		31	*M L J*	688	1286	37	*I C*	763	1331	42	*I C*	223
1152	39	*I C*	91		4	*M L W*	456	1287	40	*Mad*	259		1917	*M W N*	751
	4	*M L W*	286		1916-2	*MWN*	362	**FB**	37	*I C*	414		6	*M L W*	635
1154	39	*Mad*	1026	1200	37	*I C*	495		21	*M L T*	82		33	*M L J*	615
	38	*I C*	675		1917	*M W N*	141		1917	*M W N*	217	1332	37	*I C*	756
1155	5	*M L W*	402		18	*Cr L J*	143		1917	*M W N*	246		1917	*M W N*	9
	38	*I C*	200		5	*M L W*	218		5	*M L W*	558		5	*M L W*	461
1158	32	*M L J*	503	1201	38	*I C*	194		32	*M L J*	477		32	*M L J*	317
	38	*I C*	481		1917	*M W N*	5	1293	39	*I C*	933	1335	40	*Mad*	775
	5	*W L W*	407		5	*M L W*	250		6	*M L W*	631		37	*I C*	892
1159	39	*I C*	954	1203	37	*I C*	524	1294	37	*I C*	957		5	*M L W*	261
	1917	*M W N*	560		18	*Cr L J*	156		31	*M L J*	860		1917	*M W N*	426
1163	40	*I C*	223	1204	39	*I C*	950		1917	*M W N*	73	1337	42	*I C*	684
	1917	*M W N*	241		6	*M L W*	19		5	*M L W*	275	1346	41	*Mad*	44
1166	40	*Mad*	1108	1204	37	*I C*	692	1296	37	*I C*	505	**FB**	42	*I C*	556
	40	*I C*	516		1916-2	*MWN*	312		1916-2	*MWN*	254		22	*M L T*	94
	32	*M L J*	237		31	*M L J*	733		4	*M L W*	364		6	*M L W*	149
	21	*M L T*	411		4	*M L W*	576	1297	37	*I C*	773		33	*M L J*	224
	5	*M L W*	346	1210	39	*Mad*	1085		20	*M L T*	486		1917	*M W N*	688
1167	40	*Mad*	1016	**SB**	37	*I C*	525		1917	*M W N*	75	1360	40	*Mad*	804
	38	*I C*	627		1916-2	*MWN*	385		5	*M L W*	255		37	*I C*	444
1173	42	*I C*	536		5	*M L W*	1	1299	40	*Mad*	818		31	*M L J*	548
1174	40	*Mad*	283		21	*M L T*	124		38	*I C*	223		1916-2	*M WN*	321
FB	32	*M L J*	13		18	*Cr L J*	157		21	*M L T*	93		20	*M L T*	403
	21	*M L T*	24	1256	41	*I C*	719		5	*M L W*	334		4	*M L W*	433
	5	*M L W*	132		41	*Mad*	256	1302	37	*I C*	768	1363	38	*I C*	244
	1917	*M W N*	44		6	*M L W*	337		5	*M L W*	127	1366	37	*I C*	41
	37	*I C*	836		1917	*M W N*	743		1917	*M W N*	40		18	*Cr L J*	57
1178	32	*M L J*	400	1257	37	*I C*	655	1305	38	*I C*	227		5	*M L W*	372
	37	*I C*	502	1258	27	*I C*	497		5	*M L W*	364	1367	38	*I C*	292
1179	1916-2	*MWN*	351		4	*M L W*	609		32	*M L J*	536		5	*M L W*	259
	37	*I C*	688		31	*M L J*	877	1307	37	*I C*	764		1917	*M W N*	535
	4	*M L W*	441	1260	38	*I C*	715					1368	37	*I C*	673
1183	40	*Mad*	835		5	*M L W*	360	1309	37	*I C*	857		1917	*M W N*	93
	27	*I C*	516		1916	*M W N*	333		32	*M L J*	63		5	*M L W*	701

LIST OF CASES OVERRULED
in
A. I. R. 1918 MADRAS.

Kakarla Abbayya v. Raja Venkata Papayya Rao, (1906) 29 Mad. 24=16 M. L. J. 8.	Overruled in	A.I.R. 1918 Mad. 1 (F.B.).
Kuppusawmy Aiyar v. Venkataramier, (1905) 15 M. L. J. 462.	"	A.I.R. 1918 Mad. 484 (F.B.).
Sundaram Iyer v. Deva Sankara Bhat, (1918) A. I. R. 1918 Mad. 428=40 I. C. 976n.	"	A.I.R. 1918 Mad. 435 (F.B.).
Venkata Perumal v. Prayag Dosajee, (1915) 29 I. C. 556.	"	A.I.R. 1918 Mad. 1187 (F.B.)

THE
ALL INDIA REPORTER
MADRAS HIGH COURT
1918

** A. I. R. 1918 Madras 1
Full Bench

WALLIS, C. J., SADASIVA AIYAR, KUMARASWAMI SASTRI, PHILLIPS AND NAPIER, JJ.

Kumarappa Reddi—Plaintiff—Appellant.

v.

Manavala Goundan—Defendant—Respondent.

Second Appeal No. 1660 of 1913, Decided on 23rd November 1917, against the decree of District Judge, Chingleput, in Appeal Suit No. 542 of 1911.

****(a) Civil P. C. (1908), S. 100—Findings as to usages, genuineness of document in support of usages and credibility of witnesses are findings of fact as cannot be disturbed:** 29 *Mad.* 24, *Overruled.*

The findings of an appellate Court as to instances of usage, the genuineness of documents put forward as regards usage and the credibility of the witnesses, are findings of fact and the High Court cannot, in second appeal, review the evidence on these matters and interfere with such findings: 29 *Mad.* 24, **Overruled.** [P 14 C 1; P 15 C 2]

(b) Land Tenure—Mirasi—Thunduwaram—Payment of — Custom to pay — Burden of proof is on mirasidar.

The liability to pay thunduwaram is a well-known incident of mirasi tenure in the Chingleput District, but as it is not universally applicable, it is for the mirasidar to show that he is entitled to enforce it by the custom of the estate or the neighbourhood: 2 *Mad* 149, *Foll.* [P 15 C 1]

(c) Evidence Act (1 of 1872), S. 35—Entry in settlement register about right of mirasidar to recover swatantram or thunduvaram dues is of great evidentiary value—Refusal to make such entry has no importance as revenue officer is not competent to inquire into matter.

The recognition of a mirasidar's right to swantantram or thunduvaram in the settlement register is of great evidentiary value as a strong instance of the assertion of the right on the estate and is therefore entitled to great weight while, on the other hand, the refusal of the settlement officer to register the swantantram, is not conclusive as he has no authority to determine the question and does not detract from the weight of other evidence relating to the mirasidar's right by custom to collect such dues. [P 14 C 2]

(d) Evidence Act (1872), S. 18—Admission in writing by tenant agreeing to pay swatantram or thunduvaram is evidence of custom though the admission is recent.

A written agreement by a tenant to pay the swantantram or thunduvaram is admissible as an admission of the evidence of custom unless the tenant explains away the admission and its effect cannot be discounted or neutralized on the ground that the admission is recent. [P 15 C 1]

(e) Civil P. C. (1908), S. 100—No wider power is conferred in disturbing findings about custom than other finding of fact.

Per *Wallis, C. J.*—The words 'usage having the force of law' in S. 100 are little more than words of amplification and do not give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact, than with any other findings of fact. [P 14 C 2]

(f) Madras High Court Rules (Appellate), R. 2—Division Bench is competent to refer not only question but whole case.

Per *Sadasiva Aiyar* and *Phillips, JJ.*—It is competent to a Division Bench of the High Court to refer to a Full Bench, not merely a question of law but the whole matter of an appeal. [P 12 C 1]

****(g) Civil P. C. (1908), Ss. 100 and 103—Value to be attached and relevancy of evidence can be determined in second appeal also—When can High Court disturb finding of fact stated.**

In dealing with second appeals the High Court is bound by the lower appellate Court's opinion on the reliability of evidence, but the value to be attached to the evidence (provided it is not mere opinion evidence) supposing it is accepted as true, and the relevancy of evidence, are questions to be considered by the High Court also. If notwithstanding uncontradicted instances ranging over a long period and recognized judicially in several cases, the lower appellate Court finds against the existence of a proper custom on the ground that in its opinion the instances are insufficient in number, the High Court is entitled to hold that on the facts found by the lower appellate Court, the custom is legally established. [P 16 C 1]

(h) Provincial Small Cause Courts Act (9 of 1887), Art. 13—Thunduvaram claimed by mirasidar is not rent but dues within Art. 13.

By the Division Bench: *Sadasiva Aiyar* and *Napier, JJ.*, The thanduvaram cess claimed by a mirasidar is not of the nature of rent but comes under the general expression "dues" in Art. 13. [P 2 C 1]

(i) Limitation Act (9 of 1908), Art. 131—Refusal by Government to recognize payment of thunduvaram is not refusal by tenant within Art. 131.

The refusal of Government to recognise the thunduvaram does not amount to a "refusal" by the tenant to pay the due to the mirasidar within the meaning of Art. 131. [P 2 C 2]

(j) Custom—Evidence of custom for whole period must be considered.

In dealing with evidence of custom, Court should examine the evidence covering the whole period of the custom. It may be that the earlier evidence is not sufficient to establish the custom: it may be that it is sufficient but that later evidence establishes a discontinuance—all these aspects must be considered. [P 3 C 2]

(k) Landlord and Tenant—Abandonment—Burden of proof of abandonment of customary dues is on tenant — Mere nonpayment is not sufficient to prove abandonment.

Where abandonment of a customary due is pleaded it is for the tenant to prove it and mere nonreceipt of the due will afford very weak evidence of such abandonment. [P 4 C 1]

L. A. Govinda Raghava Aiyar and *D. V. Nilameghachariar*—for Appellant.

T. R. Ramachandra Aiyar—for Respondent.

Sadasiva Aiyar and Napier, JJ.—The plaintiff is the appellant. He brought the suit to recover thunduvaram alleged to be due to him as mirasidar by the defendant who is a Government raiyat in a mirasi village. A preliminary objection was raised by the respondent's learned vakil (Mr. T. R. Ramchandrier) that no second apeal lies as the suit was of a small cause nature and the value of the claim is less than Rs. 500. In our opinion, mirasi right is an interest in the village lands, though it may not now be a proprietary interest therein. The thurduwaram payable to the mirasidar (assuming it to be payable) might have once been part of the kudivaram produce, but it is now claimed merely as the fee due to the mirasidar as such by custom. Hence it is not of the nature of "rent" (like jodi), but comes under the general expression "dues" in Art. 13, Provincial Small Cause Courts Act.

We therefore overruled the above preliminary objection. We are unable to agree with the learned District Judge that plaintiff's claim to obtain thunduwaram (a part of the mirasidar's swatantram) from the defendant became barred in 1890, because the Government refused some time prior to 1878 to recognize the custom under which the mirasidar claimed such dues. Evidently the learned District Judge has applied Art. 131, Lim. Act as he states that "there must have been a refusal" (by the defendant to pay the thunduwaram to the mirasidar) "prior to 1878." The learned Judge then on this sole ground of the Government's disinclination in 1878 to recognize the custom in favour of the mirasidar considered that he would be legally justified in finding that "there must have been a refusal" (by the defendant) "prior to 1878." We think that such a finding must be treated as one based on no legal evidence and cannot be accepted. The recent Full Bench decision in *Seshachala Chetty* v. *Para Chinnasami* (1) does not deal directly with the mirasidar's right to thunduwarm (the question directly in issue in that case being the mirasidar's alleged right to eject occupiers of nattam poramboke land sites held under pattas). There are however passages in two of the judgments in that case which relate to thunduvaram and which are entitled to great respect. We therefore refer to them. Ayling J. says:

"there are undoubtedly certain incidents, which have been claimed as attaching to it (the Mlrasi tenure) from ancient times and have to some extent been recognized one of such incidents being the right to certain fees (Thunduwaram) on lands granted for cultivation to non mirasi cultivators (payakaris) by the Government."

Then the learned Judge says that this right also requires to be separately established by the mirasidar and that he ought to adduce proof of the existence of the custom to pay such dues, and he refers to *Sakkaji Rau* v. *Latchmana Goundan* (2). Kumaraswami Sastri, J. refers to the opinion of the Collector of Chingleput in 1839 which admitted the Mirasidar's right to collect Thunduwaram, swatantrams, etc., in the sheikal lands. In another place the learned Judge quotes the opinion of the Board of Revenue in 1892 as follows:

"Briefly, the system, as it at present exists rests on the claims of the mirasidars to all the, waste lands in their villages and to the levy of swatanatram or fees from payakarees or non-Mirasidars who may take up land for cultivation. This claim was fully recognized in the new settlement carried out in 1876—78 (Vide, Govern-

(1) [1917] 40 Mad. 410=40 I. C. 909.
(2) [1878] 2 Mad. 149.

ment Order dated 15th February 1876, No. 221) and after full consultation with the mirasidars, a memorial fee (swatantram), fixed at an average rate of 2 annas on every rupee of Government assessment, was declared to be leviable by the mirasidars not only on every field lying waste in each village, but also on all lands now held by the mirasidars themselves and included in their pattas, should such land be subsequently relinquished and taken up by a non mirasidar. The fee claimable on each field was duly entered in the settlement registers against every field liable to it. The only lands against which fees were not entered, were those which had already been obtained by strangers and which were held under lease or patta from Government."

Then the learned Judge refers to the Government orders passed on 19th October 1909 about Swatantrams as follows:

"The right of the mirasidars to levy a fee at the rate of 2 annas in the rupee of the assessment of both dry and wet lands, has been recognized by Government except in the case of the undermenticned fields which are free of swatantrams so long as they are held under the terms of the original grants."

Next the learned Judge referred to *Sakkaji Rau* v. *Latchmana Goundan* (2) in which it was held that

"where the right was denied there should be inquiry whether by custom it prevails on the estate or if there are not sufficient instances on the estate to afford grounds for a decision, on similar estates in the neighbourhood."

In the result, following the decision in *Sakkaji Rau* v. *Latchmana Goundan* (2) which was recognized as good law by the Judges who decided the above Full Bench case, we hold that where (as in this case) the tenant denies the right of the mirasidar to thunduwaram, the burden of proof is on the mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues. Now the learned District Judge in considering the evidence in this case as to custom has fallen into several material errors. He thinks that documents relating to other than the plaint lands which establish the claim of the mirasidar to thunduwaram, are not of much value. But the decision in *Sakkaji Rau* v. *Lakshmana Goundan* (2) which states that evidence even as to neighbouring villages and estates is admissible, is clearly against the District Judge's view. Then he seems to think that Exs. H, E and K, do not relate to plaint lands, but it has been shown that they do relate to some of the lands against which no swatantram is shown as due in Ex. J. It is contended for the respondent that the lands to which those documents refer, were waste lands granted by Government after the year 1878 when an arrangement was made between the Collector and the mirasidars by virtue of which they were to be allowed swatantrams on such lands in consideration of their waiving their claim in respect of lands already granted by Government and lands taken up by the mirasidars themselves and abandoned. This may or may not be so but we are at present only concerned with the question how these documents have been dealt with by the District Judge and there is no doubt that he has fallen into an error of fact. Then he thinks that the omission in the documents Ex. 3 to 5 (b), and 7 to 8 (b), of any reference to thunduwaram, is strong evidence in the defendant's favour. Most of them are however sale deeds and it is not usual or necessary in such deeds to insert a recital that a purchaser should thereafter pay the Theervai or thunduwaram payable on the lands sold.

It is the duty of the purchaser to do so whether it is mentioned in the sale deed or not. The District Judge has declined to give any weight to old documents on the ground that it is admitted that mirasidars had many more privileges in the old days: vide, para. 5. This method of dealing with a question of custom is not correct. The evidence covering the whole period must be examined. It may be that the earlier evidence is not sufficient to establish the custom: it may be that it is sufficient but that later evidence establishes a discontinuance—all these aspects must be considered, which admittedly has not been done in this case. The agreement, Ex. B, again is brushed aside by the District Judge as a document executed without consideration. If of course we assume that the mirasidar has no right to thunduwaram, Ex. B, was executed without consideration. But that is the very point in issue. Anyhow, Ex. B is a clear acknowledgment by the tenant of the mirasidar's right to thunduwaram and must be given whatever consideration it is worthy of in arriving at a conclusion on the question of the mirasidar's right by custom to claim thunduwaram. The Diglot Register Ex. 7, read with Mr. Puckle's report and the subsequent conduct of the mirasidar in not claiming thunduwaram for 16 years before 1905, may afford evidence that the mirasidar had no right by custom to claim thundu-

waram on waste lands which he had not been cultivating and which had been granted as waste by Goveenment to outside Payakaree tenants and it can even afford evidence that he abandoned his customary right so far as those lands are concerned. But as regards those lands in respect of which the right to thunduwaram is recognized in the Diglot Register itself, it is for the defendant to prove that the mirasidar has abandoned such customary rights and mere nonreceipt of the dues will afford very weak evidence of such abandonment. There are other matters in which the judgment is unsatisfactory, notably the statement in para. 4, line 35 that the defence witnesses deny payment of thunduwaram. This is not correct. They admit payment but seek to explain it away. We cannot accept findings based on incorrect tests as to custom and mistakes of fact as to the effect of documents. We therefore send back the records to the District Judge for fresh findings on issues 1 and 2 with reference to the above observations and for findings on issues. 3 and 4. The time for submission of findings will be four weeks from the receipt of records and 10 days for objections.

Findings.—The High Court has called for findings on issues 1, 2, 3, and 4. This was a suit to recover arrears of thunduwaram or mirasi perquisites alleged to be due to the plaintiff from the defendant, a raiyat of Chittamur village. Chittamur is a Government village in Madurantakam Taluk. It is undoubtedly a mirasi village and it is not disputed that the plaintiff is the sole mirasidar. The plaintiff bases his right, (1) on custom and (2) on Ex. B, an agreement alleged to have been executed by the defendant in his favour in 1905. In his written statement the defendant denied the plaintiff's right. As laid down in *Sakkaji Rau* v. *Latchmana Goundan* (2) and the remand order of the High Court in the present case, the main question for consideration is whether by custom prevailing in the village, the plaintiff is entitled to thunduwaram. The defendant's holding consists of A and B schedule lands attached to the plaint, the former being wet lands and latter dry. As regards the wet lands, in the settlement register, Ex. J, no swatantram-fee is entered, but in respect of the first seven fields, viz., Nos. 5, 6, 20, 22, 24, 46, 48 and 129 in Sch. B, it is entered and against No. 114 B, the remark is, no swatantram is due until resigned.

The earliest documents filed in the suit are Exs. L and L (1) of the year 1826. There was litigation between the plaintiff's grandfather and one Nagammal and her son. The question of mirasi right was not directly involved in it. The parties compromised the matter, Ex. L (1) being a copy of the compromise petition. The then defendants executed an agreement, Ex. C, in pursuance of the compromise. These documents are relied upon on behalf of the plaintiff as showing that the plaintiff's predecessor's title to collect thunduwaram and other mirasi dues was recognized. It has to be observed that the dispute was not between the mirasidar and sukhavasi raiyats and that the question of the right to collect mirasi dues, was not formally adjudicated upon by the Court. The next set of documents relied upon by the plaintiff are Ex. C series C (1) to C (15). Ex. C (1), purports to be an agreement of the year 1829 executed by Ulkudi Sukhavasis and Parakudi Sukhavasis recognizing the mirasi right of the plaintiff's grandfather and undertaking to pay mirasi dues to him. The District Munsif suspected the genuineness of this document. The writing looks too fresh to be as old as it purports to be. Some of the other documents in the Ex. C, series purport to be debt bonds for arrears of village Adaya income and there is no reference to thundu or thnduwaram in them. The rest however are debt bonds for arrears of thunduwaram. Exs. C series were not filed in the suit of 1905 which was brought by the defendant against the plaintiff. Further Ex. C (1), refers to lands leased by the mirasidar, and with regard to the other documents, which refer to thunduwaram, it is not stated to what lands they refer and it is possible that they also refer only to lands leased by the mirasidar. The practice in the case of such lands cannot be invoked in proof of a customary right to mirasi dues from tenants introduced by the Government. Ex. F and G, have next to be considered. Ex. F was a joint statement prepared by the then kurnam and the agent of the plaintiff's grandfather at the time of the settlement in 1878. Having regard to the fact that the Government did not act upon it, as is

clear from the settlement register, not much importance can be attached to it. As regards Ex. G which is a copy of the shares of the mirasidars, it has to be observed that it is not signed by any one and it does not convey any information as to what lands are included in it and it is therefore doubtful whether it included also lands not included in the mirasidar's patta.

The next set of documents relied upon by the plaintiff are Exs. E, 'H, and K. Ex. E is a mortgage of the year 1887 in favour of the defendant. The mortgagee is therein directed to pay the Government tirvai and tundu. According to the plaintiff, tundu mentioned therein, refers to thunduwaram due to the mirasidar. Ex. H, is a mortgaged eed of the year 1885 in favour of one Narayana Chetty. The mortgagee was therein directed to pay circar Tirvai and village tundu and there is a reference to the existence of arrears of thunduwaram to the villagers (Gramattar). Ex. K is also a mortgage deed in favour of the defendant wherein the mortgagee was directed to pay tirvai and tundu. The lands referred to in Exs. H and K are 177 (B) and 137 (E), and 245 respectively, and in the settlement register no swatantram fee is entered against them. This certainly indicates that the mirasidar has a right to thunduwaram even on lands against which no Swatantram fee is entered in the settlement register. On behalf of the defendant, it is urged that Exs. E, H and K are not sufficient to prove a general custom, especially as they relate only to a small extent of land. I think there is considerable force in this argument. Next we come to recent documents Exs. B and D series. Ex. B is an agreement taken from the defendant himself in 1905. Ex. D series are similar agreements taken from other tenants and attested by the defendant. I do not think any importance should be attached to these documents as they are recent. Coming to the documents filed on behalf of the defendant, reliance is placed on Ex. 10, the partition deed in the plaintiff's family in which no reference is made to mirasi dues. I do not think any inference can be drawn from the omission of mirasi dues in the document.

The other documents relied upon are sale deeds and mortgage deeds, Ex. 3 to 8 series, in which no reference is made to the payment of tundu by the purchaser or the mortgagee. It is urged on behalf of the defendant that the omission though not a conclusive piece of evidence, suggests that there is no such general custom as is set up by the plaintiff. The plaintiff has examined nine witnesses including himself. When giving evidence in the suit of 1905, he stated he had no personal knowledge of the estate prior to 3 years when he entered upon it, but now he says he saw Thunduwaram being collected by his predecessor. He admits he has not collected thunduwaram from anyone. He does not produce any account regarding payment of tundu kept by his predecessor. P. W. 2 was karnam at the time of settlement. He speaks to Exs. F and G. His evidence is that tundu was being paid to Mutturama Reddi, a former mirasidar by sukhavasi pattadars. He says he saw a collection account of thunduwaram which is not now produced. He gives instances of persons holding sukhavasi patta lands, not paying thunduwaram. He is now plaintiff's gumastah and cultivates a land under him. He admits he was dismissed from the office of karnam, though he says he was restored on appeal. He also admits having given evidence in a dacoity case against the defendant. P. W. 3 says he was gumastah under the plaintiff's predecessor-in-title, Muthurama Reddi. He merely says that there is a custom to pay thunduwaram to the mirasidar. According to him there was no account for the collection of thunduwaram. P. W. 4 says that he holds lands in Chittamur and that he used to pay thunduwaram.

He states that he pays it even to the plaintiff. It will be remembered that the plaintiff himself says that he has not collected thunduwaram. Later on, in his deposition he admits that since the plaintiff's advent no collection has been made. He cannot say who else paid tundu. He admits he gave evidence against the defendant in a criminal case. P. W. 5 says he used to pay thunduwaram and obtained receipts. In cross-examination he says he does not know who paid tundu for wet lands. P. W. 6 is an inamdar and is connected with Nagammal referred to in Exs. L and L (1). He says he used to see some tenants pay grain to the mirasidars of the plain-

tiff's predecessor-in-title. He cannot give details. When giving evidence in the suit of 1905, he said he could not give the names of persons who paid thunduwaram. He admits that in respect of certain lands which were transferred to himself he does not pay tundu. According to him the practice of paying thunduwaram has not been in existence for about 16 years past. P. W. 7 in chief examination says that there is a custom for sukhavasi tenants to pay tundu to the mirasidar, but in cross examination he states that it became discontinued 12 or 15 years ago. His master is the plaintiff's brother-in-law. P. W. 8 has no land at Chittamur and yet says he used to see collections of thundu some 15 years ago. H cannot mention any one who paid it. P. W. 9 gives similar evidence. He admits that a contribution used to be made by the villagers for the temple of the village goddess. From the above oral evidence adduced on behalf of the plaintiff, it is clear that thunduwaram has not been collected for many years past and that, according to some of them, the practice was discontinued.

D. Ws. 1 to 6 say that no thunduwaram was ever collected. They have attempted to make out that the contribution to the festival of a village goddess is called tundu, but it cannot be said that they have succeeded. The defendant tries to explain Exs. E and H by saying that the tundu referred to therein was a contribution to a temple and not the mirasi perquisite known as tundu. For the defendant, much stress is laid on the settlement register, Ex. J. It is urged that the distinction between pangu lands, darkhast lands and waste lands should be borne in mind, and that what we have to consider is how far did the Government recognize the custom set up by the plaintiff. Though the Government cannot take away any pre-existing rights enjoyed by the mirasidar, the fact that it recognized them only to a certain extent, cannot altogether be ignored. The plaintiff has to show not merely that the perquisites which he claims were paid at some former period of time, but also that he can enforce their payment now. The settlement register is therefore an important piece of evidence. The learned vakil who appears for the defendant relies upon the observations of their Lordships of the Privy Council in *Secy. of State* v. *Bai Rajbai* (3) and refers to p. 29 of the recent, Full Bench decision *Seshachala Chetty* v. *Para Chinnasami* (1) at p. 941 on mirasi tenure:

> "What we have to consider is whether this power to evict under the circumstances contemplated by the reference is an incident of mirasi and whether it has been recognized by the Government. That the latter is a necessary condition of enforceability has been laid in the most stringent terms by their Lordships of the Privy Council, etc."

The learned vakil for the plaintiff points out that the above decision of the Privy Council applies only to the state of things that prevailed when the British Government first assumed sovereignty and not to any subsequent period. He further urges that the Government at first fully recognized the rights of Mirasidars and only gradually began to curtail them. In my opinion the settlement register must be regarded as a Record of Rights showing how far the Government was prepared to recognize the claims of the Mirasidar. The raiyats knowing as they did that there was a conflict between the mirasidar and the Government would have naturally refrained from paying all the dues claimed by the mirasidar. The settlement register coupled with the oral evidence shows that there was interruption in the enjoyment of the mirasidar's right to thunduwaram. It is urged on behalf of the plaintiff that the burden lies on the defendant to show that the mirasidar abandoned his right. The explanation offered on behalf on the plaintiff for the discontinuance or interruption of his right is that the plaintiff's predecessor was a woman and her agents failed to collect the mirasi dues. This explanation cannot be accepted, for the evidence shows that the payment ceased to be made even earlier when males were in possession of the estate. No doubt when a custom has been proved to exist any subsequent interruption cannot by itself extinguish it, but if the interruption is not due to natural or incidental causes, a presumption arises against the existence of the custom itself. In the present case, in my opinion, Exs. E, H and K are the only instances which may be said to afford evidence of the custom set up by the plaintiff. There is no evidence that the mirasidar has attempted

(3) A. I. R. 1915 P. C. 59=30 I. C. 303=39 Bom. 625=42 I. A. 229 (P.C.)

to enforce his right in a Court of law during all these years. Under these circumstances the interruption raises a presumption against the existence of the custom.

I therefore hold that the plaintiff is not entitled by custom to collect thunduwaram and this applies even to the lands in Sch. B some of which are liable to swatantram fees according to the settlement register, and I find accordingly on issue (2).

Issue (1)—Whether the plaint agreement bears no consideration. Ex. B is the plaint agreement. The defendant brought a suit in 1905 to declare that it was not genuine. Both the Court of first instance and the appellate Court found it to be genuine. The consideration for it is said to be the pre-existing liability of the defendant to pay thunduwaram. In the view I have taken I hold that there was no consideration for it and find accordingly.

Issue (3).— Whether the plaintiff's right to the dues became barred by limitation to any and to what extent. The contention raised on behalf of the plaintiff is that the plaint claim is not one for rent but for a customary due and that the article of the Limitation Act which applies to it is Art. 120. On behalf of the defendant it is urged that thunduwaram is in the nature of rent as the mirasidar is a middleman between the tenant and the Government. The plaintiff relies on the observations in the remand judgment in the present case. Following *Venkatavaraga* v. *District Board of Tanjore* (4) and *Rathna Mudaliar* v. *Tiruvenkata Chariar* (5), I hold that it is not rent but a customary due. I find that the article applicable is Art. 120, Lim. Act, and therefore the suit is not barred by limitation.

Issue (4).--What sum if any is due to the plaintiff? If it is held that the plaintiff is entitled to tundu I hold that according to Exs. B and D, he is entitled to it at 15 marakals per cawni of wet for the first crop 7½ marakals for the second crop and 3½ annas per cawni of dry land and that he is not bound to collect only at the rate of 2 annas in the rupee as laid down in the settlement register. I find accordingly on issue 4.

(4) [1893] 16 Mad. 305.
(5) [1899] 22 Mad. 351.

Order of Reference

Sadasiva Aiyar, J.—The plaintiff is the appellant. This litigation commenced in December 1909 (nearly 8 years ago), but I have felt it advisable that the whole matter of this second appeal should be referred to a Full Bench as some questions of law of more than ordinary importance are involved in its decision. Without expressing a final opinion on any of the questions involved or as to what should be the final result of the second appeal I shall set out the material questions of fact and law making provisional comments here and there. The suit was brought for recovery of Rupees 168-11-3, being the amount of thunduwaram perquisites due to the plaintiff as ekaboga mirasidar of Chittamur village (in the Madurantakam Taluk, Chingleput District) from the defendant who is a raiyat in the village, the thunduwaram being claimed at 15 marakals per cawni of wet land for the first crop 7½ marakals per cawni for the second crop and 3½ annas per cawni of dry land. The thunduwaram was claimed by the plaintiff by virtue of his mirasi right over the village and also by reason of an agreement that is a registered muchilika, dated 26th January 1905, Ex. B, executed by the defendant. The District Munsif held (a) that the mirasidar's right to collect the plaint perquisites "fell into disuse" about 1870; that

"it was too late in the day for him now to seek its enforcement as subsisting right on the basis of the general custom in the village."

(b) that the defendant executed the muchilika Ex. B of 1905, possibly

"in order to help the plaintiff in his endeavours to resuscitate the plaintiff's primitive right which had fallen into disruption,"

and that it was also possible

"that the defendant executed a document under a misapprehension as to the exact right of plaintiff to enforce the fee at present;"

and the District Munsif finally thought that "on the whole there was no legal consideration" for the plaint agreement. He therefore dismissed the plaintiff's suit.

On appeal the learned District Judge (Mr. Booty) held that as in the settlement register (Ex. J of 1878) it was recorded that

"the lands for which pattas had been given by Government to payakaris or on dharkast to mirasidars were exempted from swatantram fees"

and as the plaintiff had failed to prove that the plaint lands fell under the cate-

gory of lands other than those exempted from swatantaram fees according to that settlement register, and as the defendant had probably refused prior to 1878 to pay thunduwaram to the mirasidar on the strength of the statement in the settlement register, "the mirasidars' right was dead by limitation in 1890." He further held that the muchilika, Ex. B of 1905, had absolutely no consideration to support it. He therefore dismissed the appeal. When this second appeal first came on for hearing on 17th December 1914 before a Division Bench of this Court, it was adjourned sine die for the decision of the Full Bench to which the general question of mirasidars' rights were referred in *Seshachala Chetty* v. *Para Chinnasami* (1). The opinions of the Full Bench in that case were pronounced on 17th February 1916 and they are reported as *Seshachala Chetty* v. *Para Chinnasami* (1): see 447 (of 40 *Mad.*) The present second appeal then came on for hearing before myself and Napier, J., in September 1916. We found ourselves unable to accept the finding of the District Judge "that the plaintiff's claim to obtain thunduwaram" (a part of the mirasidar's swatantaram) "became barred in 1890." Then as regards the right of the mirasidar to collect thunduwaram, I shall here quote from my above order of 20th September 1916 concurred in by Napier, J.

"Ayling J., [in "*Seshachala Chetty* v. *Para Chinnasami* (1)] says: 'There are undoubtedly certain incidents, which have been claimed as attaching to it' (the Mirasi tenure) 'from ancient times and have to some extent been recognized,' one of such incidents being, 'the right to certain fees (thunduwaram) on lands granted for cultivation to nonmirasi cultivators (payakaris) by the Government.' Then the learned Judge says that this right also requires to be separately established by the mirasidar and that he ought to adduce proof of the existence the custom to pay such dues, and he refers to *Sakkaji Rau* v. *Lıtchmana Goundan* (2). Kumaraswami Sastri, J., refers to the opinion of the Collector of Chingleput in 1839 which admitted the mirasidar's right to collect thunduwaram, swatantrams, etc., in the sheikal lands. In another place, the learned Judge quotes the opinion of the Board of Revenue in 1892 as follows: 'Briefly the system, as it at present exists, rests on the claims of the mirasidars to all the waste lands in their villages and to the levy of swatantram or fees from payakaris or nonmirasidars who may take up land for cultivation. This claim was fully recognized in the new settlement carried out in 1876-78 (vide Government order dated 15th February 1876, No. 221), and after full consultation with the mirasidars, a memorial fee (swatantaram), fixed at an average rate of two annas on every rupee of Government assessment was declared to be leviable by the mirasidars not only on every field lying waste in each village, but also on all lands now held by the mirasidars themselves and included in their pattas, should such lands be subsequently relinquished and taken up by a nonmirasidar. The fee claimable on each field was duly entered in the settlement registers against every field liable to it. The only lands against which fees were not entered were those which had already been obtained by strangers and which were held under lease or patta from Government.'

Then the learned Judge refers to the Government orders passed on 19th October 1909 about swatantrams as follows: 'The right of the mirasidars to levy a fee at the rate of two annas in the rupee of the assessment of both dry and wet lands, has been recognized by Government except in the case of the under mentioned fields which are free of swatantrams so long as they are held under the terms of the original grants.' Next he refers to *Sakkaji Rau* v. *Lıtchmana Goundan* (2) in which it was held that 'where the right was denied, there should be inquiry whether, by custom, it prevails on the estate or if there are not sufficient instances on the estate to afford grounds for a decision, on similar estates in the neighbourhood.' In the result, the following the decision in *Sakkaji Rau* v. *Lıtchmana Goundan* (2) which was recognized as good law by the Judges who decided the above Full Bench case, we hold that where (as in this case) the tenant denies the right of the mirasidar to thunduwaram, the burden of proof is on the Mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues."

After thus indicating our opinion that the custom of paying thunduwaram when set up by the mirasidar is one to be proved by the mirasidar by adducing proofs of instances of levy of such fees in his own estate and similar estates in the neighbourhood, we sent back the record to the District Court for fresh findings on issues 1 and 2, pointing out some of the errors which, in our opinion, occurred in the judgment of the District Judge. Issues 1 and 2 are as follows:

"(1) Whether the plaint agreement, Ex. B, bears no consideration. (2) Whether the plaintiff is entitled to the dues, claimed even apart from the agreement?"

On remand, the case was heard in the District Court by another District Judge (Mr. Venugopala Chetty) and he recorded findings against the plaintiff, his material conclusions being as follows:

(a) In the settlement register, Ex. J of 1878, swatantram fee due to the mirasidar is entered only in respect of some fields, namely Nos. 5, 6, 20, 22, 24, 46, 48 and 129 in the plaint Sch. B (which

relates to dry lands in defendant's patta). Against No. 114 B in that same schedule the remark in the settlement register is that no swatantram is due until the land was relinquished, that is until it was given up by the then pattadar and taken up by another. Against the wet lands in Sch. A, no swatantram fee is entered in the appropriate column as due to the mirasidar.

"The settlement register must be regarded as a Record of Rights showing how far the Government was prepared to recognize the claims of the mirasidars.' 'The ryots knowing as they did that there was a conflict between the Mirasidar and the Government, would have naturally refrained from paying all the dues claimed by the mirasidar. The settlement register coupled with the oral evidence shows that there was interruption in the enjoyment of the Mirasidar's right to thunduwaram. There is no evidence that the mirasidar has attempted to enforce his right in a Court of law during all years. Under these circumstances, the interruption raises a presumption against the existence of the custom."

(b) Exhibits L and L-1 of the year 1826 relate to litigation between the plaintiff's grandfather and certain maniamdars (not sukhavasi tenants). Though the plaintiff's predecessor's right to collect thunduwaram and other mirasi dues was recognized therein, the dispute there was not between the mirasidar and the sukhavasi raiyats and the question of the right to collect mirasi dues was not formally adjudicated upon by the Court. (Though the District Judge does not expressly say that these ancient documents of 1826 are, therefore not of much value, he evidently means to suggest it). (c) The documents Exs. C 2 to C-15 beginning with 1864 are debt bonds executed to the mirasidar by sukhavasi tenants. Some of them are for arrears of village. Adaya income and others expressly state that they are debt bonds for arrears of thunduwaram. "It is possible that they refer only to lands leased by the mirasidar."

"The practice in the case of such lands cannot be invoked in proof of a customary right of mirasi dues from tenants introduced by the Government."

(The reasoning in this part of the learned District Judge's judgment is not quite clear, but he evidently means that as the settlement register Ex. J does not mention the swatantram fees with reference to most of the plaint lands, the defendants predecessor-in-title must be deemed to have been a tenant introduced to those lands by the Government and a customary right to collect mirasi dues from such lands can only be proved by evidence of payment made specifically for such lands). (d) As regards Exs. F and G, Ex. F was a statement prepared by the then karnam and the agent of the plaintiff's grandfather at the time of the settlement in 1878. Having regard to the fact that the Government did not act upon it, as is clear from the settlement register Ex. J, not much importance can be attached to it. As regards Ex. G, it is not signed by anyone and does not convey any information as to what lands are included in it and it is therefore doubtful whether it inculded also lands not included in the mirasidar's patta (that is, lands for which Government issued pattas direct to the tenants). (e) Exs. E, H and K, (two of them executed to the defendant himself) no doubt refer to the right of the mirasidar to receive melwaram thundu from certain lands in the village. They are of the years 1885, 1887 and 1889, long after the settlement register, and though in the settlement register, Ex. J, swatantram is not entered against the lands mentioned in these mortgage deeds the right of the mirasidar is acknowledged in these documents. The District Judge however held that there was

"considerable force in the defendant's argument that these documents are not sufficient to prove a general custom, especially as they relate only to a small extent of the lands."

(f) As regards B and D series, Ex. B being the plaint agreement executed by the defendant himself in 1905 and the other exhibit agreements taken from other tenants, though attested by the defendant himself, the District Judge thinks that no importance should be attached to those documents of 1905 as they were "recent". (g) Then the District Judge refers to some document on defendant's side on which it was argued that the omission to expressly mention thunduwaram in those documents was against the plaintiff's claim and to the fact that no thunduwaram has been collected for several years before suit. (The question whether Ex. B was supported by consideration or not is so closely interwoven with the question whether the mirasidar has a right by custom to recover thunduwaram that it might be said to stand or fall with it. As regards the rate of the thunduwaram, the Dis-

trict Judge decided that if the plaintiff was entitled to it at all, he was entitled at the rates claimed by him). Mr. Govindaraghava Aiyar, the learned vakil for the appellant, strenuously contended (a) that he was entitled to argue on the whole evidence adduced as to custom just as if it were a question of fact the finding on which might be attacked in a regular appeal preferred to this Court; (b) that even if he was bound to accept particular facts and pieces of evidence which the lower Court held to be not established or false as conclusive, he was entitled to argue that on the facts held to be established and the pieces of evidence accepted as genuine by the District Judge, the District Judge ought to have found as a matter of law that the custom set up by the plaintiff was established; (c) that the learned District Judge was mistaken in his statement that Ex. G is not signed by anyone; and (d) that he was not justified in making a distinction between the rights to collect mirasi dues from tenants introduced by the Government and tenants introduced by the mirasidar and in rejecting the evidence indicating the collection of thunduwaram on the mere ground that it was not specifically shown that that evidence related to the former class of lands.

I shall deal now with the first question, namely, that as this second appeal relates to a question of custom, we are entitled to consider the whole evidence ourselves including the evidence which was not believed by the District Judge to be true or genuine. As I said in the very beginning, I do not intend to deal finally with any of these questions as I have considered it advisable that the whole case should be decided by a larger Bench. In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) Sir S. Subramania Aiyar, Offg. C. J., and Boddam, J., refer to *Hanumantamma* v. *Rami Reddi* (7), *Mirabivi* v. *Vellayanna* (8) and *Vishnu* v. *Krishnan* (9) (the last of which was decided by a Full Bench) has established that a finding as to the non-existence of an alleged local custom could be revised by the High Court on second appeal on the evidence. They then refer to the language of S. 584, old Civil P. C., corresponding to the present S. 100 (a), which contains the words "the decision being contrary to (some specified) law or usage having the force of law." The learned Judges then continue:

"This language is so explicit as to render superfluous the seeking for the reason of the provision though that is not difficult to discover, viz., that a usage of the kind mentioned, being in its nature such as must necessarily affect, not only parties to the particular litigation and their privies, but whole bodies of people, stands on a footing similar to a matter of law derived from other sources than usage. The very limited scope which is allowed to usages in England, due to special historical causes (See Pollock and Maitland's History of English Law, Edn. 1, Vol. 1, p. 163), accounts for questions as to their existence being treated as falling under the category of questions for the jury. Of course, it is otherwise in this country where from the days of Manu it has been laid down that 'custom is transcendent law.' It is clear therefore both upon authority which is binding upon us as the opinion of a Full Bench, and as the right interpretation of the provision in question of S. 584, Civil P. C., that, though the section disallows a second appeal with reference to findings of fact, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of this Court, when it has to pronounce upon that question, to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility, of the evidence relied on and the weight due to it. Accordingly we heard Mr. Rangachariar upon the evidence in support of the alleged usage."

Thus according to this decision even the credibility of pieces of evidence adduced in support of local usage can be considered by the High Court on second appeal. In *Mahamad Meeran Bibi* v. *Mahamed Rowther* (10) Spencer and Phillips, JJ., have held that the question whether the parties in a suit are governed by the Hindu or Mahomedan law, is a question of fact and does not relate to any usage having the force of law. The parties in that case were Mahomedan Labbais of the Trichinopoly District. It seems to me fairly arguable with the greatest respect to the above decision, that the question whether the local usage among these Labbais had the force of a law which made their rights of succession governed by the rules of Hindu law, comes under S. 100, old Civil P. C., though the rules of both the Hindu and Mahomedan laws always have the force of law. The learned Judges refer to a prior deci-

(6) [1906] 29 Mad. 24.
(7) [1882] 4 Mad. 272.
(8) [1885] 8 Mad. 464.
(9) [1884] 7 Mad. 3 (F. B.).

(10) [1917] 37 I. C. 879.

sion in *Kunhambi* v. *Kalanathar* (11) decided by Tyabji and Spencer, JJ. The most recent case which I have come across in this Court decided in November 1916 is that reported as *Pankajammal* v. *Secy. of State* (12), by Ayling and Seshagiri Aiyar, JJ. That related to the custom as to the order of succession of trustees of a particular Kattalai in the Conjeevaram temple. The following observations occur:

"Before we send the case down, it is desirable to advert to the extreme contention that was put forward in this Court that in all cases where evidence as to custom has been let in, we are bound to weigh such evidence and decide for ourselves upon the materials. Mr. Ramachandrier, who came in at a later stage of the case, conceded that this contention is not supported by authority. The learned vakil argued that the question, whether on the facts as found, the Courts below were justified in saying that a custom has not been proved, is a point on which the High Court is entitled to draw its own inference. To the proposition thus advanced, we see no objection. But we must point out that the value to be attached to the evidence let in, its reliability and, in a measure, its relevancy, are all matters for the Court below and that the High Court would not be justified in weighing the evidence, as if it were sitting to hear a first appeal. It is open to doubt whether the expression, 'a usage having the force of law' in S. 100 (a), Civil P. C., should not be confined to the usages of the country or of the community as suggested by Petheram, C. J., in *Nivath Singh* v. *Bhikki Singh* (13). Customs like pre-emption, the law merchant and usages like those referred to in S. 11, Act 8 of 1865, seem to have been in the contemplation of the legislature. It seems doubtful whether a private right, like the one we are considering, fallse within S. 100, Cl. (a). However that may be, we feel no doubt that the High Court should not be called upon to examine the oral and documentary evidence relating to a private custom as if it were hearing a first appeal."

I must, however, say that the decision of this Court in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), following the Full Bench decision in *Vishnu* v. *Krishnan* (9), is not adverted to by the learned Judges who refer to the case in *Nivath Singh* v. *Bhikki Singh* (13), which seems to have never been followed in this Court as law. I shall now refer to a very recent decision of the Privy Council in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Snnadhi* (14). There a custom of granting permanent leases of the property of a particular temple was set up. Their Lordships of the Privy Council say at p. 13 of 33 *M. L. J.* (1):

"It has, however been pressed on behalf of the appellants that there are two findings: one by the Munsif and one by the Subordinate Judge, who agrees with him that the ancient custom relied upon has been proved, and that as that is an issue of fact, it must be accepted. No doubt two findings upon questions of pure fact must be accepted by this Board, but questions of the existence of an ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact."

I think that this case gives to the expression "local usage" a much wider meaning than Sir C. Petheram, C. J., was inclined to allow in the case of *Nivath Singh* v. *Bhikki Singh* (13). I shall now turn to the case of *Kailas Chandra Dutta* v. *Padma Kishore Roy* (15), decided in April 1917. Here Mookerjee, J., reviews the authorities, dissents from *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), and *Vishnu* v. *Krishnan* (9), and sums up as follows:

"But this does not entitle the High Court in second appeal to determine whether the evidence of the existence of the alleged usage is or is not credible, though the High Court is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law. . . . . The substance of the matter is that while the question whether a given state of facts establishes a binding custom or usage is a question of law, the question whether such a state of facts has been proved by the evidence is a question of fact."

In this conflict of authorities, in view of the facts that *Vishnu* v. *Krishnan* (9), was decided by a Full Bench of this Court consisting of four very learned Judges (Turner, C. J., Innes J., Kindersley J., and Muthusami Aiyar, J.) and was followed in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), and having in view the fact that this question of mirasi rights is reaching its final stage, I think that not only the mere questions of law, (namely, whether the High Court in second appeal can go into the credibility of the evidence, whether it can consider the weight to be given to the evidence which is believed by the lower appellate Court and whether the evidence taken as a whole is legally sufficient to establish the custom and the legality and binding force as law of the custom, etc.) but even the decision of the whole

(11) A. I. R. 1915 Mad. 711=24 I. C. 528=38 Mad. 1052.
(12) [1917] 40 Mad. 1108=40 I. C. 516.
(13) [1885] 7 All. 649.
(14) A. I. R. 1917 P. C. 33=39 I. C. 722=40 Mad. 709=44 I. A. 147 (P. C.).
(15) [1917] 41 I. C. 959.

matter might be left to a larger Bench. The Appellate Side Rules of the High Court, p. 3, R. 2 says: "The following matters shall ordinarily be heard and decided by two Judges," and then among the matters are mentioned "appeals from the decree of a civil Court" which I take it, includes a second appeal. So a second appeal is treated as one of the "matters" to be heard by a Bench of two Judges. Then it says

"provided both Judges agree that the determination involves a question of law, they may order that the matter, or the question of law, be referred to a Full Bench."

I think that this empowers us to refer not only a question of law but the whole "matter" of the second appeal to a Full Bench. If a question of law alone is perferred, then R. 3 (p. 4) would apply and the "matter" (or the case) would ultimately come back to us.

I have thus dealt with the contentions (a) and (b) of Mr. Govindaraghava Aiyar. As regards contention (c) about the learned District Judge's alleged mistake in his statement that Ex. G is not signed by any one Mr. Govindaraghana Aiyar has not printed the whole of Ex. G and I think it is better to leave it to the Full Bench to decide whether they would allow him to have it printed in order to prove his contention. As regards the last contention (d), I think there is much force in his argument that the District Judge ought not to have rejected the evidence afforded by Ex. C series on the ground that such evidence is valueless unless it was shown to specfically relate to lands granted by Government. I am also inclined to hold that the Government's non-recognition in the settlement register of the mirasidar's right to collect swatantrams from such lands cannot be said to detract in any appreciable manner from the weight of the other evidence relating to mirasidar's right by custom to collect such dues having regard to the history of the mirasi tenure rights and to the fact that the Government has been trying to gradually restrict such rights. I might also state that as at present advised (assuming that this Court is entitled to weigh the evidence), I should be inclined to hold that the learned District Judge has not given sufficient weight to Exs. E, H, K and B and the old legal records Exs. L and L 1. (I would accept the rate of thunduwaram found by the District Judge if the plaintiff is held entitled to collect thunduwarm). I am inclined further to doubt very much the soundness of the view of the District Judge that even as regards the plaint lands, fields Nos. 5, 6, 20, 22, 24, 46, 48 and 129 which are specially mentioned in the settlement register itself as liable to pay swantantram fee to the mirasidar, the custom set up should be held to be not proved because the custom is not (in the learned Judge's view) proved as regards the other lands also and because there has been an interruption for several years. However as I said I would, having regard to the difficulty and importance of all the questions involved, refer the whole matter to a Full Bench.

Phillips, J.—This suit was remanded for a finding on several issues the most important of which is issue 2

"whether the plaintiff is entitled to the dues claimed even apart from the agreement"

The dues claimed consist of what is called thunduwaram, and the plaintiff alleges that as mirasidar, he is according to custom entitled to levy those dues from the defendant. The District Judge has tried the issue and has found that no custom has been proved to exist under which the plaintiff is entitled to make this claim. This finding is a finding on custom and it is now sought to impeach it upon the evidence. No doubt, a question of the existence of a custom is a question of mixed law and fact, and under S. 100, Civil P. C. a second appeal may lie to the High Court on the ground that the decision is contrary to law or to some usage having the force of law. The question of custom has been repeatedly considered and it has been held that the question of the mere existence of a custom is a question of fact [vide in *Hureehur* v. *Judoonath* (16) and *Syud Ali* v. *Gopal Doss* (17)], and this has also been the view of the Judicial Committee in *Md. Kamil* v. *Imtiaz* (18) and in *Anant Singh* v. *Durga Singh* (19). In *Ramratan* v. *Nandu* (20) it was held by the Judicial Committee that,

"no Court of second appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of first appeal, and if there is evidence to be considered, the decision

(16) [1868] 10 W.R. 153. (17) [1870] 13 W.R. 420.
(18) [1909] 31 All. 557=13 O. C. 183=36 I. A. 211=4 I. C. 457 (P.C).
(19) [1910] 32 All. 363=13 O.C. 163=6 I. C. 787 (P. C.).
(20) [1892] 19 Cal. 249=19 I. A. 1 (P.C.).

of the Court, however unsatisfactory it might be, if examined, must stand final."

In *Ramgopal* v. *Shamskhaton* (21) this principle was approved, although it was held that in that particular case, which related to a custom, the facts found need not be questioned, but the soundness of the conclusions from them was in question and that was a matter of law. In *Mohesh Chunder Dhal* v. *Satrughan Dhal* (22) it was held that the question of the existence of a custom of lineal primogeniture as the rule of succession was a question of fact. In *Kunhambi* v. *Kalanathar* (11) it was held by this Court that

"whether an alleged custom can be enforced at all or whether it is uncertain, irregular or unreasonable and as such ought not to be recognized, is a question of law, but the question whether the custom exists and if it exists, it applies to a particular person or set of persons, is a question of fact,"

and this seems to me to correctly describe the principle laid down by the Judicial Committee in the above cases. In the present case, the question that has to be decided is whether the plaintiff is entitled to collect thunduwaram from the defendant, the right claimed being based upon an alleged custom. The existence of this custom in certain places has been held to be true and the right has been held to rest in certain mirasidars as such. The Full Bench decision reported as *Seshachala Chetty* v. *Para Chinnasami* (1) has recognized this customary right of levying thunduwaram but the Court was opinion that its existence in any particular case was a matter of proof. When therefore it is not a question as to whether a certain set of circumstances forms a custom having the force of law, but where the question is whether a custom which has already been recognized by Courts as having the force of law, exists in a particular locality or between particular parties, it seems to be a question of fact, and if the matter were res integra, I should feel inclined to hold that the present finding of the District Judge, to which exception has been taken, is a finding of fact with which this Court cannot interfere in second appeal. In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) however it was held that when the finding was as to an alleged local custom, the finding could be examined in second appeal and a conclusion arrived at. The decision was based upon the decisions in *Hanumantamma* v. *Rami Reddi* (7), *Vishnu* v. *Krishnan* (9) and *Mirabivi* v. *Vellayanna* (8), in all of which cases a question of custom has been considered by this Court in second appeals, but in which the contention had not been put forward that such a question could not be raised in second appeal. In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) this Court went, as it seems to me, considerably further than the dictum laid down by the Privy Council in *Ramgopal* v. *Shamskhaton* (21), which was that the facts found need not be questioned but the question of the soundness of the conclusion arrived at, was a matter of law, for it held that where the existence or non-existence of a usage having the force law was in question,

"it is the duty of this Court . . . . to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.,) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it."

If this be accepted as correct law, a Court in second appeal would be bound to examine the whole evidence relating to an alleged custom and to see what weight is to be attached to each particular portion of it, and I decide whether the evidence was reliable and witnesses worthy of credit. This appears to be somewhat inconsistent with the usual understanding that in a finding of fact upon the evidence, the lower appellate Court's decision is final; and in *Kailas Chandra Dutta* v. *Padma Kishore Roy* (15), *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) has been expressly dissented from. In a recent case in *Pankajammal* v. *Secy. of State* (12) another Bench of this Court remarked that the contention put forward that, in all cases where evidence as to custom had been let in, the Court was bound to weigh such evidence and decide upon the materials was not supported by authority, but apparently the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) was overlooked. The learned Judges proceeded to say that the question whether, on the facts as found, the Courts below were justified in saying that the custom had not been proved, was a point on which the High Court was entitled to draw its own inference, and that in accordance

(21) [1893] 20 Cal. 93=19 I. A. 228 (P. C.).
(22) [1902] 29 Cal. 343=29 I. A. 62 (P. C.).

with the above mentioned dictum of the Privy Council in *Ramgopal* v. *Shamskhaton* (21). In *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (14), the Judicial Committee also remarked that:

"questions of the existence of an ancient custom are generally questions of mixed law and fact, the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact."

If we apply this principle to the present case it would appear that the finding that the custom of levying thunduwaram does not exist as between plaintiff and defendant, is a finding of fact. In view however of the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) I agree that it is advisable that the question should be submitted to a Full Bench and as my learned brother wishes to refer, not an abstract question, but the whole of this case, I concur.

Opinion

Wallis, C. J.—As regards the question of law referred to us I am of opinion that the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) must be overruled. In the cases to which Sir Charles Turner was a party the Court no doubt examined the evidence in detail to see if it was sufficient to support the custom, but in no case did they interfere with the findings except in *Mirabivi* v. *Vellayanna* (8) and thereafter referring to the findings they observed that the question before them was "whether there is evidence on which such custom could reasonably have been found to exist." They came to the conclusion that the evidence was not reasonably sufficient to support the custom. No question of the limits of the Court's right of interference in second appeal was raised or decided in these cases. As regards *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) I am unable with great respect to agree with the observations of Subramania Aiyar, J., as to the effect of the words "usage having the force of law," in that section. This section has a long history going back to the days of the Sudder Court. Act 16 of 1853 gave a special appeal to the Sudder Courts from any decision passed on a regular appeal in any of the subordinate civil Courts:

"first on the ground that the decision hath failed to determine all material points in difference in the cause, or hath determined the same or any of them contrary to law or usage having the force of law."

Under that section, as under this, where one of the material points in the case is the existence of a custom, that, as the Privy Council has recently laid down is a mixed question of fact and law; and the Sudder Court was only entitled to interfere if the subordinate Court had determined it "contrary to law or usage having the force of law," and not, also, as in ordinary appeals, on the ground that the subordinate Court had determined the point contrary to the weight of the evidence. The words "usage having the force of law" in the section appear to me to be little more than words of amplification, and in any view not to give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact than with any other findings of fact. This section was reproduced in the successive Civil Procedure Codes with alterations that in no way affect its scope so far as the present question is concerned. The more recent decisions of Ayling and Seshagiri Aiyar, JJ. [*Pankajammal* v. *Secy of State* (12),] and of Mookerjee and Beachcroft, JJ., in *Kailas Chandra Dutta* v. *Padma Kishore Roy* (15), where all the cases are exhaustively reviewed, take the same view. Even so, I am of opinion that the finding of the District Judge that the custom is inapplicable to this estate cannot be accepted. He does not find that there has been in law a discontinuance of the custom, but uses the fact that swatantrams are not proved to have been paid for a long time as evidence against the existence of the liability. He gives no effect to the record in the settlement register of 1878 that the lands in B schedule were liable to pay swatantrams. This is a strong instance of the assertion of the right on the estate and is entitled to great weight, while on the other hand the refusal of the settlement officers to register the Swatantram as payable in support of the lands in A schedule is not conclusive as they had no authority to determine the question. As regards Exs. E, H, and K, the District Judge finds that they indicate a right to thunduwaram even in suit lands against which no swatantram is entered in the register, but observes

that they relate only to a small extent of lands. Lastly we come to the document Ex. B in which the defendant agrees to pay swatantrams and Ex. D series to the same effect which were taken from the other tenants. These are strong admissions against interest, and the District Judge was not justified in dismissing them as of no importance because they are recent. The liability to pay swatantrams is a well-known incident of mirasi tenure in Chingleput; but as it is not universally applicable, it has been held by the Full Bench in *Sakkaji Rau* v. *Lachmana Goundan* (2), that it is for the mirasidar to show that he is entitled to enforce it "by the custom of the estate or the neighbourhood." The above findings of fact by the District Judge are in my opinion sufficient to raise a presumption in the plaintiff's favour which is not rebutted by any other findings, and I would reverse the decrees and decree the suit with costs throughout.

Sadasiva Aiyar, J.—I confess that I have felt great hesitation in arriving at a conclusion on the question whether in second appeal the High Court has got a right to itself examine the evidence with reference to which the finding of the District Judge on the issue of custom was given. On the one side there are the decisions of this Court in *Hanumantamma* v. *Rami Reddi* (7), *Vishnu* v. *Krishnan* (9) and *Mirabivi* v. *Vellayanna* (8), where several learned Judges of this Court (including Sir Charles Turner, C. J., and Muthusami Aiyar, J.) have assumed as indisputable that this Court has got such a right. I agree with Sir S. Subramania Aiyar (Officiating Chief Justice) in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) that "it is impossible to believe that the learned Judges who decided those cases overlooked so obvious an objection." In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) Sir S. Subramania Aiyar (Officiating Chief Justice) and Boddam, J., directly decided that whatever may be the English law, where a question of "usage having the force of law," is concerned, the High Court in second appeal ought to have and has the power to consider even the oral evidence as regards facts, incidents and instances on which the parties relied in the lower Courts to prove or to disprove the alleged usage. The tendency of recent decisions in this Court has been to follow the Calcutta decisions. In *Kailas Chandra Dutta* v. *Padma Kishore Roy* (15) that very learned Judge, Sir Asutosh Mookerjee who was one of the Bench which decided the case, very exhaustively deals with the question and I shall extract from that judgment the material conclusions arrived at therein:

(1) "The question of the existence of an alleged custom is a question of fact. (2) The finding of the lower appellate Court is liable to attack on the ground that irrelevant evidence has been received or that relevant evidence has been excluded. (3) Also on the ground that there is no evidence of the alleged eustom" or that the finding is based on legally insufficient evidence or that the facts found do not constitute evidence of the alleged custom. (4) also, on the ground that legal principles or tests have been erroneously applied or that the Court has not correctly appreciated the essential attributes of a custom, or has overlooked the distinction between a custom and a usage. (5) Consequently, the question whether the facts found prove the existence of the essential attributes of a custom, is a question of law which may be discussed in second appeal."

I am naturally very loth to differ from the opinion of Sir S. Subramania Aiyar, J., especially as he gives very cogent reasons for his conclusion in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), but I think that there are certain dicta of their Lordships of the Privy Council which are more binding upon me. In *Ramgopal* v. *Shamskhaton* (21) their Lordships quote their own decision in *Ramratan Sukal* v. *Nandu* (20) and lay down as regards the construction of Ss. 584 and 585, old Civil P. C. (re-enacted practically in the same terms in the new Code) that

"it has now been conclusively settled that the third Court cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; and if there is evidence to be considered, the decision of the second Court however unsatisfactory it might be if examined, must stand final."

Now, the findings as to instances of usage, as to the genuineness of documents put forward as regards usage and the credibility of witnesses are clearly findings of fact. But as pointed out by their Lordships of the Privy Council themselves in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (14) the Judge's findings as to "what were the things actually done in alleged pursuance of custom" may be findings of fact but whether the facts so found satisfying the requirement of the law, is

a question of law. The decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) is not expressly referred to in *Pankajammal* v. *Secy. of State* (12). Mr. T. R. Ramachandra Aiyar who appeared in the latter case assures us that *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) was in the minds of the learned Judges who decided the latter case and that it was quoted to them. Of course, I accept his statement. The position laid down in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), namely, that the evidence can be gone into in detail in the High Court in second appeal, is characterized in the judgment in *Pankajammal* v. *Secy. of State* (12) as an "extreme contention." The learned Judges proceed to say that

"the value to be attached to the evidence let in, its reliability and in a measure, its relevancy are all matters for the Court below."

They again indicate their inclination to the view that the usage having the force of law mentioned in S. 100 (a), Civil P. C. should be confined to the usages referred to by Petheram, C. J., in *Nivath Singh* v. *Bhikki Singh* (13). While the reliability of evidence let in is for the lower appellate Court, I think (with the greatest respect) that the value to be attached to the evidence (provided it is not mere "opinion" evidence) supposing it is accepted as true and the relevancy of evidence are questions to be considered by the High Court also. If notwithstanding uncontradicted instances ranging over a long period and recognized judicially in several cases, the lower appellate Court finds against the existence of a proper custom on the ground that in its opinion the instances are insufficient in number, the High Court is clearly entitled to hold that on the facts found by the lower appellate Court, the custom is legally established. As regards the observations of Petheram C. J,, in *Nivath Singh* v. *Bhikki Singh* (13), they have been expressly overruled by their Lordships of the Privy Council in *Ramgopal* v. *Shamskhaton* (21). However as I said already, I feel (though after some hesitation) that I should follow the principles laid down in *Kailas Chandra Dutta* v. *Padma Kishore Roy* (15) in preference to the conclusions in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), as the former decision seems to be more in consonance with the dicta of the Privy Council in *Ramgopal* v. *Shamskhaton* (21) and in *Muhammad Kamil* v. *Imtiaz* (18) and in *Anant Singh* v. *Durga Singh* (19).

In the present case, accepting the facts as found, I agree with my Lord that they do satisfy the requirements of the law as to the existence and validity of the custom. I am incilned also to hold that we are entitled under S. 103, Civil P. C. to go into the genuineness of the documents in Ex. C series (except C1), the District Judge, in my opinion, having not given a finding about the genuineness of these documents (except C1) and I would find that they are genuine. They strongly corroborate the other evidence as to custom. Further, the document Ex. B executed by the defendant is a clear admission of the existence of the custom in 1905 and of the defendants' liability to pay thunduwaram according to that custom. Their Lordships of the Privy Council in *Chundra Kunwar* v. *Chaudhri Narpa Singh* (23) quoting from English cases state :

"What a party himself admits to be true may be reasonably presumed to be so. The express admissions of a party to the suit are evidence, and strong evidence against him."

No explanation was given by the defendant from the box as to his admission in Ex B and

"unless and until he explains such admission" the fact admitted must be taken to be established (p. 195)"

The lower Courts merely argue in a circle when they find that Ex. B has no consideration because the liability by custom to pay thunduwaram is not established. Further the lower Courts have ignored the consideration that as regards the right to thunduwaram, the mirasdar has a far less heavy burden to discharge than when he lays claim to Natham Poramboke lands, etc. [See judgments in the Full Bench case in *Seshachala Chetty* v. *Para Chinnasami* (1)].

I therefore agree in reversing the lower Court's decrees and allowing the appeal as proposed by my Lord.

Kumaraswami Sastri, J.—I agree with the conclusions arrived at by my learned brother Sadasiva Aiyar, J. and have nothing useful to add.

S.N./R.K. *Appeal allowed.*

(23) [1907] 29 All. 184 (P.C.).

A. I. R. 1918 Madras 17

ABDUR RAHIM AND OLDFIELD, JJ.

Kasi Viswanatham Chetty—Petitioner—Appellant.

v.

Murugappa Chetty and *another*—Counter-Petitioners—Respondents.

Appeal No. 217 of 1917, Decided on 8th October 1917, against order of Sub-Judge, Ramnad, in Execution Appeal No. 361 of 1915.

(a) Civil P. C. (1908), O. 21, R. 8—"Court of competent jurisdiction" refers to territorial competence.

The expression "Court of competent jurisdiction" in O. 21, R. 8, refers to territorial competence and not to pecuniary competence. [P 17 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 8 and 80—Court cannot in execution sell property outside its territorial jurisdiction, although decree is transferred by Court having jurisdiction.

A Court cannot in execution sell property that is outside its territorial jurisdiction, even though the decree under execution was transferred to it by a Court having jurisdiction over the property. [P 17 C 2]

(c) Civil P. C. (1908), O. 22, Rr. 3 and 8—Execution—Territorial competence is necessary in execution of decree.

Although territorial competence is not necessary in the matter of the trial of suits it is necessary in execution, since, apart from the special and exceptional procedure by precept, a Court cannot act through its officers except within its territorial jurisdiction. [P 17 C 2]

Judgment.—The order before us is one passed under O. 21, R. 90, Civil P. C., refusing to set aside a sale in execution. As regards the objections to it argued on the evidence relating to inadequacy of price and substantial loss, we accept the lower Court's observations and concur in its conclusions. The remaining objection that the sale was held without jurisdiction calls for more lengthy discussion. It arises as between appellant, the judgment-debtor and respondent 1, the decree holder and is that the lower Court, the Subordinate Court of Ramnad, had no jurisdiction to sell property which it is admitted is situated in the territorial jurisdiction of the Subordinate Court of Sivaganga. The decree under execution was passed by the Chief Court of Lower Burma and was transmitted by it for execution to the District Court of Ramnad, that Court transferring it for execution to the lower Court.

The objection has been met first by the argument that the lower Court is of unlimited pecuniary jurisdiction, and therefore of competent jurisdiction within the meaning of O. 21, R. 8, Civil P. C. The transfer to it by the District Court of the decree for execution was accordingly such as the rule contemplates and conferred on it the jurisdiction necessary to support its proceedings notwithstanding its territorial jurisdiction over the property to be sold was wanting. But this has been justified only by the assumption that the expression "Court of competent jurisdiction" in the rule should be interpreted, as it must be when it occurs in S. 24, without reference to territorial jurisdiction. The assumption is unsustainable, because it is negatived by the object of the last mentioned provision. For the competence of a Court to try a suit does not depend on its possession of any power connected with territorial competence, since it has independently of it machinery for issuing process, obtaining the presence of parties and securing evidence throughout India. It is otherwise as regards O. 21, R. 8, Civil P. C., and the execution since apart from the special and exceptional procedure by precept, a Court cannot act through its officers except within its territorial jurisdiction

This follows from S. 39 (1) (b) and S. 42, Civil P. C. S. 38 is no doubt general in its terms. But the reference to "the Court to which the decree is sent" must be read with reference to a sending authorized by law, that is subject to S. 39. And the reference to competence in O. 21, R. 8, must be interpreted in the same way. It may be added that that this reference was first made in O. 21, R. 8 of the present Code, the wording of S. 226 of the old Civil P. C., corresponding with it having been modified, and it is therefore useless to refer to the only decisions on the point, those reached under the former law. The conclusion must in the circumstances be against the contention of the decree-holder respondent 1. He has hower argued in the alternative that the transfer of the decree to the lower Court by the District Court was or must be presumed to have been to a Court competent when the transfer was made, and that its competence has not been affected by any subsequent transfer to the Sivaganga Court of jurisdiction over the village, where the property sold is situated. The transfer of jurisdiction to the Sivaganga Court took place, we have ascertained from the District Judge, on 15th April

1913. Regarding the date of the fransfer of the decree by the District Court there is nothing on the record before us. But if it be presumed that it was before the transfer of jurisdiction and that the transfer of the decree was valid, that cannot avail respondent 1. For the material point is that the sale under consideration was held after 15th April 1915, when the lower Court had no territorial jurisdiction; and it is the law, as laid down in *Subbiah Naicker* v. *Ramanathan Chettiar* (1), a decision by which we are bound that pending proceedings are transferred by operation of law on the occurrence of any change in the territorial jurisdiction over the property with which they are concerned. Therefore if the lower Court was at any time competent to execute the decree in virtue of any transfer to it prior to 15th April 1913, it forfeited its competence to keep the suit property under attachment or to sell it from that date. The decision cited dealt, like the present proceedings, with execution. The only ground of distinction from it suggested, that the notification transferring jurisdiction in question in it may have withdrawn, whilst that in question here did not withdraw, jurisdiction over the transferred area, would require clear support from the terms of the notifications, since such concurrent jurisdiction in the case of Courts of equal grade is rare, if not unprecedented. But such support, we have satisfied ourselves, is in no degree forthcoming. This argument also must therefore, be rejected.

As the sale was held without jurisdiction it must be set aside, the appeal being allowed and the lower Court's order being reversed with costs throughout.

S.N./R.K. *Appeal allowed.*

(1) A. I. R. 1914 Mad. 162=22 I. C. 899=37 Mad. 462.

A. I. R. 1918 Madras 18 (1)

OLDFIELD AND PHILLIPS, JJ.

Amba—Petitioner

v.

Srinivasa Kamathi—Opposite Party.

Civil Misc. Petn. No. 1588 of 1918, Decided on 26th July 1918, against decree of the High Court, in Appeal Suit No. 24 of 1916.

Civil P. C. (5 of 1908), O. 44, R. 1—Privy Council appeal to—Leave to appeal in forma pauperis cannot be granted.

The High Court has no jurisdiction to grant leave to a party to appeal to the Privy Council in forma pauperis. 44 *I. C.* 731, *Foll.*; 4 *M. I. A.* 114, *not Foll.* [IP 18 C 2]

C. V. Ananthakrishna Aiyar—for Petitioner.

B. Sitaram Rao—for Opposite Party.

Judgment.—The petition, in so far as it is for a certificate that the case is a fit one for appeal to His Majesty in Council, is not opposed. We certify accordingly under S. 110, Civil P. C. The petition is further for leave to appeal in forma pauperis. In *Munni Ram Awasty* v. *Sheo Churn Awasty* (1), Counsel (Mr. Moore) referred generally to a practice of the Courts in India granting such leave mentioning Bengal Regulation 28 of 1814. But no precedent for its grant has been proved in this Court and the authority of decisions in other High Courts is against it. *Jagadananda Asram* v. *Rajendra Roy* (2) and *Ramkishen Lal* v. *Manna Kumai* (3). We respectfully adopt the grounds of the latter decision and dismiss the petition as far as it relates to leave to appeal in forma pauperis. There will be no order as to costs.

S.N./R.K. *Petition partly granted.*

(1) [1846] 4 M.I.A. 114=7 W. R. (P. C.) 29
(2) [1913] 18 I. C. 129.
(3) [1918] 44 I C. 731.

A. I. R. 1918 Madras 18 (2)

BAKEWELL, J.

Srinivasa Thathachariar, Accused Petitioners, In re

Criminal Revn. Case No. 635 of 1917, and Criminal Revn. Petn. No. 561 of 1917, Decided on 18th January 1918, to revise judgment of Joint Magistrate, Chingleput, in Criminal Appeal No. 16 of 1917.

Criminal P. C. (5 of 1898), S. 144—Trustee of temple required to abstain from interfering with conduct of adyapakam service—Order is sufficiently definite.

Where a trustee of a Vaishnavite temple was directed under S. 144 to abstain from "in any way interfering with the conduct of the adyapakam service;"

Held: that the order was definite and sufficiently defined the acts from which the trustee was required to abstain, and that it rendered the acts 'certain' within the meaning of the S. 144: 24 *Mad.* 45, *Appl.* and 16 *Cal.* 80 *Doubted.* [P 19 C 1]

T. R. Ramchandra Ayyar and *T. M. Vedantam*—for Accused.

Public Prosecutor—for the Crown.

Order.—The first point taken is that the act for which the petitioner was convicted does not fall within the order

passed under Criminal P. C., S. 144. It is true that the order mentions a specific act, but it also includes all acts of the same kind by the general words, "in any way interfering with the conduct of the adyavakam service." I think that these words sufficiently define the acts from which the petitioner was required to abstain and thus renders them "certain" within the meaning of S. 144. I may also point out that the petitioner as trustee had powers of management over the temple and its property and the act done was within those powers, and the order as regards him may be read as directing him "to take certain order" in the management of the temple. I think that the case falls within *Ramanadhan Chetti* v. *Murugappa Chetti* (1) and I have some doubt as to the decision in *Abayeswari Debi* v. *Sidheswari Debi* (2). The learned Magistrate seems to have made a slip as to the liability of D. W. 4 in his discussion of the credibility of that witness, but there was sufficient evidence on which he could act, and I do not think that this vitiates his decision. The conviction of the petitioner for the act complained of is also questioned, but I see no reason to differ from the Magistrate in his conclusion. The fine is not excessive. The petition is dismissed.

S.N./R.K. *Petition dismissed.*

(1) [1901] 24 Mad. 45.
(2) [1889] 16 Cal. 80.

A. I. R. 1918 Madras 19

OLDFIELD AND SADASIVA AIYAR, JJ.

Murajalli Hunia Goundan—Defendant—Appellant.

v.

Ramasami Chetti and *others*—Plaintiffs—Respondents.

Second Appeal No. 1 of 1917, Decided on 12th February 1918, against decree of Temporary Sub-Judge, Salem, in Appeal Suit No. 99 of 1915.

(a) Limitation Act (9 of 1908), Art. 126—Joint morgage by father and son—Father selling whole property as self acquired—Transferee redeeming mortgage and entering possession as owner—Vendee of son's share suing for redemption and possession of son's share—Art. 126 applies.

Defendant 1 and his father *G* mortgaged family property to defendant 2. *G* subsequently sold the equity of redemption as if the property was his self-acquisition to defendant 3. Defendant 3 redeemed defendant 2 and obtained possession of the property. After *G*'s death defendant 1 sold his share in the property to the plaintiff. In a suit by the plaintiff for possession of defendant 1's share on payment of a proportionate portion of the mortgage amount.

Held: that Art. 126, Limitation Act, was applicable to the suit and that time commenced to run from the date of defendant 3's entering into possession. [P 21 C 2]

(b) Limitation Act, Art. 126—Art 126 does not contemplate mere declaratory suit.

Per *Sadasiva Aiyar*, *J.*—Art. 126, which speaks of a suit "to set aside" the father's alienation of ancestral property, includes a suit in which possession is claimed and does not only contemplate a mere declaratory suit. [P 21 C 2]

(c) Limitation Act (9 of 1908), Art. 126.—Art. 126 applies to alienation with or without notice.

An alienation under Art. 126 need not be for consideration. The article applies alike to an alienee with and to an aliense without notice. [P 22 C 2]

G. S. Ramachandra Aiyar—for Appellant.

T. R. Ramachandra Aiyar—for Respondents.

Oldfield, J.—The facts admitted or found are that defendant 1 and his father Gopal Row mortgaged their property to defendant 2 with possession under Ex. 1. Gopal Row afterwards sold the equity of redemption, as though the property were his self-acquisition, to defendant 3 by Ex. 2. The lower appellate Court has found, and we accept its findings, that the property belonged to the family and the sale does not bind defendant 1. After Gopal Row's death defendant sold to plaintiff by Ex. A and plaintiff now sues for possession of defendant 1's share on payment of the appropriate proportion of the mortgage amount, which defendant 3 has paid. The question is whether the suit filed on 26th August 1912 is in time. It will be if the article of Sch. 1, Limitation Act, applicable is No. 148. It may be, if the article is No. 144 and defendant's possession, which, it is not disputed, began in 1898, was not adverse to defendant 1 and plaintiff. It will not be if the Article is No. 126. It is simplest to disregard for the present the distinction between Articles Nos. 144 and 126. The substaintial question is then whether the suit is for redemption or for possession, subject no doubt to the satisfaction of defendant 3's lien. It is brought in effect by one co-owner, represented by plaintiff, for recovery of mortgaged property redeemed by another co-owner and now in possession of his transferee, defendant 3; and argument has turned on whether Art. 148 or Art. 134 would apply to the case thus simplified. The question has not been dealt

with by this Court. But the conclusion reached in Allahabad and Bombay is in favour of the latter. It was no doubt held in *Ashfaq Ahmad* v. *Wazir Ali* (1) that when one co-heir of a mortgagor had redeemed the whole mortgage, the suit against his representative was subject to Art. 148. But recently, when that decision was considered in *Jai Kishen Joshi* v. *Budhanand Joshi* (2), the question being whether Art. 134 should be applied against a transferee from a redeeming co-owner on the assumption that the latter had the equivalent of a mortgage right, one learned Judge held, with reference to the principle stated in S. 95, T. P. Act, that he was only a charge-holder and applied Art. 144, whilst the other concurred, observing with reference to the earlier decision that the possession of the charge-holder need not be regarded as in all respects equivalent to that of a mortgagee.

The view taken in *Ashaq Ahmad* v. *Wazir Ali* (1) was not adopted in *Vasudev* v. *Balaji* (3) or in other cases decided by the Bombay High Court and referred to therein or in *Bhaiji Shamrao* v. *Hajiram Hajimiya Mahamad* (4). The objections made to the reasoning in these authorities are that the Transfer of Property Act was not applicable to the facts, the mortgage in the later Allahabad case having been executed before it and the Act not being applicable to the Bombay Presidency at the time, and that the distinction between the positions of a mortgagee and a charge-holder or, as he is called in the Bombay cases, alienor, has been abrogated since the decision of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (5). The first is unsubstantial, the prinple involved not depending on the Act for its validity. The second was, no doubt, not noticed in the judgments in question. But it cannot affect the conclusion. For the Privy Council held only that a simple mortgage was to be treated as equivalent to a charge for the purpose of Art. 132, not that every charge was a mortgage for the purpose of Art. 134. And the argument is unsustainable, because defendant 3's right, being equivalent only to that of Gopal Row, is, as the cases referred to show, not based on the principle of subrogation recognized in S. 101, T. P. Act. For neither Gopal Row nor defendant 3 became or could have become absolutely entitled to the property so far as defendant 1's share was concerned. As *Danappa* v. *Yamnappa* (6) and other cases referred to in *Raushan Ali Khan Chowdury* v. *Kali Mohan Moitra* (7), show the right is to contribution and is secured only by a lien. These considerations applied to the present case, and the decision must be that plaintiff's suit is not for redemption and is not subject to Art. 148.

The question is then between Arts. 126 and 144, the contention in connexion with the latter being that inquiry must be held to ascertain the date, at which defendant 3's possession became adverse to defendant 1 and plaintiff. It is urged that the lower appellate Court has already dealt completely with the matter in its reference to defendant 1's alleged acquiescence; but that is only one aspect of it. The decision in *Bhavrao* v. *Rakhmin* (8) has been referred to as negativing defendant 3's right to an inquiry; but it is not clear that it can be applied to the facts in the case before us. To these facts Art. 126 is exactly applicable; and it was applied to similar facts in *Ramsawmy Aiyar* v. *Vanamamalai Aiyar* (9), the superfluity of any inquiry as to the character of defendant's possession being pointed out. The suit, being subject to Art. 126 and having been filed over thirteen years after the possession of defendant 3 began, is out of time and must be dismissed with costs throughout, the District Munsif's decree being restored and the appeal being allowed.

Sadasiva Aiyar, J.—Defendant 3 is the appellant. The suit was for redemption of 1/4th share in a certain property half of which was mortgaged for Rs. 700 in 1892 to defendant 2 by defendant 1 and his father who owned the said half share in equal moieties of 1/4th and 1/4th. The plaintiff is the purchaser of defendant 1's 1/4th share. The other half-share in the property belonged to one Narasayya but we are not concerned

(1) [1891] 14 All. 1=11 All. 423 (F.B.).
(2) [1916] 38 All. 138=34 I. C. 244.
(3) [1902] 26 Bom. 500.
(4) [1912] 15 I. C. 500.
(5) [1907] 30 Mad. 426=34 I. A. 186 (P. C.).
(6) [1902] 26 Bom. 379.
(7) [1906] 4 C. L. J. 79.
(8) [1899] 23 Bom. 137.
(9) [1915] 26 I. C. 873.

with that half-share in this suit. Defendant 1's father and Narasayya sold the entire property to defendant 3 and to another person (who transferred his rights afterwards to defendant 3) for Rs. 2,000. As regards Narasayya's half-share which was sold for Rs. 1,000 there is on dispute in this suit. As regards the other half-share which defendant 1's father sold for the remaining Rs. 1,000, defendant 1's father is found to have had no right to sell defendant 1's 1/4th share out of that half share. Thus defendant 3 so far as title is concerned, has the same only to the extent of 3/4ths share. As there was a mortgage for Rs. 700 in 1892 on both the quarter-shares which belonged to defendant 1 and to his father in favour of defendant 2 and as half of that Rs. 700 or Rs. 350 is binding on defendant 1's 1/4th share now vested in the plaintiff, the plaintiff offers in the plaint to pay Rs. 350 and seeks to redeem the said 1/4th share on payment of the said Rs. 350.

As I said already, defendant 1's father sold away both the 1/4th shares in 1897. Though defendant 2 was the original mortgagee under the mortgage of 1892, as defendant 3 after his purchase in 1897 paid up in April 1898 the Rs. 700, mortgaging to defendant 2 out of the sum of Rs. 1,000 (the price he paid to defendant 1's father for the half-share) and is in possession of the half-share from April 1898, this suit for redemption of 1/4th share is really directed against defendant 3. Several defences to the suit were raised by defendant 3 (the appellant before us), but I think it is necessary to consider only the defence of limitation. The plea of bar by limitation is based on the fact that from April 1898 defendant 3 has been in adverse possession (claiming as full owner) till the date of suit (August 1912), that is for more than 14 years. Arts. 126 and 144, Limitation Act are relied upon. The District Munsif upheld the plea of limitation without mentioning in his judgment the Article of the Limitation Act on which he relied. The Subordinate Judge on appeal held that the suit was not barred by limitation because the mortgage of 1892 for Rs. 700 was payable only in June 1902, which was within 12 years of the date of the plaint (August 1912). His judgment also does not refer to any of the Articles of the Limitation Act. He gave a decree for redemption in favour of the plaintiff on payment of Rs. 350 and of half of the value of the improvements. (The claim for improvements, even if the plaintiff was entitled to redeem, was put forward by defendant 3 on the ground that the plaintiff's vendors knew of the sale of 1897, that defendant 3 redeemed and got into possession in April 1898 and that defendant 3 made improvements of large value to plaintiff's knowledge without objection on plaintiff's part).

The Subordinate Judge quotes from the District Munsif's judgment without dissent as follows: "He" (the plaintiff) "stood by when these," that is the improvements, "were made. He knew of the sale and of defendant 3's possession." Then the learned Subordinate Judge says: "*there is no dispute to the claim for compensation*. But the claim" (that is, the amount due for the value of the improvements) "should be proved by the best evidence." The Subordinate Judge therefore refused to accept the amount of Rs. 4,000 claimed by defendant 3 as the value of the improvements and directed the issue of a commission by the lower Court to exactly ascertain such value before passing the final decree for the redemption of the ¼th share. As I said, it is necessary for the disposal of this appeal to consider only the question of limitation. I am clear in my opinion that Art. 126, Lim. Act applies to this case. That Article provides a limitation period of 12 years for a suit by a Hindu governed by the Mitakshara Law "to set aside his father's alienation of ancestral property," the period being calculated from "when the alienee takes possession of the property." It has been held under the analogous Art. 44 relating to a suit by a minor whose property was alienated by his guardian that the expression "suit to set aside a transfer of property" includes a suit in which there is a prayer for consequential relief of possession [see *Annamalay Chettiar* v. *Pitchu Aiyar* (10)]. I am also clear that the Art. 126, which speaks of a suit "to set aside" the father's alienation of ancestral property, denotes also a suit in which possession is claimed and does not only contemplate a mere declaratory suit [see Rustomjee's Limitation Act, p. 326, quoting *Deo Raj* v. *Shiv Ram* (11)]. The present suit is

(10) [1905] 28 Mad. 122.
(11) A. I. R 1914 Lah. 408=25 I. C. 463=70 P. R. 1914.

by a person claiming from a Hindu (defendant 1) governed by the Law of the Mitakshara to set aside the said Hindu's (defendant 1's) father's alienation of ancestral property to the extent of defendant 1's share and for consequential relief of possession by redemption. The alienee (defendant 3) took possession of the property in April 1898 and, as more than 12 years had elapsed from that date before the date of suit, the suit is barred under this Article. Mr. T. R. Ramachandra Aiyar for the respondent contended that the Art. 126 (Col. 1), when it uses the words:

"to set aside his father's alienation of ancestral property 'means' to set aside his father's alienation of ancestral property, *provided the alienation was made by the father alleging that it was ancestral property or at least without alleging that it was not ancestral property.*"

I see no reason whatever to add any such words as those italicized by me to Col. 1 of the Article. Mr. Ramachandra Aiyar relied upon the decision of their Lordships of the Privy Council in the case reported as *Balwant Singh* v. *Rev. Rockwell Clancy* (12) to the effect that when an elder brother mortgages a property as if he was the sole owner and not as the manager of the family consisting of himself and his younger brother, the creditor is not entitled to prove that the younger brother's share was also bound by the mortgage as executed by the de facto manager for necessary family purposes. In the first place, it is not easy to see what the above observation has to do with the interpretation of the Art. 126. Further, their Lordships clearly make a distinction between an alienation by an elder brother and an alienation by a father. They state at p. 303 *of* 34 *All.*: "It need hardly be said that Sheoraj Singh" (the alienor elder brother) "was not an ancestor or a predecessor of Maharaj Singh" (the younger brother). The legislature and the Hindu law do make a distinction between an alienation by a father of ancestral property and that by any other person who was a mere manager.

The doctrine of right by birth in the son is wholly antiquated and inconvenient for modern times. The Privy Council have taken advantage of the texts relating to the father's power of alienation for antecedent debts to mitigate the inconvenience of that doctrine and the legislature has provided by a special Art. 126 for the perfection of the title of an alienee from the father, when a Hindu son who wants to take advantage of the antiquated Mitakshara law seeks to set aside such an alienation. It is significant that the alienation under Art. 126 need not be for consideration. It is also significant that Art. 126 applies alike to an alienee with and to an alienee without notice: see *Bhavrao* v. *Rakhmin* (8). The legislature has clearly fixed an overt and patent fact, namely, the taking of possession of the property by the alienee, as the event from which the period has to be calculated so as to avoid as far as possible difficult questions as to notice. Mr. Ramachandra Aiyar further argued that the words in Col. 3, Art. 126 "when the alienee takes possession of the property" mean

" when the aliene takes possession of the property by the sole and unaided virtue and effect of the father's alienation"

and that where the alienee gets possession by redeeming a previous usufructuary mortgage, the date of such possession given by mortgagee will not form the starting point under Col. 3, and so apply Art. 126. Here again I see no reason whatever to add to the plain language of the Article. Supposing for instance the alienation by the father is made one year after a trespasser had deprived the father of his possession of the property and the alienee after his alienation sues the trespasser and gets into possession, can it be argued that the son can come in more than 12 years afterwards treating the alienee's possession as that of a mere cosharer and treating Art. 126 as not applicable because the alienee had to sue the trespasser in order to get possession. Assuming however that Art. 126 is not applicable, I think that the suit is barred also under Art. 144. In *Vasudev* v. *Balaji* (3) the facts were as follows:

V. and *G*, co-owners of a land, mortgaged it in 1872. *V.* alone redeemed it in 1882 and obtained possession and he and his heirs asserted adverse and exclusive title to the whole and continued in possession till 1898. Then *G's* heirs brought a suit in 1898 for redemption of their half share. Jenkins, C. J., and Crowe, J., held that the co-owner who redeemed the whole of the mortgage was not a mort-

(12) [1912] 24 All. 296=14 I. C. 629=39 I. A. 109 (P. C.).

gagee, and did not stand in the shoes of the mortgagee, that he was a mere charge-holder, that a charge-holder can assert and claim adverse possession and that after 12 years the charge could not be redeemed by the other cosharer as the title by adverse possession became perfected. The learned Judges held that Art. 148 applied only to a suit against a mortgagee, and not to a suit against a person who obtained a charge by paying up the mortgagee. In this connection, it might be remarked that, under S. 95, T. P. Act, one of several co-mortgagors who redeems the mortgaged property and obtains possession thereof does not himself become the mortgagee but is given only a charge on the share of the other cosharers for the proportion of the expenses of redemption and of obtaining possession. In this case, it is clear on the proved documents and the facts found by the lower appellate Court that defendant 3 when he purchased in 1897 had the animus to claim title as the sole owner of the equity of redemption and not merely to claim title to defendant 1's father's 1/4th share, and that he took possession in April 1898 with the animus to hold the whole half share against all the world and not as a mere cosharer with defendant 1 in that half share. That possession of immovable property is notice to the whole world of the title under which possession is held, and that possession is prima facie adverse and exclusive are well known principles of law: see *Magu Brahma* v. *Bholi Das* (13). Of course a mortgagee or a cosharer or a tenant who first obtains possession as such cannot without notice to the mortgagor or to the other cosharers or to the landlord (as the case may be) claim to hold adversely, that is, by mere unilateral declaration of intention he could not convert his original possession into the adverse possession, but in this case the possession was obtained from the very beginning under an assertion of exclusive title.

The date fixed for the redemption in the mortgage of 1892 has no relevancy on the question of adverse possession, as it is not a mortgagee who sets up adverse possession but a purchaser from one of the co-mortgagors (see Freeman on Cotenancy, S. 224, at p. 296 and 207). In the result, I hold that the suit is clearly barred by limitation under Art. 126, and even if Art. 126 does not apply, under the general Art. 144 and I would therefore set aside the decree of the lower appellate Court and restore that of the District Munsif with costs payable by the plaintiff to defendant 3 throughout.

S.N./R.K. *Appeal allowed.*

(13) [1913] 20 I. C. 195.

A. I. R. 1918 Madras 23

ABDUR RAHIM AND OLDFIELD, JJ.

Vidhya Theertha Swamigal—Appellant.

v.

Venkatarama Iyer—Respondent.

Appeal No. 143 of 1916, Decided on 19th September 1917, against appellate order of Dist. Judge, Tinnevelly, in Appeal Suit No. 316 of 1915.

Limitation Act (9 of 1908), S. 14—Time spent in application for transfer of decree and appeals on orders therein cannot be excluded in limitation for execution.

A decree-holder applied in the Tinnevelly Munsif's Court on 13th September 1909 for transfer of his decree to the Ambasamudram Munsif's Court. The application was rejected by the Munsif but was allowed in appeal. In second appeal however the High Court restored the Munsif's order on 13th February 1913. The decree-holder then applied for attachment of the judgment debtor's properties on 14th October 1913:

Held: that the application was barred by limitation and that the time occupied in the appeal and second appeal in the matter of the first application could not be excluded under S. 14, Lim. Act, inasmuch as the application was proceeded with in a Court having jurisdiction and the decree-holder could not be said to have pursued his remedy through a bona fide mistake in the wrong Court: *A. I. R.* 1916 *P. C.* 96 (*P. C.*) and 35 *Cal.* 209, *Dist.* [P 24 C 1]

T. Narasimha Aiyangar—for Appellant.

K. R. Gurusami Aiyar and *A. Subbaraya Aiyar*—for Respondent.

Abdur Rahim, J.—The question for decision in this appeal is one of limitation in connexion with a petition for execution. The decree-holder made an application for execution, No. 1571 of 1909, on 13th September 1909, the object of the application being to get a transfer of the decree from the Tinnevelly Court to the Ambasamudram Munsif's Court. The application was dismissed on two grounds by the District Munsif, firstly, that it was not shown that there was no property of the judgment-debtor within the local limits of the Tinnevelly Court; and secondly, that the application was barred by limitation. Then on appeal

the Subordinate Judge reversed that order. But the High Court in second appeal restored the order of the District Munsif. This was on 13th February 1913. The present application was put in on 14th October 1913 and limitation is said to be saved by deducting the time between the filing of the application on 13th September 1909 and the date of the High Court's order, 13th February 1913. The District Judge, who has held in favour of the decree-holder, applied S. 14 Lim. Act, to this case. But it seems to us that that section has no application because it could not be said that the application was proceeded with in a Court without jurisdiction, that is to say, that the application was infructuous because it was proceeded with in a Court without jurisdiction or on a similar ground. The Tinnevelly Court had jurisdiction to deal with the application for transfer, though it could make the order only if certain facts were proved. It could not be said therefore that the decree-holder was pursuing his remedy through a bona fide mistake in the wrong Court. Further the relief that is now sought, that is attachment of properties in the Tinnevelly Court is not the same relief which was asked for in the application of 13th September 1909, because all that was asked for in it was transfer of the decree for execution to another Court.

Then the learned vakil for the respondent has asked us to uphold the order of the District Judge on the basis of the ruling reported as *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (1), following the ruling in *Lakhan Chunder Sen* v. *Madhusudan Sen* (2). There what was apparently held was that since the party against whom limitation was pleaded was in fact litigating the same question in another Court, the remedy of the party was suspended during the time that that litigation occupied. This apparently was the principle, so far as I understand it, upon which that case proceeded. I am unable to hold that it applies to the present proceedings. The one complete answer to the argument of the learned vakil for the respondent is that the remedy which is now sought could have been asked for if he had only put forward proper facts before the Court even while the application of 13th September 1909 was pending litigation. It was open to him to find out the facts and make an effective application for attachment of the properties. The appeal must be allowed and the execution petition of 14th October 1913 is dismissed with costs here and in the Court below.

Oldfield, J.—I agree and only wish to add that I cannot read the decision in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (1) as in any way affecting the scope of S. 14, Lim. Act. There is no doubt that the appellant must succeed.

S.N./R.K. *Appeal allowed.*

(1) A. I. R. 1916 P. C. 96=33 I. C. 452=43 Cal. 660 (P. C.).
(2) [1908] 35 Cal. 209.

A. I. R 1918 Madras 24

OLDFIELD AND BAKEWELL, JJ.

Chella Ballayya—Defendant—Appellant.

v.

Kanuparthi Subbayya — Plaintiff — Respondent.

Appeal No. 288 of 1916, Decided on 10th January 1917, against order of Dist. Judge, Cuddapah, in appeal Suit No. 140 of 1914.

(a) Negotiable Instruments Act (1881), Ss. 4 and 27—What is execution and how can it be proved stated.

A promissory note purporting to have been executed by one *C* contained the words "Nishi, mark of *C*," but there was no separate mark:

Held: (1) that a separate mark was unnecessary to prove execution of the document; (2) that the payee was at liberty to prove execution by the authority of the executant: 34 *I. C.* 849, *Dist.* [P 25 C 2]

(b) Contract Act (1872), S. 226—S. 226 applies to negotiable instruments.

The ordinary law of agency stated in S. 226 is applicable to negotiable instruments. [P 25 C 1]

I. V. Ramanuja Rao—for Appellant.

M. Patanjali Sastri—for Respondent.

Judgment.—The suit promissory note purports to be executed by defendant-appellant in virtue of the words on it "Nishi, mark of Chella Subbayya."

There is in fact no separate mark. The plaintiff contends that the absence of one is immaterial and that he is at liberty to prove that the words referred to were written with defendant's authority and therefore constituted a valid execution of the instrument. As regards the first point, we cannot see and have not been shown authority for holding that any separate mark is essential, if the writing relied on is in fact written with authority. As regards the second no case has been

cited to the effect that the ordinary law agency stated in S. 226, Contract Act, is inapplicable to negotiable instruments, and S. 27, Negotiable Instruments Act, is to the contrary effect, its restrictive portion being irrelevant in the present connexion. *Radhakrishna Mudaliar* v. *Subraya Mudaliar* (1), relied on by appellant, was decided with reference to the execution of a will and the special wording of S. 50, Succession Act. It therefore lays down no general rule. We accordingly agree with the lower appellate Court that plaintiff is at liberty to prove the execution of the suit note by defendant's authority and that the case must be remanded in order that he may have an opportunity to do so. The appeal against order is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1916] 40 Mad. 550=34 I. C. 849.

A. I. R. 1918 Madras 25

AYLING AND SESHAGIRI AIYAR, JJ.

Godavarthy Sundaramma—Plaintiff—Appellant.

v.

Godavarthy Mangamma—Defendant—Respondent.

Letters Patent Appeal No. 97 of 1916, Decided on 15th November 1916, against judgment of Coutts Trotter, in Civil Revn. Petn. No. 663 of 1915.

Court-fees Act (1870), S. 7 (5) (b) and (d) —Suit for recovery of land forming part of entire estate but neither sub-divided nor separately assessed—Court-fee is payable on market value of land.

The court-fee payable in respect of a suit for recovery of land forming part of an entire area but neither sub-divided nor separately assessed to land revenue must be computed on the market value of the land sued for under S. 7 (v) (d). [P 26 C 2]

P. Narayanamurthy—for Appellant.

A. Krishnaswamy Aiyar—for Respondent.

Coutts-Trotter, J.—This case raises the question of the construction of a section of the Court Fees Act, 7 of 1870, and the way that the matter arises is this. A suit was brought for the recovery of land which was a definite plot forming part of Survey No. 304 and was in fact 3 acres 59 cents in extent. That survey number as a whole consists of 4 acres 42 cents, out of which 83 cents had been sold away before leaving a residue of 3 acres 59 cents, which was what the plaintiff was suing for. The point is this: that according to the construction of the Court Fees Act will the question be determined as to what Court has jurisdiction, because it is not contested that on the method of valuation of the land, the jurisdiction of the Court to try will depend. According to the plaintiff the proper sub-section to apply is sub-S. 5-(b), S. 7 of the Act, which would be to apply a system of multiplying the revenue payable in order to arrive at the calculation provided by the Act for fixing the value of the suit. According to the defendant, it is sub-S. 5-(d) of the section which really governs the matter, in which case the market-value of the land has to be ascertained. According to the plaintiff as I say S. 5-(b) applies and the words then are these: "Where the land forms an entire estate," that is not this case:

> "Or a definite share of an estate, paying an annual revenue to Government, or forms part of such estate, and is recorded as aforesaid,"

which by reference to sub-Cl. (a) means "is recorded in the Collector's register as separately assessed with such revenue." It is not disputed that what appears in the Collector's book is this: a description of the whole area covered by a particular patta, an enumeration of its extent and a figure representing the total revenue payable in respect of that patta. Then there follow particulars which show the rate charged per acre. I am asked to say by the plaintiff that the true construction of this Act is that because you can by a mathematical calculation arrive at what fraction of the whole patta any piece of land is therefore any and every bit of land that you like within the whole patta must be considered to be separately assessed to revenue. That seems to me to be a proposition which is utterly incapable of being supported, if for no other reason because it gives no meaning whatever to the words "separately assessed." It is all assessed; the only thing is whether it is separately assessed as distinct from something which is assessed as part of a whole, and that is what I find to be the meaning of the words. Within the meaning of these words therefore the land in question in this suit cannot fall. Then it is said even if this is not a part of an estate separately assessed to revenue, nevertheless it may be regarded as "a definite share of an estate." Once more I make the same criticism on that construction

as upon the other. It entirely ignores the word 'definite,' because every share in an estate is in some sense a definite share, and I have no doubt that what is meant by the words "definite share" is an undivided tangible fraction of an estate as distinct from a defined demarcated plot which has been taken out of an estate. Supposing for instance I sell Brownfield plot out of Whiteacre estate that would be in my opinion not a definite share of an estate within the meaning of this enactment. But if I sell a fraction of my blackacre estate and it has got to be divided up among different kinds of land that I think is a definite share of an estate within the meaning of the section.

I observe the same view was taken by a learned Judge of the Allahabad High Court in *Reference under the Court-fees Act* 1870, S. 5 (1). I am conscious of the extreme inconvenience of this decision but I see no possible escape from that construction of the Act. It leads no doubt to this absurdity in some cases. For instance you might have a case where if you sue for the recovery of the whole plot, if it falls under sub S. 5 (b), taking five times the revenue, would result in a lower value than if you sue for a portion of the land which according to this view, has to be taken at the market-value. Probably in the present case it may be that a suit for the recovery of the whole survey number will have to go to the District Munsif, whereas the suit for a portion of it may have to go to the Subordinate Judge's Court. The result is doubtless regrettable and I tried very hard to avoid it; it seems to me that the view of the person who drafted the section in fact was that, wherever you can calculate with reasonable certainty the amount of revenue payable on a plot, you should take 5 or 10 times the revenue and in default of any possibilty of measuring the revenue then you must in the last resort have recourse to the inconvenient and cumbersome method of valuation by the market-value. That is a logical and intelligible method and must have been the intention of the framer of the Statute; but if so he has fallen very short of his object, because though, as I say the construction that I have adopted is probably not what was intended, it is the only possible construction on the wording of the Statute. The result is that this petition is allowed and I declare that the subject matter of this suit must be valued according to its market value and the case must be remanded to the lower Court to ascertain the market-value and determine the question of jurisdiction in accordance with the value found. The petitioner's costs in this Court will be paid by the respondent.

(1) [1894] 16 All. 493.

Judgment.—The report of the District Munsif now received places it beyond doubt that the portion of Survey No. 304, which is a part of the subject-matter of the suit, has not been subdivided and separately assessed to land revenue. It cannot therefore be valued under Cl. (b), S. 7-(v), Court fees Act. The order of the learned Judge is clearly right. The appeal must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

** A. I. R. 1918 Madras 26
Full Bench

WALLIS, C. J., OLDFIELD AND SESHAGIRI AIYAR, JJ.

(*Yarlagadda*) *Mallikharjuna Prasada Naidu*—Defendant—Appellant.

v.

Matlapalli Virayya and *others*—Plaintiffs—Respondents.

Second Appeal No. 1561 of 1916, Decided on 22nd July 1918, against decree of Temporary Sub-Judge, Masulipatam, in Appeal Suit No. 132 of 1915.

**** Civil P. C (1908), O. 21, R. 63—R. 63 applies to claims preferred to property attached before judgment—Claims of title should be promptly disposed of.**

Rule 63, O. 21, applies to orders on claims preferred to property attached before judgment : 39 *I. C.* 863, **Overruled.** [P 29 C 1]

The general policy of the law is that questions of title raised by claims against attachments before or after judgment should be promptly disposed of. [P 28 C 2]

C. V. Ananthakrishna Aiyar—for Appellant.

C. Rama Rao for *P. Narayanamurthi*—for Respondents.

Order of Reference

Krishnan, J.—The facts necessary for this reference may be briefly stated as follows : Defendant 1, who is the appellant before us brought a suit for money against defendants 2 to 4 and when that suit was pending he obtained an order under R. 6, O. 38, Civil P. C., for attachment before judgment and attached the plaint properties. The plaintiff intervened and claimed the proper-

ties as belonging to him by reason of a prior purchase from the same defendants. The claim was enquired into and an order was passed in March 1910 in plaintiff's favour disallowing the attachment. In 1912, defendant 1 obtained his decree for money against defendants 2 to 4 and then proceeded again to attach the same properties. He had taken no steps to contest the order on the claim petition, nor has he done so up to date. Nevertheless when plaintiff again filed a claim against the second attachment his claim was dismissed and the attachment was confirmed. For some reason not apparent the Court failed to consider the effect of the first order. Plaintiff has filed this suit under R. 63, O. 21, Civil P. C., for a declaration of his title and for setting aside the order of attachment.

Both the lower Courts have decreed the plaintiff's suit without going into the merits, on the ground that the order on the first claim petition was conclusive between the parties because that order had decided in favour of plaintiff's title and against defendant 1's right to attach. In second appeal it is argued before us that as that order was passed on a claim to property attached before judgment, it is of no force now and that it is not an order to which R. 63 applies or which need be set aside. The appellant's vakil has relied on the ruling in *Ramanamma* v. *Bathula Kamaraju* (1) which certainly supports him. But on the order side our attention has been drawn to the decision in Second Appeal No. 601 of 1916 : *Muthukumara Chettiar* v. *Alagappa Chettiar* (2) where my learned brother Spencer, J., and I were of opinion that R. 63 did apply to cases of attachment before judgment. As there is a clear conflict between the two decisions on the point before us and as I still adhere to the view expressed by us in the second appeal, I consider that the question should be referred to the Full Bench. As our attention was not drawn to the ruling in the 5 Law Weekly : *Ramanamma* v. *Bathula Kamaraju* (1) when we were hearing the Second Appeal No. 601 of 1916 : *Muthukumara Chettiar* v. *Alagappa Chettiar* (2), we then stated our reasons for our view only very briefly. It is necessary now to state my reasons more fully, as with all respect to my learned brothers who decided the case in the Law Weekly : *Ramanamma* v. *Bathula Kamaraju* (1) I am unable to accept their view that R. 63 is inapplicable in cases of attachment before judgment.

The decision on the point turns upon the construction of R. 63, O. 21 and on the meaning to be attached to the word "investigated" in R. 8, O. 38. The wording of R. 63 is clearly wide enough to include claims before decrees, for the rule speaks of "claims and objections preferred" without restricting them in any way to claims after decree. The charge in the wording of that rule from what it was in the corresponding S. 283 of the old Code of 1882, by omission of all reference to Ss. 280 to 282, seems to indicate that it was intended to widen the scope of the rule and to make it clearer that claims of all kinds were included in it. This is the view taken in *Bisheshar Das* v. *Ambika Pershad* (3), and I agree with it in spite of the dissent from it in the 5 Law Weekly case: *Ramanamma* v. *Bathula Kamaraju* (1). As R. 63 is an enabling rule which gives a right of suit to parties defeated in claim proceedings which they will not otherwise have, I am inclined to think that we should not unduly restrict its scope. If the rule is held not to apply, the result seems to me to be that the original order becomes final without being subject to the result of a suit; I fail to see on what ground it can be treated as of no force, as argued. It is an order between parties by a competent Court deciding that a certain property can or cannot be attached for realizing by sale the amount of the decree that may be passed and as such it seems to me it is binding on the parties thereto unless set aside. Considering that the two sets of orders those before and those after decree are passed after similar inquiries no distinction should be made between them as to their effect unless the legislature has clearly indicated a distinction.

Such a distinction is sought to be made out by reference to the word "investigated" in R. 8, O. 38 It is argued that the word refers only to the enquiry on the claim and nothing more in other words only Rr. 58 and 59, O. 21 apply. Now it will be seen that the heading of

(1) [1917] 41 Mad. 23=39 I. C. 863.
(2) [1917] 42 I. C. 554.
(3) A. I. R. 1915 All. 275=37 All. 575=29 I.C. 622.

the subdivision of O. 21 where these rules are is " investigation of claims and objections," and under this heading we have grouped all the rules from 50 to 63. It is a reasonable inference from this that the legislature treated them all as steps in " investigation " or parts of it. If we adopt a restricted meaning of the word " investigated," Rr. 60 to 62 will not be included in it as they deal with orders to be passed after the " investigation " proper is completed and as a result we will have to hold that the legislature has not made any provision for orders to be passed in claims under that rule as there is no other provision with regard to it except R. 8. Such a construction seems to me to be hardly right. If we consider that the order in the present case was passed under R. 60, O. 21 read with R. 8, O. 38, as I think we should, it follows that R. 63 applies to it as being an order under R. 60.

The restricted meaning is adopted in the 5 Law Weekly case: *Ramanamma* v. *Bathula Kamaraju* (1), as the learned Judges considered that it would be unfair and inexpedient to drive a plaintiff into a fresh litigation which might eventually turn out to be a futile proceeding if he failed to secure a decree. It may be remarked that even in cases of attachments after decree, the suit under R. 63 may turn out to be futile if the first decree is reversed on appeal or second appeal and plaintiff's suit is dismissed and yet the legislature has clearly given the right of suit. I can see nothing unfair in making a person sue if her wishes to insist on his right to attach a certain property in execution of his anticipated decree in spite of the adverse order against him in the claim. If his second suit turns out to be futile because he fails to secure a decree, the fault is his own in bringing an unfounded suit in the first instance. It seems to me however these are not relevant considerations in deciding whether a suit lies under R. 63, nor can the wording of Art. 11, Limitation Act, be used to decide the question. If that article does not apply as to which I express no opinion it will be necessary to find what article does when the question arises.

A similar question as the one before us which arose in an attachment before judgment when the Code (Act 8 of 1859) was in force was considered by Sir Barnes Peacock, C. J., and Mitter, J., the learned Judges held on a construction of Ss. 86 and 246 of that Code, which were the corresponding provisions then in force that the words :

" Investigated in the same manner as a claim to property attached in execution of the decree "

incorporated all the provisions of S. 246 and gave the remedy by suit which was the only and proper remedy to contest the order on the claim. This was decided in 1868 and till the decision in *Ramanamma* v. *Bathula Kamaraju* (1), no ruling has been cited to us to the contrary. I feel therefore fortified in my view that R. 63 does apply to claims before decrees as well. But on account of the conflict of authority in this Court the question must now be decided by the Full Bench. I would submit the case for the opinion of the Full Bench on the following question :

" Does R. 63, O. 21, Civil P. C., apply to orders on claims preferred to property attached before judgment."

Bakewell, J.—I agree.

Opinion.--S. 86, Civil P. C. 1859, which was re-enacted without material alternation in S. 487 of the Code of 1877 and in O. 38, R. 8 of the present Code, admittedly had the effect of applying to claims in respect of attachments before judgment all the provisions of S. 246 of the Code, including the final provision enabling the party against whom the order was given to bring a suit to establish his right at any time within one year from the date of the order. By the Limitation Act 9 of 1871, the provision as to limitation was taken out of S. 246 and dealt with in Art. 15 of that Act. In the Code of 1877, Ss. 278 to 283 were substituted for S. 246 of the Code of 1859. In S. 283, which corresponded to the last sentence of S. 246 the language was altered but there was nothing in the alteration from which an intention to make any of these provisions inapplicable to attachments before judgment could be inferred, nor is there anything of the sort in the changes made in the Code of 1908. The general policy of the law is that questions of title raised by claims against attachments before or after judgment should be promptly disposed of and as has been pointed out to us, this section was applied without question to a case of attachment before judgment which came before the Privy Council in

Kissorimohun Roy v. *Harsukh Das* (4). We must overrule *Ramanamma* v. *Bathula Kamaraju* (1) and answer the question in the affirmative.

S.N./R.K. *Answered in the affirmative.*

(4) [1890] 17 Cal. 436=17 I. A. 17 (P.C.).

A. I. R. 1918 Madras 29

SESHAGIRI AIYAR AND NAPIER, JJ.

Ankalamma—Plaintiff—Appellant.

v.

Bellam Chenchayya and *others*—Defendants—Respondents.

Second Appeal No. 1949 of 1916, Decided on 14th December 1917, against decree of Temporary Sub-Judge, Cuddappa, in A. S. No. 87 of 1916.

(a) Hindu Law—Joint family—Manager—Bond in his favour — Payment to junior member in lifetime of manager does discharge liability—Contract Act, S. 45.

Payment to one of the co-heirs of a promisee under a bond would not discharge the promisor from his liability. The same considerations govern payments made to a junior member of a Hindu family during the lifetime of its manager in whose favour the bond was executed. [P 31 C 1]

(b) Contract Act (1872), S. 45 — Payment to one son during life-time of others does not amount to discharge.

A payment made to one of the sons of a promisee under a bond, while the latter is undergoing a sentence of transportation and there are other sons of the promisee alive at the time, does not discharge the bond: 10 *I. C.* 874; 35 *Mad.* 685 and 36 *Mad.* 544, *Dist.* [P 29 C 2]

(c) Contract Act (9 of 1872), S. 2—Ordinarily promisee denotes person in whose favour document is executed—Other members do not become co-promisees when amount is advanced by manager of family—Real owner is not co-promisee in bond executed benami—Hindu law, joint family.

Prima facie the word "promisee" in S. 2, means, in reference to bonds, a person in whose favour the document is executed. [P 30 C 1]

Where money has been advanced by the manager of a joint family the other members do not become co-promisees with him. [P 30 C 1]

A person who has an interest in bonds or securities standing in the name of another is not a co-promisee with him. [P 30 C 1]

M. O. Parthasarathy Aiyangar and *M. O. Tirumalachariar*—for Appellant.

A. Narasimhachariar for *V. V. Srinivasa Aiyangar*, *Venkatasubba Row* and *Radhakrishnayya*—for Respondents.

Judgment.—The bond sued on was executed to the father of plaintiff 1. Plaintiff's case was that it was assigned to him by the father. After filing the suit he died and plaintiff 2 is his legal representative. Defendant 1 is the son of the mortgagor. Defendants 2 to 11 are the alienees of some of the properties mortgaged. Defendant 12 is the eldest son of the mortgagee. The defendants pleaded that the mortgage bond was discharged by the payment made to one Chinna Narayana Reddi. This Chinna Narayana Reddi was another son of Byreddi Venkata Reddi, the original mortgagee. In the written statement, the case for the defence was that, in a partition between the father and sons, this bond fell to the share of Chinna Narayana Reddi and that after it came to him, there was a complete discharge of the obligation under the bond. The District Munsif gave a decree to the plaintiff. In appeal, after remand in which the District Judge asked for certain findings upon some subsidiary issues, the Subordinate Judge, who heard the appeal, finally has come to the conclusion that the payment to Chinna Narayana Reddi discharged defendant 1 from liability and that the plaintiff is not entitled to claim anything under the bond. The facts found are (a) that Venkata Reddi was alive at the time that the alleged payment was made to Chinna Narayana Reddi. Venkata Reddi and his son, defendant 12, were sentenced to transportation for life somewhere near 1880 and the discharge is alleged to have been in the year 1883. At that time the father is alleged to have given a power-of-attorney to a person called Narayana Reddi (b). It is further found that there was no partition as alleged by the defendants. The District Munsif has stated that there was no allegation that Chinna Narayana Reddi was the manager of the family and that it was not sought to establish it before him. In this Court an attempt was made both by Messrs. Narasimha Chariar and Radhakrishnayya to show that Chinna Narayana Reddi was actually managing the family affairs. But the circumstances mentioned by the Subordinate Judge negative any such presumption. After the father and the eldest son were convicted and sentenced to transportation for life, apparently every member of the family was endeavouring to get as much family property as possible into his own hands. In these circumstances, it is unlikely that any one of the members was looked up to as the managing member of an undivided family.

On these facts, the question of law for decision is whether the payment to Chinna Narayana Reddi could discharge

defendant 1, from liability. Chinna Narayana Reddi was undoubtedly not a promisee. The learned vakils for the respondents argued that, as the money was advanced by the father while the family was still undivided, every member of the family must be taken to be a co-promisee with the father. In the first place, there is no evidence as to the source of the money which was lent. For all we know, it might have been the self-acquisition of the father. Even granting that it was from the family funds that the father advanced the money, it does not follow that the other members of the family were co-promisees with him. The definition of "promisor" and "promisee" contained in the Contract Act negatives any such presumption. Prima facie the word "promisee" means a person in whose name the document has been executed. No authority has been cited before us for the broad proposition that where money had been advanced by the manager of joint Hindu family the other members of the family would become co-promisees with him. The fact that the other members of the family have an interest in the debt is not enough to constitute them promisees. That is a technical expression carrying with it certain rights: we are not prepared to hold shat every person who has an interest in bonds or securities standing in the name of another is a co-promisee, even though that other may be the manager of the Hindu family of which he is a member. Therefore, we must proceed on the footing that Chinna Narayana Reddi was not a promisee under the bond. He was one of the heirs of Venkata Reddi to whom the bond was executed.

There were also other heirs including the plaintiff who were entitled to the money under this bond. The question therefore is whether payment to one of the co-heirs would discharge the obligor from liability. The principle regarding co-heirs would be equally applicable to co-parceners. In *Ahinsa Bibi* v. *Abdul Kadar Saheb* (1) Bhashyam Aiyangar, J., accepts the proposition laid down by Mahmood, J., in the case in *Surju Prasad Singh* v. *Khwahish Ali* (2) and says that the co-heir of a single promisee is not entitled to give a discharge in respect of a bond executed to his ancestor. The Subordinate Judge has relied for his conclusion that payment to one of the co-heirs would discharge the obligor, upon *Sheikh Ibrahim* v. *Rama Aiyar* (3). That case only decided that where payment is made in fraud of the other co-heirs, to one of the co-heirs the obligor is not discharged. Further there are some observations in the judgment which are against the view taken by the Subordinate Judge. There is nothing in that judgment to support his position. Mr. Parthasarathy Aiyangar has drawn our attention to the Full Bench decision in *Mannava Annapurnamma* v. *Uppala Akkayya* (4), where two learned Judges of this Court held that payment to one of the co-promisees would be a good discharge.

The Chief Justice was against that view. Even the two learned Judges who held that payment to one of the co-promisees would amount to a discharge, guard themselves by saying that the case of a co-heir would stand upon a different footing. Sankaran Nair, J., at p. 549 (of 36 *Mad.*) says that the proposition which he enunciated would not cover case of co-heirs. Sadasiva Aiyar, J., uses similar language in his judgment. In a later case reported as *Muniandi Servai* v. *Ramasami* (5), Sadasiva Aiyar, J., sitting with Hannay, J,. held that payment to one of the co-heirs of the promisee would not amount to a discharge of the liability incurred under the bond. Coutts-Trotter, J., in *Ponnusamy Pillai* v. *Thyagaraja Pillai* (6) seems to doubt the correctness of the Full Bench decision in *Mannava Annapurnamma* v. *Uppala Akkayya* (4). If the question for decision were whether the payment made to one of the co promisees would amount to a discharge of the bond, it might become necessary to refer the matter to a Full Bench, having regard to the fact that two cases in Calcutta in which the question was fully argued and elaborately considered, took a different view and to the fact that Coutts-Trotter, J., is of opinion that the decision is opposed to the current of authorities in England. We refer to *Husainara Begum* v. *Rahmannessa Begum* (7) and *Umes Chandra*

(1) [1902] 25 Mad. 26.
(2) [1882] 4 All. 512.
(3) [1911] 35 Mad. 685=10 I. C. 874.
(4) [1913] 36 Mad. 544=19 I. C. 12.
(5) [1915] 29 I. C 586.
(6) [1916] 32 I. C. 173.
(7) [1910] 38 Cal. 342=8 I. C. 837.

Banerjee v. *Dinabandhu Mahan ti* (8). But that question need not be considered in this case. The principle seems to be clear that payment to one of the co heirs of the promisee would not discharge the promisor from his liability to pay under the bond.

The same considerations govern payments made to a junior member of a Hindu family during the lifetime of its manager in whose favour the bond was executed. In the view we have taken the decision of the Subordinate Judge must be reversed and that of the District Munsif restored with costs here and in the lower appellate Court. Time for paymert is extended to 9th April 1918.

S.N /R.K. *Appeal allowed.*

(8) [1915] 29 I. C. 956.

A. I. R. 1918 Madras 31

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Muthiah Chetty P. M. A. and *others*—Plaintiffs—Appellants.

v.

Alagappa Chetty and *another*—Defendants—Respondents.

Civil Appeals Nos, 192 and 193 of 1915, Decided on 29th January 1917, against decree of Temporary Sub-Judge, Sivaganga, in O. S. No. 9 of 1914.

(a) Limitation Act (1908) Art. 89—Suit against agent for accounts though misappropriation alleged in plaint is governed by Art 89.

A suit by a principal for accounts of moneys entrusted to his agent is governed by Art. 89, even though there are averments in the plaint that the agent either through negligence or misconduct has misapplied the moneys in an unauthorized manner. [P 31 C 2]

(b) Limitation Act (1908), Arts. 89 and 90—Term "other suits" in Art. 90 implies other than covered by Art. 89.

The words "other suits" in Art. 90 show that that article does not include suits which properly come within Art. 89. *Great Western Insurance Co., of New York* v. *Cunliffe*, (1874) 9 *Ch. Ap.* 525, *Dist.* [P 31 C 2]

(c) Limitation Act (1908), Art. 89—Liability of agent for wilful default is covered by Art. 89.

Such matters as the liability of the agent for wilful default and to account for moneys that should have come to his hands come within the scope of an ordinary money account and are governed by Art. 89. [P 31 C 2; P 32 C 1]

(d) Limitation Act (1908), Art. 89—Termination of agency for purpose of Art. 89 is question of fact—When agency is deemed terminated stated—Civil P. C. S. 100.

The termination of an agency is a question of fact for the purposes of Art. 89 and the agency must be considered as having terminated when the authority of the agent is revoked, or the agent renounces the agency or the business of the agency is completed, which is practically another case of revocation or determination of authority. [P 32 C 1]

A. Krishnasami Ayyar—for Appellants.

S. Srinivasa Aiyangar, *K. Bashyam Ayyangar* and *N. M. Malim Sahib*—for Respondents.

Wallis, C. J.—In the first of these cases—Appeal No. 192 of 1915, the Subordinate Judge has dismissed a suit brought by the principals against an agent and his son to recover a specified sum of money particulars of which are set out at length in the plaint, and those particulars show that what they are really seeking to do is to make defendant 1 account for the moneys which they entrusted to defendant 1. The main ground of complaint taken by the plaintiffs in their plaint is that defendant 1 lent moneys of the principals to persons to whom he was not authorized to lend them, and Mr. Krishnasami Ayyar for the appellants has taken the point that this case is governed by Art. 90, Lim. Act, which proviees for

"Other suits by principals against agent for neglect or misconduct,"

and not by Art. 89 which deals with suits

"by a principal against his agent for moveable property received by the latter and not accounted for."

Now the use of the word "other" in Art. 90 shows that that Article does not include suits which properly come within Art. 89, and we think that this is really a suit for a mere money account which comes within Art 89. Mr. Krishnasami Ayyar has relied upon *Great Western Insurance Co. of New York* v. *Cunliffe* (1). In that case it was sought, in taking an account by a principal against his agent, to hold the agent responsible for the loss which had occurred to the principal by the agent's failure to insure certain goods, that is to say, for failing to carry out the instructions of the principal by spending moneys of the principal in a particular manner, and James, L. J. held that that did not come within an ordinary money account. In an ordinary money account the accounting party is asked to account for the moneys which have come to his hands and to pay over the balance, and where the account is on the footing of wilful desault, he may be held liable, not only for the moneys which come to his hands, but also for

(1) [1874] 9 Ch. Ap. 525.

moneys which ought to have come to his hands; and if he is shown, in taking such an account, to have applied moneys in a way in which he was not authorized to apply them, the result is that he is not allowed credit for that sum in taking account. That is the ordinary practice in taking accounts and it seems to us that there is no reason for holding that the matters pleaded in this case should not come into an ordinary money account. As I have said, *Great Western Insurance Co. of New York* v. *Cunliffe* (1) itself and also the illustration put there of an attempt to make a solicitor liable for his negligence in the conduct of an action when taking an account in respect of his client's moneys those are cases of a different nature from the present.

Therefore in our opinion, in this case, Art. 89 was rightly applied. Then the question arises as to whether this case was properly disposed of with regard to that Article. Now the Judge has simply held the suit to be barred on the authority of a decision of my learned brother and myself in *Venkatachalam Chetty* v. *Narayanan Chetty* (2). All we decided in that case was that termination of agency is a question of fact for purposes of Art. 89, Lim. Act and the agency must be considered as having terminated when the authority to the agent is revoked, or the agent renounces the agency or the business of the agency is completed, which is practically another case of revocation or determination of authority. Now that must be a question of fact in each case to be decided upon the evidence. We do not think the case is sufficiently clear upon the pleadings to enable us to dispose of the case without taking evidence, and we have therefore decided to call for a finding upon fresh evidence as to whether the suit is barred under Art. 89. We think it necessary however to say that we consider this question depends upon the question when the authority of the agent to represent the principal ceased, and that it does not depend upon the question as to the agent's obligation to take back a salary chit and pass his accounts with the principal. Fresh evidence may be taken. The finding will be submitted in two months from this date and seven days will be allowed for filing objections. [The connected appeal was then taken up, but the decision in that appeal does not contain any law point.—Ed.]

(2) [1915] 39 Mad. 376=26 I. C. 740.

Seshagiri Aiyar, J.—I agree.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 32

SPENCER AND SRINIVASA AIYANGAR, JJ.

Vikrama Deo Garu—Plaintiff—Petitioner.

v.

Vikrama Deo Maharajulu Garu and *another*—Defendants—Opposite Parties.

Civil Misc. Petns. Nos. 1582 and 1583 of 1916, Decided on 27th April 1917.

(a) Will—Pardanashin lady—If genuine—Onus is on party propounding.

Where the only point in issue between the parties in a suit based on a will executed by a pardanashin lady is whether the will is genuine, the burden of proving it lies on the party propounding the will. The Court cannot, without giving the plaintiff an opportunity of rebuttal, decide on the want of capacity of the executant to understand the contents of the will. [P 34 C 1]

(b) Pardanashin Lady—Rule as to, does not apply to all gosha ladies.

The rule as to pardanashins does not apply to all gosha ladies alike. The rule, at the best, is a presumption of want of ordinary capacity, which can be rebutted. [P 34 C 1]

(c) Hindu Law—Woman in possession of property—Presumption that she is absolute owner applies—Evidence Act, S. 110.

The ordinary presumption that a person in possession of property is the absolute owner applies to Hindu woman: *Metters* v. *Brown*, (1863) 32 *L. J. Ex.* 138; 8 *Mad.* 214; 26 *Cal.* 871, (*P. C.*); *A. I. R.* 1914 *Mad.* 428 and 2 *M. L. J.* 261, *Foll.* [P 35 C 1]

(d) Hindu Law—Widow—Savings—Hindu woman can dispose of moveable property representing savings of income.

A Hindu woman can dispose of, either inter vivos or by will, moveable property which represents the savings out of the income of property which was at her absolute disposal: 28 *Mad.* 1 (*F. B.*) and 33 *I. C.* 532, *Foll.* [P 36 C 1]

V. Ramesam—for Petitioner.

B. N. Sarma and *R. Narasimham*—for Opposite Parties.

Order.—These are applications under the agency rules for a direction to the agent to review his judgment by which, varying the decree of the special assistant agent, he dismissed the plaintiff's suit with costs. The suit was brought for the recovery of certain moveables and cash of nearly a lakh of rupees in value from defendant 1, the Maharajah of Jeypore, to whom they were handed over for safe custody by the Government, defendant 3, after the death of Sri Sulochana Patta Mahadevi whose property they were. The plaintiff claimed them as

sole legatee under the will, dated 23rd November 1901, of the patta Mahadevi. Defendant 1 in answer to the plaintiff's claim raised two substantial pleas, one that the will, which was executed by the Mahadevi at a time when she was bitterly hostile to him in consequence of a pending litigation between them, was subsequently revoked by her after the suit was compromised in 1904; and (2) that the Mahadevi had no power of disposition over the suit properties, as they were held by her as part of the Estate of Nowrangapore and Gudari which were settled on her for her maintenance for life in pursuance of the compromise aforesaid. Somewhat inconsistently with his plea of revocation of the will, which assumed that it was the genuine will of a capable testator, defendant 1 also put the plaintiff to strict proof of the genuineness and validity and subsisting character of the will and proceeded to state that if any will was executed, the same must have been brought into existence by the plaintiff and his partisans fraudulently and collusively (para. 5 of the written statement). Defendant 2, who also claimed the properties, was removed from the suit in an early stage of the inquiry and the issues which were raised on his pleas were struck out. The Government took no part in the trial. A considerable number of issues were raised for trial between the plaintiff and defendant 1, of which only Nos. 2, 3 and 4 are now material; they relate to the title of the plaintiff. Of these the second was "whether the will in question is genuine," the third "whether the will was revoked," and the fourth "whether the Patta Mahadevi had absolute power of disposal."

The trial Judge held on issues 2 and 3 that the will was genuine and was not revoked, and on the fourth that the the Patta Mahadevi had only a Hindu widow's interest in the suit properties except in some clothes of small value included therein and gave a decree for the plaintiff for the clothes and dismissed the rest of his claim. Both the plaintiff and defendant 1 appealed to the agent, who found in favour of the plaintiff on issues 3 and 4 and on issue 2, while holding that the will was genuine in the sense that the Patta Mahadevi signed it however found against the will on the ground that there was no direct proof that it was read and explained to her and was understood by her, that being necessary in his opinion as he assumed that the Patta Mahadevi was the widow of an Uriya zemindar, and therefore must have been a pardanashin lady, and the plaintiff had a particular and peculiar onus to show that the executante thoroughly understood what she was doing and was thoroughly and fully acquainted with its terms, a far higher burden than the ordinary burden of proving the will of a capable testator. The plaintiff contends that there was no plea that the Patta Mahadevi was a pardanashin lady who required special protection when she executed the will, that the whole trial in the first Court was really fought out on the question of revocation, defendant 1 having practically given up his contention as to the genuineness of the will, that no such point was raised even in the grounds of appeal to the agent, that the plaintiff was taken by surprise by such a point being taken in the arguments on appeal and that if such a question had been raised at the original trial, he would have offered evidence to show that the Patta Mahadevi was quite capable of taking care of herself. He also contends that the agent misdirected himself as to what was necessary to be proved before a lady can claim protection as a pardanashin, and also that the agent erred in holding that there must be direct proof that the will was read over and explained to the Rani. There is considerable force in these contentions.

It is to be observed that the form of issue 2 raises only the question of the genuineness of the will. In para. 5 of the written statement its validity was attacked, apparently on the ground that the testatrix was not the absolute owner of the property as stated in para. 4 and that was the subject of a separate issue, The subsisting character of the will was questioned because it was said that it had been revoked, and that again was the subject of issue 3. There is no other paragraph of the written statement which in the remotest manner suggests that the Patta Mahadevi, if she did execute the will, did not understand it or know its contents and no notice was taken in either of the lower Courts about the vague statement as to fraud and collusion. No issue was raised on it, and apparently there is no evidence about it.

On the other hand there was some attempt made to prove that the genuine will of the Rani was not the will propounded by the plaintiff, but that attempt wholly failed for it was clearly proved, and that is the finding of both the lower Courts, that the Rani deposited her will in a sealed cover in the Registrar's Office and the identical cover with the seals intact was produced by the plaintiff soon after the death of the Rani before Mr. Parsons, the then Agent, and was opened by him and contained the will now propounded by the plaintiff. This again is inconsistent with the plea that the Rani as a pardanashin must be presumed till the contrary is proved, to have had no knowledge of its contents. More than all it is quite clear, as pointed out by Mr. Ramesam, that the defendant himself let in his evidence on the assumption that the Rani knew the contents of her will, for witness after witness was called to prove that the Rani, knowing that she had bequeathed to the plaintiff all her properties including Nowrangapore and Gudari for which she had obtained a decree against defendant 1 in the first Court, which however was then the subject of an appeal to the High Court, after the termination of the litigation by a compromise in 1904, called for the document from the Registrar's Office where it was in deposit and directed its destruction. We therefore think that the Agent should not have allowed this point to be raised in appeal at any rate without giving an opportunity to the plaintiff to adduce evidence of the Rani's capacity and status, the circumstances attending the execution of the will and the means she had of obtaining independent advice

We also think that the Agent was wrong in thinking that the rule as to pardanashins applies to all gosha ladies alike. The rule at the best is one of presumption of want of ordinary capacity which can be rebutted. It has been pointed out that the Patta Mahadevi was at the time of the execution of the will about fifty-five or fiify-six years of age, was transacting her business through agents to whom she gave personal instructions, was interviewing Government officers, was giving evidence before Magistrates, and was directly presenting documents to registration officers. She had just then successfully emerged from a very heay litigation in which she was represented by the late Mr. V. Krishnaswami Iver who was subsequently a Judge of this Court and afterwards a member of the Executive Council. She came to Madras during the pendency of the appeal evidently to give instructions to her vakils. It is difficult to treat a lady in her position and of her capacity as a pardanashin, though she as belonging to a noble family may be gosha when young, and may not needlessly appear in public even when she was advanced in years. Further defendants' 12th witness Mohana Santra, who was her Dewan or principal officer from 1900 to 1907, and who is the principal witness for the defence to prove the revocation of the suit will, states in his examination that the wills (i. e. the will and the previous will, dated 10th October 1900, which she joined with her co-widow in executing) were written by the advice of Mr. Krishnaswami Iyer and he knew about them. That statement, if true, is conclusive on this question, even if the Mahadevi was strictly a pardanashin. This witness attested both the wills, was present when it was deposited with the Registrar and it was he who brought it back from the Registrar's office in 1904 under a special power-of-attorny given by the Mahadevi. It appears to be also true that the Agent precluded himself from considering a number of circumstances which go to show that the Maha. devi must have been fully conversant with the contents of the will by too narrowly confining his attention to direct proof. As we are not finally deciding the case, it is unnecessary to enter into the details of the evidence here.

There were two issues, the 7th and 8th, which the Agent thought it was unnecessary to decide; but they raised subsidiary question of fact which were relevant to the decision of the issues 2 and 3. Both sides complain the the Agent should have considered those issues before arriving at a conclusion on issues 2 and 3. In these circumstances we must direct the Agent to review his judgment on issues 2 and 3 in the light of the above observations. If he thinks it right to allow defendant 1 to raise the question as to whether the Patta Mahadevi was a pardanashin lady and whether or not she knew the contents of the will, he must give

the plaintiff an opportunity of adducing evidence as to her capacity and position as to her knowledge of the contents of the will.

The respondent attempted to support the judgment on the ground that the finding of the Agent on issue 4 as to the Rani's power of disposition over the suit properties was erroneous. He argues first that, as there is no direct evidence as to how the suit properties were acquired, the plaintiff, who has to make out that they were the absolute property of the testatrix, must fail as there is no presumption that they were her stridhana, next that the property was held by her as part of the estate settled on her by the deed of 1904 and must revert to the Maharajah on her death. As to the first it is difficult to see why the ordinary presumption that a person in possession is the owner and an absolute owner should not apply to Hindu women: see *Metters* v. *Brown* (1) and S. 110, Evidence Act. In *Narayana* v. *Krishna* (2), this Court held that property standing in the name of a Hindu lady with which she was dealing was her separate property, and that there was no presumption that it was the common property of the family. and in *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh* (3) the Privy Council said that there was no presumption that property in the possession of a Hindu widow, of the acquisition of which no account is given, descended to her from her husband though the husband was shown to have died possessed of considerable property and that he who claims property through some other person must show the property to have been vested in that person. In this case both the parties agree that the property was in the Rani's possession at the time of her death; and as the plaintiff claims under her he must succeed unless defendant 1 proves his contention that her interest ceased on her death and the property reverted to him. This appears to have been the view taken in a very recent case in this Court in *Bodi Muttayya* v. *Kavoori Kodandaramagya* (4), where the learned Judges held that if nothing is known as to how a Hindu female in possession acquired the property, the presumption is that she is holding it as absolute owner though without title. The decision in *Gopala Aiyangar* v. *Savuri Aiyangar* (5) is not against this view.

Further it is be observed that defendant 1 is merely the custodian of the property pending adjudication of the rival claims of the plaintiff and defendant 1 and that the plaintiff who claims under the will of the last owner would preferably be entitled to possession. The fact that Government under executive authority chose to hand it over to defendant 1 cannot give him a right to retain it unless he proves a title to hold them, for the representative of the person last in possession is entitled to have possession. However that may be, there is no difficulty in this case; for the nature of the property claimed and the circumstances of the case naturally lead to the conclusion that, except as regards certain items of insignificant value, the rest of them are not likely to have come to the Rani by inheritance. Her husband Sri Chaitanya Deo died in 1876. She and her co-widow inherited from him the two valuable taluqs of Nowrangapore and Gudari which had been granted to his father, who belonged to the junior branch of the Jeypore family, by the then Maharaja. After Sri Sulochana Patta Mahadevi and her co-widow had been in possession and enjoyment for over 20 years, the present Maharajah, defendant 1, purported to resume the grant and entered into possession of the taluks and the two ladies sued the Maharajah for possession and mesne profits. While the suit was pending, the co-widow died and Sri Sulochana Patta Mahadevi continued the suit and obtained a decree. The Maharajah appealed to this Court and after the hearing began the parties compromised on the terms contained in Ex. 14a, and the compromise decree passed by this Court in pursuance of which the deed Ex. 42 was executed. The construction of this deed is raised in the second contention of the respondent, but it may generally be stated now that the Rani was to have absolute or full enjoyment of the said taluks during her life for her maintenance. This was in 1904. She therefore was not in possession between 1896 and 1904 of the bulk of the property inherited by her and got no mesne pro-

(1) [1863] 32 L. J. Ex. 138.
(2) [1885] 8 Mad. 214.
(3) [1899] 26 Cal. 871=26 I A. 226 (P. C.).
(4) A. I. R. 1914 Mad. 428=23 I. C. 594.
(5) [1892] 2 M. L. J. 261.

fits and was further engaged in a very heavy litigation. It is unlikely that she had any valuable moveables left at the end of that litigation. After that date she was in possession of the taluqs which gave her an income of about Rs. 1,00,000 and the bulk of the moveable property now sued for appears to be savings from the current income or purchased out of it. This was the conclusion come to by the Agent and we agree with him. If the moveable property now sued for represents the savings out of the income which was at her absolute disposal it is quite settled so far as this Court is concerned that she can dispose of it either intervivos or by will *Subramanian Chetti* v. *Arunachelam Chetti* (6), *Veeraraghava Reddi* v. *Kota Reddi* (7).

The respondent however contends that the Patta Mahadevi and defendant 1 agreed that the savings out of the income from the taluks which the Rani did not use or consume in her lifetime should belong to the Maharajah at her death and relies on the following passage in the deed Ex. 42:

"The Maharaja without reserving to himself or his successors any power to revoke vary or modify it hereby grants to and settles on the Patta Mahadevi as from 1st July 1904 the taluks of Nowrangapore and Gundari with the cists whether in kind or in money accruing due on, from and after the said date to be held by the Patta Mahadevi for her maintenance during the remainder of her lifetime with full rights of enjoyment and to revert on her death to the Maharajah or to his successor for the time being to the Jeypore Samasthanam."

It was said that the intention of the parties was to create an interest in the Rani similar to a widow's estate not merely in the taluks but also in cists or income of the taluks. We think the words "with the cists etc.' were used to denote that every kind of interest in the taluks was granted and not to cut down her absolute interest in the income for she is given full rights of enjoyment of the taluks. That this was the intention of the parties is clear from the first clause of the decree in pursuance of which the deed was executed, which is also recited in the deed. It is quite clear and it was not disputed that the Rani could have done anything she chose with the income that she could have spent it or given it to anyone she liked. The grant was really of a life estate in the taluks in compromise of her claim to the absolute interest therein. That maintenance was stated to be the motive for the grant makes no difference in the quantum of the estate granted. Assuming that anything which she left undisposed of would go to the Maharajah, there is nothing in the deed to prevent the Rani from bequeathing the income or the savings or the properties acquired out of the income which was at her absolute disposal during her lifetime. It is also doubtful if any restrictions on her power of alienation would be legally valid (see *Sures Chandra Palit* v. *Lalit Mohan Dutta* (8). The finding of the Agent on issue 5 is therefore perfectly right. There is however one item (viz.), arrears of rent as to which there is no clear finding as to the amount due and payable to the Patta Mahadevi till her death. This must be found under issue 11.

Issues 1 and 6 have been decided in favour of the plaintiff and there was no argument about them. Issue 5 is really a part of issue 4 and requires no further consideration. Issues 7 and 8 have to be considered in connection with issues 2 and 3. If the Agent on a review of his judgment on issues 2 and 3 as directed by us decides them in favour of the plaintiff the Agent must consider under issue 9, if the plaintiff cannot have possession of the properties he is entitled to. He must also consider under issue 10 what sum if any defendant 1 is entitled to for the upkeep of the cattle. With these directions the case must go back to the Agent with a direction to him to revise his judgment and dispose of the appeal according to law. Costs here to abide and follow the result.

S.N./R.K. *Case remitted.*

(6) [1905] 28 Mad. 1 (F. B.).
(7) [1916] 33 I. C. 532.
(8) [1915] 31 I. C. 495.

A. I. R. 1918 Madras 36

AYLING AND PHILLIPS, JJ.

N. Venkatachari — Plaintiff—Appellant.

v.

Ramalinga Tevan and *another*—Defendants—Respondents.

Second Appeal No. 1274 of 1916, Decided on 23rd November 1917, against decree of Sub-Judge, Coimbatore, in A. S. No. 29 of 1916.

Contract Act, (1872), S. 74—Six months rent deposited in advance—Agreement to forfeit it on breach of any term — Suit for

rent and for declaration of forfeiture of deposit and interest at 24 per cent from date of suit — S. 74 did not apply and forfeiture was not penal—Claim for interest from date of suit was penal—Reasonableness of amount must be considered to determine whether penal or not.

In determining whether the amount stipulated to be forfeited is in the nature of a penalty, the Court must be guided by the reasonableness or unreasonableness of the amount. [P 37 C 1, 2]

Under a rental agreement executed by the defendant to the plaintiff the latter deposited six months rent as advance, stipulating for its forfeiture in case of breach by him of the terms of the lease. In a suit for rent due and for a declaration that the deposit had been forfeited in accordance with the defendant's undertaking under the lease and for interest at 24 per cent per annum from date of suit:

Held: (1) that S. 74 was not applicable to the forfeiture of deposit and that the clause for forfeiture was not a penalty;

(2) that the claim for interest at 24 per sent per annum from date of suit was penal and should be disallowed. [P 37 C 1, 2]

T. Narasimha Aiyangar and *K. S. Krishnaswami Aiyangar*—for Appellant.

T. Ramachandra Row—for Respondents.

Judgment.—Plaintiff's suit is for arrears of rent and for a declaration that the amount deposited by defendants under the rental agreement has been forfeited. It is in effect a suit for rent coupled with a claim for the damages provided in the contract, if a forfeiture of a deposit can be styled damages. Both the lower Courts appear to have treated the suit as one for damages alone and have allowed the defendants to set off the amount deposited by them under the rental agreement against the rent due, although no set-off was pleaded in the written statement and not only has the lower appellate Court awarded nothing by way of damages for breach of contract, but has mulcted the plaintiff in the costs of the suit. We think they were wrong in the view that they took and in applying the ruling in *Vellore Taluq Board* v. *Gopalasami Naidu* (1) in support of it. It was clearly held by a Full Bench in *Natesa Aiyar* v. *Appavu Padayachi* (2) that in the case of a sale, S. 74, Contract Act, was not applicable and that a stipulation for forfeiture in case of breach is not a penalty. The same view was held by Seshagiri Aiyar, J. in the case of a lease, *Orr* v. *Chitha Chinna Yegappa Chetty* (3), and it is not contended before us that any distinction can be drawn between the case of a sale and that of a lease.

In determining whether the sum of Rs. 150 agreed to be forfeited was a deposit or not, we must be guided by the reasonableness or unreasonableness of the amount. The point has not been considered by the lower Courts, but taking all the circumstances into consideration, we must certainly hold the amount to be reasonable, being, as it is, one-half year's rent in a rental agreement for five years. Following the Full Bench ruling in *Natesa Aiyar* v. *Appavu Padayachi* (2), we think plaintiff is entitled to retain the deposit. Plaintiff is also entitled to his rent, and that is not disputed. Plaintiff has made a further claim, i. e. for interest at 24 per cent from date of suit until realisation. This is clearly in the nature of a penalty and as his vakil says he does not press the claim, we disallow it, and reduce the rate to 6 per cent. The second appeal is accordingly allowed and plaintiff will have a decree as prayed for except in regard to the penal interest claimed with costs throughout.

S.N./R.K. *Decree varied.*

(1) [1915] 38 Mad. 801=26 I. C. 226.
(2) [1913] 38 Mad. 178=19 I. C. 462.
(3) [1915] 28 I. C. 318.

A. I. R. 1918 Madras 37

WALLIS, C. J. AND BAKEWELL AND KUMARASWAMI SASTRI, JJ.

(*Grandhe*) *Gangayya*—Plaintiff — Appellant.

v.

(*Grandhe*) *Venkatramiah* and *others*—Defendants—Respondents.

Letters Patent Appeal No. 261 of 1916, Decided on 12th September 1917, against decision of Spencer and Phillips, JJ., D/- 20th October 1916 reported in 38 *I. C.* 111.

Hindu Law -- Joint family — Partnership between managing member and strangers — Every member does not become partner — Partition — Divided members have right to call on manager partner to get in assets due to him as partner and divide them between themselves— Divided member cannot sue for dissolution of partnership — Contract Act (1872), Ss. 264 and 265.

A contract of partnership between the managing member of a joint family and a stranger does not make every member of the family which the managing member represents a partner so as to clothe him with all the rights and obligations of a partner as defined in S. 239, Contract Act. [P 38 C 1, 2]

The effect of a partition is only to confer on the divided members the right to call on the manager or co-parcener partner of the firm to get in the assets which would be due to him as

partner by proper proceedings against his co-partners and divide them between them in the proportion of their shares in the joint family property. If he refuses or neglects to do so, the remedy of the divided co-parceners is to treat the interest of the manager as joint family assets and to sue for partition.

The position of a divided member therefore is not better than that of a sub-partner and is analogous to that of a trustee and he cannot sue for a dissolution of the partnership entered into by the managing member : 36 *Mad.* 185 (*P. C.*), *Dist.* [P 38 C 1, 2]

B. Seetharama Row for *A. Krishnaswami Aiyar*—for Appellants.

K. V. Krishnaswami Aiyar — for Respondents.

Kumaraswami Sastri, J.—The question for decision is whether it is open to a member of a Hindu family, who has become divided in status, to sue for dissolution of partnership entered into between the managing member of the family and strangers, when the family was joint. Ss. 254 and 265, Contract Act, only contemplate suits by one of the partners (as defined in S. 239) for dissolution of partnership and the taking of the partnership accounts, and there is nothing in the Act which confers such a right of suit on a person merely by reason of his being entitled to a share in the interests of one of the partners in the firm. Such a person cannot be in a better position than a sub-partner and it is settled law that he has no right to ask for dissolution of partnership or the taking of the partnership accounts, there being no contract or privity except between him and the partner with whom he is a sub-partner. In the present case the plaintiff was not admitted as a partner in the firm during his minority so as to enable him to the benefit of S. 247, Contract Act, or after he became a major so as to make him a partner within the meaning of S. 239. The only ground on which he became a partner in the firm is that he became in law a partner of the firm when the managing member of the family entered into the contract of partnership with defendant 3 or when, owing to a partition between himself and the other members of the family, he became entitled to a specific divided share in the joint family properties.

It is well settled that a contract of partnership between a member of a joint family and a stranger does not make every member of the joint family, which the managing member represents, a partner so as to clothe him with all the rights and obligations of a partner as defined in S. 239, Contract Act. I need only refer to *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (1), *Ramanathan Chetty* v. *Yegappa Chetty* (2) and *Vadilal Lallubhai* v. *Shah Khushal Dalpatram* (3). It is no doubt true that as between the members of the undivided family and the co-parcener who enters into a contract of partnership for the benefit of the family they will be entitled to call upon him to account for the profits earned by him from the partnership and to share in such profits, but this will not place them in any position of direct contractual relationship with the other partners of the firm. Nor would the fact that the entire assets of the joint family might be available to the creditor of the firm make any difference. The position of the plaintiff in the present case cannot be higher than that of a sub-partner. The managing member of an undivided family, though he has the power of representing the interests of the other members, is not their agent in the strict sense of the term so as to clothe the other members of the family with all the rights of principals in respect of contracts entered into by their agent. His position is, as pointed out by their Lordships of the Privy Council in *Annamalai Chetty* v. *Murugesa Chetty* (4), more analogous to that of a trustee.

If a member of a joint family does not become ipso facto a partner by reason of the contract of partnership entered into between a member of his family, it is difficult to see on what ground a partition would place him in a better position. Reliance has been placed by Mr. Seetharama Row on the observations of their Lordships of the Privy Council in *Joopoody Sharayya* v. *Pulavarti Lakshmanaswamy* (5), to the effect that different personae arose in law on a partition between the members of a joint family, one of whom was carrying on business in partnership with a stranger so as to entitle the stranger to refuse alliance in partnership with the divided members. What their Lordships were considering was the question of fact as to when a partnership became dissolved so as to attract the provisions of Art. 106, Lim.

(1) [1905] 28 Mad. 344.
(2) [1916] 32 I. C. 427.
(3) [1903] 27 Bom. 157.
(4) [1902] 26 Mad. 544=30 I. A. 220 (P.C.).
(5) [1913] 36 Mad. 185=19 I. C. 513 (P.C.).

Act, and I entirely agree with the observations of Coutts-Trotter and Srinivasa Aiyangar, JJ., in *Ramanathan Chetty* v. *Yegappa Chetty* (2), to the effect that their Lordships cannot be taken to have overruled the decisions of the Indian Courts as to the position of a co-parcener in relation to a partnership entered into by one of the members of the family.

When there has been a partition between the members of a joint family, all that the divided co-parcener can do is to call upon the managing member or co-parcener partner of the firm to get in the assets which would be due to him as a partner by proper proceedings against its partners and divide it between them in the proportion of their shares in the joint family property. If he refuses or neglects to do so, their remedy is to treat the interest of the co-parcener in the firm as joint family assets and to sue for partition. In such a suit the assets can be realized by the appointment of a receiver who, as representing the partner co-parcener, can, by appropriate proceedings, get in what may be due to him. It has been argued that this procedure will lead to a multiplicity of actions, but looking at the question from the mere standpoint of convenience, I think it would be mischievous to hold that a co-parcener can interfere with the affairs of the partnership, simply because he has on partition got a specific share in the interests of one of the partners and to treat him as a partner because of a partition with which the other partners have no concern. In cases of mere change of status, which according to the recent decision of the Privy Council can be effected by a mere unilateral declaration of intention, the position is still more complicated, as it may well be that on the actual partition of the various items of joint family property the interest of the family in the business may go to some other co-parceners. I do not think that any consideration of inconvenience to the members of a joint family should affect the settled rules of law as to the rights and obligations of partners inter se. I am of opinion that the decision of Spencer, J., is right and would dismiss the Letters Patent Appeal with costs.

Wallis, C. J.—I agree.

Bakewell, J.—I agree.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 39

SPENCER AND SESHAGIRI AIYAR, JJ.

Sankaramahalingam Chetty and *another*—Defendants—Appellants.

v.

Muthulakshmi and *another*—Plaintiff and Defendant—Respondents.

Second Appeals Nos. 275 and 276 of 1917, Decided on 14th August 1917, against decrees of Sub-Judge, Tuticorin, in Appeal Suits Nos. 84 and 85 of 1916.

(a) Civil P. C. (1908), S. 11—Co-defendants—Adjudication of unnecessary findings does not operate as res judicata.

M. sued her brothers and brother's sons for recovery of property under alleged deeds of gift and sale from her father. In a prior suit against *M.* by the assignee of a mortgage bond executed by *M.* wherein the defendants in the present suit were, on their own instance, impleaded as co-defendants with *M.* the suit was dismissed on the ground that the mortgage was a sham transaction. The Court also recorded findings in the prior suit that the gift and sale deeds to *M.* by her father were genuine and that the brothers and brother's sons of *M.* acquired no title by adverse possession:

Held: (1) that these findings being unnecessary in the former suit did not operate as res judicata: 9 *I. C.* 787 and 34 *I. C.* 929 *Foll.*; 38 *Mad* 138, *Dist*; [P 40 C 2; P 42 C 1, 2]

(2) that defendants were not estopped by conduct from contesting those findings by the mere fact that they insisted on being pleaded as parties to the prior suit and invited those findings: *Collier* v. *Walters*, (1874) 17 *Eq.* 252; 6 *I. C.* 554; 6 *W. R* 66 and 5 *C. L. J.* 95, *Dist.* [P 41 C 1]

Per *Spencer, J.*—There can be no res judicata as between co-defendants in cases where it is not necessary to decide on their conflicting interests in order to give the plaintiff the relief appropriate to his suit. [P 40 C 2]

Per *Seshagiri Aiyar, J.*—The first requisite, in order that a finding or decision may operate as res judicata as between defendants inter se, is that there should be an active controversy as against each other between them. The second requisite is that the adjudication inter se between the co-defendants should be necessary to give the appropriate relief to the plaintiff. [P 41 C 2]

(b) Civil P. C. (1908), S. 11—Quaere.

Quaere—Whether the adjudication should be express and not one which may be inferred or be deemed to have been granted or refused.

(c) Civil P. C. (1908), S. 11—Co-defendants (Obiter).

Obiter—Though a finding may be unnecessary if it is embodied in the decree, it will operate as res judicata. [P 41 C 2; P 42 C 1]

L. A. Govindaraghava Ayyar, K. Jagannatha Ayyar and *H. Subramania Ayyar*—for Appellants.

V. Viswanatha Sastri—for Respondents.

Spencer, J.—The plaintiff sued her brother and brother's sons in this suit for the recovery of certain immovable property, to which she claimed title under

deeds of sale and gift from her father. Questions were raised at the trial whether these deeds represented real or sham transactions and whether the defendants had a good title by adverse possession for over the statutory period. The suit has been decreed in the plaintiff's favour both the lower Courts holding that the defendants are debarred from raising these defences by the decision in a prior suit, Original Suit No. 232 of 1910 on the file of the Court of the District Munsif of Koilpatti, which makes these matters res judicata. Original Suit No. 232 of 1910 was a suit brought by the assignee of a mortgage to enforce a sale of the suit properties upon a bond executed by Muthulakshmi, who was defendant 1 in that suit and is the plaintiff in this suit. That suit was dismissed on the finding that the mortgage was a sham transaction devoid of consideration. The defendants in this suit were defendants 2 to 4 in that suit and they raised similar contentions when Original Suit No. 232 was tried. Muthulakshmi then contended that they were unnecessary parties to that suit. The District Munsif, M. R. Ry. M. A. Krishna Rao, who tried that suit, was rightly of opinion that they were unnecessary, as they claimed under a title adverse to both the mortgagor and mortgagee: vide *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1), and he proposed to strike their names off the record. Nevertheless as they insisted on continuing on the record, he weakly allowed them to remain.

Now it is argued that the lower Courts were wrong in treating the two findings in Original Suit No. 232 of 1910, viz., (1) that the deeds of gift and sale to Muthulakshmi from her father were real and genuine; and (2) that these defendants had not acquired any title by adverse possession, as res judicata seeing that the finding as to the enforceability of the mortgage bond was sufficient to justify the dismissal of the mortgagee's suit, and that although the mortgagee could and did appeal and the appellate Court also decided these questions against the defendants, the result of the suit could not have been otherwise even if the findings on these two issues had been the other way. I think that this contention is right and that the judgments of the lower Courts cannot be supported on this ground. The decision in *Modukuri Vankataraju* v. *Masina Ramanamma* (2) quoted by the District Munsif has no bearing on the facts of this case and it was an error to suppose that Original Suit No. 232 of 1910 could have been dismissed on the decision of the two issues upon which the contentions of defendants 2 to 4 failed. Following *Vasudeva Mallaya* v. *Thathadi Naranappaya* (3) and *Jadav Chandra Sarkar* v. *Kailash Chandra Singh* (4), I am of opinion that there can be no res judicata as between co-defendants in cases where it is not necessary to decide upon their conflicting interests in order to give the plaintiff the relief appropriate to his suit.

The respondent's vakil has not seriously attempted to support the finding as to res judicata, but he argues that the defendants, having in the prior suit invited a decision upon these points, are estopped, not by record, but by conduct from turning round and saying in subsequent litigation between the same parties that that decision was wrong. If the principles of S. 115, Evidence Act, are sought to be applied to the circumstances of the case, there is no reason for suggesting that the plaintiff was led to alter the position, that she had taken up all along, in consequence of these defendants persisting in being made parties to the mortgagee's suit. From the mere fact that the plaintiff was left to adduce evidence in the former case to substantiate her position it does not necessarily follow that she was prejudiced or induced to change her position by the defendant's inconsistent conduct. The decisions in *Collier* v. *Walters* (5) and *Aghore Nath Mukerjee* v. *Kamini Debi* (6) turned upon the construction of wills, and the decrees in the previous suits were of the nature of judgments in rem binding all persons who were parties to them. The Master of the Rolls pointed out in *Collier* v. *Walters* (5) that William Collier, Junior, the plaintiff in the subsepuent suit, had made no attempt to impeach the correctness of the former decree and, therefore, he must be bound by it. In *Kristo Gopal Shaha* v. *Kasheenanth Shaha* (7) and in

(1) [1906] 33 Cal. 425.

(2) [1913] 38 Mad. 138=21 I. C. 258.
(3) [1911] 9 I. C. 787.
(4) [1916] 34 I. C. 929.
(5) [1874] 17 Eq. 252=43 L. J. Ch. 216.
(6) [1910] 6 I. C. 554.
(7) [1866] 6 W. R. 66.

Bhaju Chowdhury v. *Chuni Lal Marwari* (8) the same person at one time set himself up as a necessary party to a suit and afterwards turned round and declared that he had nothing to do with it and had been unnecessarily impleaded. Such is not the case here. The defendants simply maintained that they are not bound by the decision in Original Suit No. 232 of 1910. Whether they were necessary parties to that suit is a question of law and there can be no estoppel on a point of law.

I am, therefore, of opinion that no case of estoppel arises from the facts of the present case. The decisions of the lower Courts on issue 5 are reversed and the suit will be remanded to the Court of first instance for disposal on the merits after trial. Costs up to date to abide and to be provided for in the final decree.

Seshagiri Aiyar, J.—I agree with the conclusion arrived at by my learned brother. But as the point for decision is one of some importance, I propose to say a few words. It was conceded that the District Munsif was wrong in saying that the decree of the Court in Original Suit No. 232 of 1910 could have been based on either of the findings arrived at in that suit. The finding on the mortgage was fatal to the suit. The other finding which related to title as between the contesting defendants could not have non-suited the plaintiff. Such a finding was unnecessary and though asked for by the added defendants should not have been given in the suit.

In this view prima facie the conclusion of the Court could not operate as res judicata. The principle underlying the bar of res judicata as between the co-defendants has been the subject of discussion in three recent ceses, *Achanta Venkatasuryanarayana* v. *Yellapragadu Shiva Sankara Narayana* (9), *Fakirchand Lallubhai* v. *Naginchand Kalidas* (10) and *Jadav Chandra Sarkar* v. *Kailash Chandra Singh* (4). The first requisite is that there should be active controversy as against each other between the parties arrayed on the same side: per Muthusami Aiyyar, J., in *Venkayya* v. *Narasamma* (11) and *Tanjore Ramchandra Rau* v. *Vellayanadan Ponnusami* (12). Secondly, the adjudication inter se between the co-defendants should be necessary to give the appropriate relief to the plaintiff. See per West, J., in *Ramchandra Narayan* v. *Narayan Mahadev* (13) and Wigram, V. C., in *Cottingham* v. *Earl of Shrewsbury* (14) and Jessel, M. R, in *Kevan* v. *Crawford* (15). In the earlier case, the Vice-Chancellor says:

> "But if the relief given to the plaintiff does not require or involve the decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceedings which may necessary only to the decree the plaintiff obtains."

The third element mentioned in *Jadav Chandra Sarkar* v. *Kailash Chandra Singh* (4) seems to imply that there should be an express adjudication and not one which may either be inferred or be deemed to have been granted or refused. Without further argument, I am not prepared to express a definite opinion on this last point. For the purposes of this case, it is enough to say that the first two requisites are wanting. Mr. Venkatarama Ayyar relied on certain observations made by the Master of the Rolls in *Collier* v. *Walters* (5). I am prepared to concede that the observations at p. 267 go a great way to help the respondent; but when the facts of the case are closely examined, the decision will be found to leave the present case unaffected. Under a will, one William Collier claimed the estate as the tenant-in-tail. He and his mortgagee sued the trustee appointed under the will for a declaration that William Collier was the tenant-in-tail, that his rights were assigned to the mortgagee, and that the trustee should convey to the mortgagee the rights of the mortgagor. To this suit the son of William Collier was a party. His contention was that his father had only a life-interest in the property bequeathed, that the estate tail vested in him and not in his father, and that subsequently the claim for a declaration that the trustee should convey the legal estate to the mortgagee was unsustainable. The Master of the Rolls pointed out that the son was not bound to put forward these pleas and could have asked to be dismissed from the suit, keeping his

8. (1907) 5 C L J 95.
9. (1915) 27 I C 861.
10. (1916) 40 Bom 210=33 I C 423.
11. (1888) 11 Mad 204.
12. (1891) 14 Mad 258 =18 I A 37 (P C)
13. (1887) 11 Bom 216.
14. (1843) 3 Hare 627.
15. (1877) 46 L J Ch 729.

right to contest the conclusion in the suit untouched; but he claimed an adjudication of his rights. In the result, it was found that the father was tenant-in-tail and not the son, and that the mortgagee was entitled to a recognition of his rights by the trustee. The decree in the suit distinctly stated that the claim of the mortgagee was only subject to the equity of redemption possessed by the son Collier.

The son preferred no appeal against this decree. In the subsequent suit, the son pleaded that the previous adjudication was not binding on him. Sir George Jessel held he was bound. The points of difference between that case and the present one are these: (a) The impleaded defendant in the English case had the right of challenging the decision in appeal, which he has not in this case; (b) The declaration against the son Collier was embodied in the decree of the Court, which has not been done in the present case It is well settled that although a finding may be unnecessary, if it is embodied in the decree it will be res judicata. *Secy. of State* v. *Swaminatha Koundan* (16). These two considerations distinguish *Collier* v. *Walters* (5) from the case before us. I have referred to this case at some length, because I was somewhat impressed by the able argument of the learned vakil when the observations were quoted before us at the hearing. I do not agree with him that the principle that a man should not both approbate and reprobate is applicable to this case or to the English case I have referred to.

The other decisions do not take us very much further. In *Kristo Gopal Shaha* v. *Kasheenauth Shaha* (7) the question did not arise in a subsequent suit. The point considered was whether a party who insists upon being put on the record and upon having his case dealt with can claim in the course of that suit or on appeal from that suit to be exonerated. The learned Judges expressly say that a question whether a decision against an unnecessary party will be res judicata did not arise in that case. On the other hand *Lallah Bholanath* v. *Beechoo Koonwar* (17) is strongly against the respondent. *Aghore Nath Mukerjee* v. *Kamini Debi* (6) proceeded on the ground that the decision was analogous to a judgment in rem and bound all the parties. I therefore agree with my learned colleague in holding that the previous adjudication does not operate as res judicata on the question of title. On the question of adverse possession, too, the same observations apply. Moreover, the fact that the claim was not barred as between the defendants on the date of the suit of 1910 is not conclusive on the question of adverse possession at the date of the present suit. This issue should have been tried under any circumstance. I agree as to the order as to costs.

S.N./R.K. *Case remanded.*

16. A I R 1915 Mad 294=12 I C 167=37 Mad. 25.

17. (1864) 1 W R 50.

A. I. R. 1918 Madras 42

ABDUR RAHIM AND OLDFIELD, JJ.

Manakari Venkappa Chari—Defendant—Appellant.

v.

Holagunel Pompana Gowd and *others*—Plaintiffs—Respondents.

Civil Appeal No. 398 of 1917, Decided on 4th December 1917, against decree of Dist. Judge, Bellary, in Original Suit No. 30 of 1912.

(a) Madras Revenue Recovery Act (2 of 1864), S. 38—Irregularity in sale under S. 38 is sufficient cause to set aside sale but not so in civil suit—What are not sufficient causes for civil Court to set aside sale stated.

An irregularity in the conduct of a sale held under S. 38 empowers the Collector to set it aside, but there must be other sufficient grounds for a Civil Court to interfere. [P 43 C 1]

An agreement made between the purchaser and other persons after the sale to go in shares, a collusive agreement between the bidders not to bid against each other, the omission of any attempt to distrain the moveable properties of the defaulter or the crops on the land are not sufficient grounds to set aside the sale by a suit filed in the Civil Court. [P 43 C 1]

(b) Madras Revenue Recovery Act (2 of 1864), S. 25—Defaulter in S. 25 refers to registered proprietor—He alone can plead absence of notice.

The 'defaulter' referred to in S. 25 who is entitled to notice or demand before attachment and sale is the ostensible registered proprietor. To plead that section the plaintiff must show that he is the defaulter. A person who owns the land but allows the patta to stand in another person's name and thus puts him forward as the ostensible owner, cannot claim the benefit of the section or complain that Government erroneously served the written demand on the latter.

[P 43 C 2 P 44 C 1, 2]

C. Ramachandra Row and *P. R. Ganapathi Aiyar*—for Appellant.

S. Swaminadhan—for Respondent.

Abdur Rahim, J.—This is an appeal against the decree of the District Judge of Bellary, setting aside a sale, for arrears

of revenue, of certain land. The sale took place on 20th May 1912 and the appellant, defendant 1 in the suit, purchased it. Defendant 2 is the mortgagee, who apparently was in possession of the land at the time of the sale. The grounds on which the sale was sought to be set aside are set out specifically in para. 3 of the plaint and made part of the issues at the time of the trial. It is clear that grounds (a), (b) and (c) would not be good grounds for a Civil Court to set aside the sale. The Collector has got power, if the sale is vitiated on account of any irregularity in the conduct of it, to set it aside.

But, it is contended, that the sale was bad, firstly, because it was fraudulently brought about. Supposing that, if made out, would be a sufficient reason for setting aside the sale, it is quite clear that it has not been shown that there was any such collusion or fraud as would make the sale liable to be set aside. The case of the plaintiff on this point rests on Ex. C, which is an agreement entered into between defendants, 1 and 2 that is, the purchaser and the mortgagee, on 23rd May 1912, by which they agreed to divide the land among themselves in certain shares. That was after the sale had been held, and it is difficult to conceive how the Judge held that the agreement must be taken to amount to a fraud vitiating the sale. Even if there was an agreement among certain bidders before the sale that they would not bid against each other or that they would divide the property among themselves after the sale had been concluded, that would not be a sufficient ground for setting aside the sale. It is enough to refer for authority to *Mahomad Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1), which is a decision of the Judicial Committee of the Privy Council. In fact here there was a number of bidders, at least 9, and it is not shown that there was any sort of understanding or collusion among them not to bid against each other. Then it was suggested that the demand was not served on the plaintiff, the owner of the land, and therefore on that ground, the sale was bad. But the point does not appear to have been taken in the form of an issue before the lower Court and, so far as we can gather from the judgment of the learned District Judge, no such question was investigated by him. The validity of such grounds depends, upon who was the defaulter within the meaning of the law, and whether the demand was not served on such defaulter in accordance with S. 25, Revenue Recovery Act, 2 of 1864. That section says:

"Such demand shall be served by delivering a copy to the defaulter, or to some adult male member of his family at his usual place of abode, or to his authorised agent, or by affixing a copy thereof on some conspicuous part of his last known residence, or on some conspicuous part of the land about to be attached."

That the terms of this section were not satisfied there is no evidence to show. Then the plaintiff is alleged to have purchased the land from the widow of one Durvasappa who had himself purchased it from one Balappa, in whose name the patta stood and who died sometime in 1907. It is alleged that the plaintiff had made an application for transfer of patta in his name, but even that is not borne out by the record, so far as our attention has been drawn to the evidence. It is sufficient to say that the question was not raised before the Court of trial and we are unable to hold that the procedure laid down by the Act was not followed on this point.

It may be pointed out that the learned District Judge has not really confined himself to the issues that arose before him. He proceeded on ground which do not appear to have been raised by the issues and which do not come apparently within the purview of the Act; take for instance grounds Nos. (a) and (b), namely:

"no attempt was made to distrain the moveable properties of the defaulters which were more than sufficeint to liquidate the arrears' and 'no attempt was made to distrain the crops on the land before the land was attached.'

These would not be good grounds for setting aside the sale by a suit. Then he finds in para. 10 of the judgment: 'Further more there was combination among the bidders. If any such case was relied upon by the plaintiff, it should have been taken distinctly in the issues. Beyond a general allegation that the sale was illegal, irregular and fraudulent, it was not alleged that there was any conspiracy among the bidders which would vitiate the sale. I would set aside the judgment of the District Judge and dismiss the plaintiff's suit with costs here and in the Court below.

Oldfield, J.—I agree with my learned brother's conclusion, and desire only to say a few words with reference to the plaintiff's contention, that the sale is bad be

1. (1900) 23 Mad 227=27 I A 17=7 Sar 661 (P C).

cause he had no such notice of the attachment, as he was entitled to under S. 25 of the Revenue Recovery Act, 2 of 1864. That section entitled a defaulter to notice of the attachment in the shape of a written demand served upon him; but in order to plead that section, the plaintiff must show that he is the defaulter. The facts are that the plaintiff had bought land about 2 years before the sale, which stood in the name of one Bellappa who was not his vendor and died before the sale and that the patta was never transferred, to plaintiff's name. The patta in fact is alleged to have remained in the name of Bellappa, notwithstanding his decease. The plaintiff, however says that he had applied for transfer of patta on the date of the sale. But the only evidence as to such application is given by the P. W. 8 the plaintiff's agent, and it does not show when the application he speaks of was made or granted or whether it was before the sale. Defendant 1 futher denies that the application referred to by the witness related to the suit land and the evidence of the witness is not absolutely clear on the point. There is further the failure to examine the P. W. 2 the Reddy regarding it. In the circumstances it does not seem to me to be proved that any application had been made when the sale took place.

Then it is contended that even if there was no registration in plaintiff's favour and no application for any he was the defaulter, because he owned the land, and had not paid the revenue. This can I think be answered by reference to *Zamorin of Calicut* v. *Sitarama* (2). There no doubt the patta stood in the name of a tenant, and the complaint was that there was no demand on the landlord. The decision however was;

"By suffering the registry to stand in the tenant's name, the proprietor puts him forward as the ostensible owner, and as between him and the Government service upon such tenant must be taken to be in law service upon the real owener. He cannot complain that the Government is in error in serving the written demand on the person whom he permitted to appear as the ostensible land-owner".

I do not think that the plaintiff's position can be better than that of the proprietor referred to in *Zamorin of Calicut* v. *Sitarama* (2), when instead of allowing some one else to appear as the ostensible pattadar, his conduct has resulted in there being no ostensible pattadar at all. For these reasons, I think that the plaintiff's contention based on S. 25 of the Act must fail even on his allegations of fact.

I agree further with my learned brother that the record indicates that the plaintiff did not think it worth while to press this contention at the trial, and that we ought not to allow him any opportunity to receive it now.

S.N./R.K. *Appeal allowed.*

2. (1884) 2 Mad 405.

A. I. R. 1918 Madras 44

WALLIS, C. J. AND SADASIVA AIYAR, J.

K.R. Muna Muhammad Rowther and *others*—Defendants—Appellants.

v.

Muthu Alagappa Chettiar and *others*—Plaintiffs—Respondents.

Appeals Nos. 146, 228 and 230 of 1916, Decided on 29th November 1917, against decree of Temporary Sub-Judge, Tanjore, in Original Suit No. 4 of 1913.

(a) Lease — Construction — Lessees from temple describing themselves as Ulavadai Kudikani tenants in tharam Faisal Muchilikas executed by them—They cannot be said to possess occupancy rights—Mere assertion that they were Ulavadai Kudikani Mirasidars did not confer such rights—Burden of proof of occupancy rights lay on lessees.

In certain Tharam Faisal Muchilikas executed by the lessees in favour of their landlords, the trustees of a temple in a village in the Tanjore District, long before the passing of Madras Act 1 of 1908, it was recited that the tenants agreed (1) to accept the lands from the temple for purposes of cultivation from the current Fasli, (2) that they would pay the Melvaram Tirva due to Government in cash instead of in grain, though the said Tirva was directly due by the lessor (temple) to Government, (3) that they would pay the equivalent price of the paddy grain besides the Punja cash rent due to the temple as Swamibogam (soil proprietor's dues) and that such rent would be paid as long as the occupants were in possession, (4) that they would pay additional revenue to Government for raising garden crops (5) that when waste lands were newly cultivated they would pay additional tirva or Sawamibogam to Government and (6) that they would supply Kudimaramath labour for repairs and men for carrying the temple paraphernalia in times of fairs and festivals. The tenants described themselves as Ulavadai Kudikani tenants :

Held : (1) that the executants of such Tharam Faisal Muchilikas could not be said to possess permanent rights of occupancy ; (2) that the mere assertion by the tenants that they were Ulavadai Kudikani Mirasidars in the village could not invest them with such rights ; (3) that the onus of proving the existence of occupancy rights lay on the lessees. [P 48 C 1 P 53 C 2]

Nature and incidents of lands held by temples in Tanjore District discussed.

(*Authorities reviewed.*) [P 46 C 1, 2, P 48 C 2]

(b) Occupancy—Right of permanant occupancy cannot be acquired by estoppel or prescription—Adverse possession—Landlord and Tenant.

The mere fact of the tenants alienating the lands without protest or demur by the temple trustees will not confer on the tenants a right of permanent occupancy by estoppel or prescription. [P 49 C 2 ; P 55 C 1]

M. D. Devadoss and *T. R. Venkatrama Sastri*—for Appellants.

T. Rangachariar and *G. S. Ramachandra Aiyar*—for Respondents.

Wallis, C. J.—These are appeals from the decree of the Subordinate Judge of Tanjore in a suit brought by the plaintiff as trustee of a temple to eject the defendants from the lands in their possession in the village of Sellur, on the ground that the lands are the properties of the temple. The Subordinate Judge, after a very careful examination of the evidence, decreed the plaintiff's suit and the defendants have appealed. The case which is one of great importance to the parties, was again very ably and elaborately argued before us for several days, and we reserved judgment. The first question for consideration is, is the village of Sellur an estate within the meaning of the Estate Land Act of 1908, as if so, the defendants are entitled to occupancy rights under Act and the jurisdiction of the civil Courts in ejectment is taken away. This question is closely connected with the question whether the defendants are entitled to occupancy rights apart from the Act, because in conferring or recognizing occupancy right the legislature speaking generally, has so far confined itself to cases where a presumption of occupancy right had been recognized by the Courts before the passing of the Act. Curiously enough the majority of cases which came before the Courts related to lands owned by temples like this or Mutts in Tanjore. In all these cases the decision was against the existance of occupancy right except in *Krishnasami Pillai* v. *Varadaraja Ayyangar* (1) and *Chockalingam Pillai* v. *Mayandi Chettiar* (2) and the latter decision was reversed by the Privy Council in *Mayandi Chettiyar* v. *Chokkalimgam Fillay* (3). In the well-known Chocklingam case [*Chokalinga Pillai* v. *Vythealinga Pandara Sunnady* (4)] certain observations of the learned Judges questioniug the decision in *Venkataramanier* v. *Ananda Chetty* (5) were thought to have gone far to negative the existence of occupancy rights in permanently settled estates, but the subsequent decision in *Appa Rau* v. *Subbanna* (6) and *Veukatanarasimha Naidu* v. *Dandamudi Kotayya* (7) and *Cheekati Zamindar* v. *Ranasooru Dhora* (8) showed that this was not so, and recognized a presumption of occupancy right in zamindari raiyat on the ground that the zamindars were largely in the position of assignees of land revenue, that the grants in their favour did not affect the ownership of the raiyat in the soil and that, even as regards raiyat admitted after the sunnads granted to the zamindari proprietors under Regn. 25 of 1802, the presumption was that they had been admitted on the same terms as other raiyats in the zamindari, that is, with occupancy rights. On the other hand in *Checkati Zamindar* v. *Ranasooru Dhora* (8), the latest and leading case on this subject, the learned Judges Shephard and Subramania Aiyar, JJ., recognized, that the presumption in the other way in the cases where the landlord claiming to eject is not a mere assignee of land revenue, but is himself the owner of the soil—following the decision of Sir Arthur Collins, C. J. and Muthusami Aiyar, J., in *Chidambara Pillai* v. *Thiruvengadathiengar* (9) The learned Judges held that

" the claim for an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character and as such it is one which the party seeking to derogate from the ordinary incidents of property is bound to establish. Of course the appellants are entitled to the benefit of any presumption which may reasonably arise from the length of enjoyment and other special circumstances of the case. The contention that mere length of enjoyment in the capacity of tenants or Purakudies irrespective of other circumstances is prima facie proof of occupancy right cannot be supported. "

Applying the principles laid down by the Courts the legislature in the Act of 1908 has conferred occupancy rights on raiyats in zamindaris, except as to zamindari Pannai lands which the zamindar cultivator as his own land except as regards lands which have never been in the hands of cultivators or have been relinquished

1. (1882) 5 Mad 345 (F B).
2. (1896) 19 Mad 485.
3. (1904) 27 Mad 291=31 I A 83 (P C).
4. (1870-71) 6 M H C R 164.
5. (1869-70) 5 M H C R 120.
6. (1890) 13 Mad 60.
7. (1913) 20 Mad 299.
8. (1900) 23 Mad 318.
9. (1897) 7 M L J 1.

and come within the definition of "old waste." The only villages outside such large estates that come under the operation of the Act and come within the definition of estate are villages

"of which the land revenue alone has been granted as Inam to a person not owning the Kudiuaram thereof . . . . . ot any separated part of such village."

If the Inamdar or assignee in whole or in part of the Government revenue on the village owns the Kudivaram, that is to say is also a land owner in the village, the presumption against him does not arise, the act is not made applicable to his case and the question whether those holding under him have occupancy rights is left to be decided by the Court, the presumption being that they have not. Now in this case it is absolutely clear. as found by the Subordinate Judge that as regards this village the temple is not mere assignee of land revenue but the owner of lands in the village. We cannot indeed tell the date at which it was founded or became so, but we know that temples in this part of India are not at all infrequently the Mirasidars or hereditary owners of the cultivable lands in the village, and there is abundant evidence that this is so in the present case. It is sufficient to refer to the Paimash register of 1829 in which the temple is described as having the Ekabogam Miras of the village, a term which is well understood as meaning the whole ownership of the Mirasi right in the village as opposed to cases of Palahogam where the ownership is divided among many. Further the parties to Ex. E though whom the plaintiff claims undertake in that instrument to pay Swamibogam and Odvarams to the temple. These payments which are in the nature of rent and fees are payable to a Mirasidar by those holding under him and the fact that they were payable by those under whom the plaintiff claims show that they held under the temple, The temple is then in the position of an ordinary raiyat owning his holding subject to the payment of land revenue either to Government itself or, if the holding be situated in a zamindari, to the zamindar as assignee of the Government demand. Now as regards such raiyats, whether they pay the revenue direct to Government or its assignees, the presumption in this Presidency, as laid down in *Chidambara Pillai* v. *Thiruvengadathiengar* (9) and recognized in *Cheekati Zamindar* v. *Ranasooru Dhora* (8), is against the existence of any occupancy rights in those holding under them and it is for those who set up such a right to prove it. This is the general law of the Presidency and the proper starting point from which to approach the question, but there are also as I have already said, a long series of decisions as to these temple villages in Tanjore which have to be considered They all recognize and enforce the presumption just referred to, but the result of course depended in each case on the materials put before the Court.

All these temple villages in Tanjore have certain features in common. They were all managed from 1802 by the Collector on behalf of the temple until the East India Company in deference to certain religious bodies in England began to with draw from management in the forties of last century. They were all included in the paimash or survey of Tanjore which, in this case, took place in 1829. They were also affected by the action taken by Mr. Kindersley, Collector of Tanjore, 1830 and the following years in substituting money payments for the system till then prevailing of paying revenue in the grain. As Collector he had to collect the revenue payable by the temples, and as manager he had to collect the rents payable to them. In these circumstances he took the engagements or muchilikas, which are a feature of all these cases except *Krishnaswami Pillai* v. *Varadaraja Ayyangar* (1), by which the executants undertook to pay directly to the Collector in money not only the Government revenue payable by the temple but also the swamibogam or rent and other dues payable to the temple as land owner. Much depends on the proper inference to be drawn from the execution of these documents. In the first case which came before the High Court in 1863, *Alagaiya Tiruchittambala* v. *Saminada Pillai* (10), Scotland, C. J., and Holloway, J., stated that the question was whether raiyat under the Mirasidar have a title to the permanent occupancy of lands subject to the payment of the mirasidar's share, and observed that such a tenure for the most part depended on long established usage and custom which had to be proved.

10. (1862-63) 1 M H C R 264.

They were of opinion however that the mere existence of a muchilika, such as had been executed by the six raiyats describing themselves as Ulavadi Kanikudi defining the terms of the raiyats' holding, was opposed to the existence of an occupancy right, and they held that the terms of the particular muchilika by which the executants agreed to surrender the lands if any one offered more were absolutly inconsistent with it. In the case of *Subupalayi Ammal* v. *Appakutti Aiyangar* (11) the muchilika seems to have been taken from a single raiyat, defendant's 1 father. Defendant 1 claimed to be a perpetual lessee under it and the Court rejected his contention on the construction of the muchilika which is not set out.

In Chockalinga's case *Chockalinga Pillai* v. *Vythealing Pandra Sunnady* (4) defendant claimed to be a permanent lessee under an izara muchilika granted to him by Mr. Kindersley in 1837, and on the construction of the document the Court held that it evidenced a letting from year to year unless the defendant alleged and proved an established custom of permanent occupancy. The defendant was not precluded, they held, by the terms of the muchilika from alleging and proving such a custom but he had not done so and it could not be presumed. No muchilika was forthcoming in *Krishnaswami Pillai* v. *Varadaraja Ayyangar* (1). We have next two judgments of the Court in the same appeal, one repor ted as *Thiagaraja* v. *Gnanasambanantha* (12) and the other as *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi* (13), where the case was re-heard. Kernan, J's judgment is in the same terms in both cases, but there is a concuering judgment by Kindersley, J., in the first case and by Brandt, J., in the second. As in *Chokalinga's* case (4) an inference against the existence of occupancy right was raised from the existence of the Muchilika. Both these decisions were approved of by the Privy Council in *Mayandi Chettiyar* v. *Chokkalingam Pillay* (3). In *Chidambara Pillai* v. *Thiruvengadathiengar* (9) there were a series of Muchilikas beginning in 1841 in which the executants bound themselves to cultivate for fixed periods and then restore the lands. The Muchilikas also contained other indications opposed to the existence of occupancy right. The learned Judges came to the conclusion that the five persons styling themselves Purakudis who executed the first Muchilika were not improbably cultivating Purakudis,

> "that they were expected to cultivate together with other Purakudis in the village that they were selected as executants of the lease probably because they were the leading men or chief Purakudis in the village for the time being and that the distribution of the cultivable area among themselves for purposes of cultivation was left to be adjusted by them at each lease or other interval of time."

I think that this is probably true of most of the other Muchilikas produced in these cases. We have next the case of *Chokkalingam Pillai* v. *Mayandi Chettiar* (2), which was overruled by the Privy Council in *Mayandi Chetliyar* v. *Chokkalingam Pillay* (3). In that case the High Court reversed the judgments of the two lower Courts in second appeal. The defendants in support of their claim produced two leases granted in 1813 which entitled the grantees to hold the lands permanently for all time to come by right of "Ulavadi Kani," and in the Muchilikas subsequently executed by the defendants who claimed under these leases they were described as Ulavadi Mirasidars. The Judicial Committee in their reversing judgment appear to have been of opinion that the leases of 1813 were of questionable validity and could not be relied on. On the other hand they laid great stress on the fact that the Darkast or application pursuant to which the Muchilika was taken by the Collector described the two applicants as Purakudis of the assessed lands in the village owned by the temple, and on the facts that in it they undertook to pay the revenue for one year and asked that a Dharkast Izara for one year might be granted in their names. The inferences to be drawn from these facts were not counterbalanced in their Lordships' opinion by the fact that in Muchalika the two executants were styled Ulavadi Miras. On the materials before them and with reference to the observations of the Subordinate Judge, their Lordships treated the words Ulavadi Miras as of doubtful signification. Having regard to the further investigation which these tenures have received especially in the judgment of Spencer, J., in *Chinnan*

11. (1866-67) 3 M H C R 103.
12. (1884) 7 Mad 374.
13. (1888) 11 Mad 77.

v. *Kondam Naidu* (14) and in the Chingleput Mirasi case, *Seshachala Chetty* v. *Para Chinnasami* (15). I have no doubt that the word Miras in this part of India implies some sort of hereditary right. All that their Lordships said about it came to this, that on the materials before them it was of doubtful signification, and that therefore the decision could not be rested on it. After referring with approval to the decisions in *Chokkalinga Pillai* v. *Vythealinga Pundara Sunnady* (4) and *Thagaraja* v. *Giyana Sambendha Pandara Sannadhi* (13) and distinguishing *Krishnasami Pillai* v. *Varadraja Ayyangar* (1), their Lordships finally observed that the question must be decided on the contract sanctioned by the Collector, that that is to say the Muchilika. In the next case, *Mahomed Meera* v. *Ramalingam* (16), which came before Munro and Sankaran Nair, JJ., the learned Judges held it sufficient to say that appellants had not proved that they had permanent occupancy rights in the village, and that it was not necessary to say that none of the tenants had it. As regards that particular village the question was again most elaborately considered by my learned brother sitting with Napier, J., in *Naina Pillai* v. *Ramanathan Chettiar* (17) and the same conclusion was come to.

The result is that in all these Tanjore temple villages which have come before the Court except one, occupancy right has been held not to exist, and in that case no muchilika taken by the Collector after 1830 was put in evidence. The onus is therefore very strongly on the defendants to make out their case. The evidence has been so very fully analysed by the Subordinate Judge and now by my learned brother taat it is unnecessary for me to say more than that I agree generally with their conclusions. I think it would be altogether unsafe to act on the cadjan documents prior to 1830 produced on either side. Those produced by the plaintiff were put in at a very late stage of the case and there is very little evidence as to how those produced for the defendants came to be preserved in the family of one of the former tenants who had long since parted with the bulk of his holding. Even assuming that they came from proper custody the facilities for procuring such documents even bearing what purport to be Government stamps are unfortunately great. On the other hand the undoubtedly authentic documents before 1829, which my learned brother has summarised strongly support the plaintiff's case that there was no occupancy right.

The strongest evidence in favour of the defendants is to be found in the paimash register of 1829, Ex. 11 (b), in which the nelkuthagai miras is said to be Ekabogam or vested in one person, and the Ulavadai Kani Miras or hereditary right to plough is said to be Palabogam or vested in several, and a number of persons are given as clutivating under this right. The temple itself is shown as cultivating 7 velis and also 5 velis which it is said to hold on mortgage from Appasami Appa, who is also shown as the mortgagor of Nayana Naick who is described as in the possession of 2 velis. So far this is in favour of the defendants but as my learned brother has pointed out this is followed by a statement that no Melvaram as such is shown in the accounts and that the custom is to give Purakudivaram and enter it in the temple accounts. Thus the temple is treated as itself cultivating all these lands and the occupants are shown as receiving as Purakudivaram, or cultivator's share, certain percentages 40 or 30 per cent of the outturn. On the whole it would seem as if some of the cultivators had induced the inferior officers who drew up the Paimash to insert entries indicated to serve at some future date as evidence of their claims to occupancy right. This would not be the only time such a thing has happened and I agree that too much weight must not be given to these entries inconsistent as they are with other entries in the paimash itself and with the evidence as to periods immediately preceding and following. Much reliance is placed for the defendants on Exs. 46 and 46 (a), which purport to be a mortgage in 1811 in favour of the temple and a receipt for the mortgage money by Ramsamia Pillai whose brother in-law Sivaji was it is suggested by the documents referred to by the Subordinate Judge, the father of Appasami Appa. I am willing to assume that these documents were produced in a Small Cause Suit in 1881 and that they bear the ini-

14. A I R 1915 Mad 698=23 I C 113.
15. (1917) 40 Mad 410=40 I C 909.
16. (1910) 8 I C 158.
17. (1917) 41 I C 788.

tials of the Subordinate Judge. What the suit was about is not in evidence but Mr. T. R. Venkatrama Sastri suggests and has asked leave to show that it was a rent suit in which the amount of rent payable to the temple was in issue. They were not exhibited in that case and there was no finding as to their genuineness.

At that time not only was there this dispute but the question of occupancy right in these Tanjore temple villages was much before the Courts from 1863 onwards and it is quite possible that these documents may have been prepared to meet a suit by the temple. There is a suspicious circumstance about them both that the stamp vendor's endorsement has been covered up in both cases in exactly the same manner so as to prevent us from ascertaining the year of issue which the plaintiff suggests is 1813 the date given in the copies put in evidence by the plaintiff Exs. PPP and QQQ. It is remarkable as the Subordinate Judge has pointed out that Appasami Appa did not insist when the Muchilika Ex. E was executed in 1831 on the ownership of these two extensive blocks of land in the village. The contents are not convincing to my mind. It is not stated by whom the money was advanced on behalf of the temple and as the temple was then in the management of the Collector a transaction of this kind does not seem very probable and I doubt if the documents represent any real transaction. On the whole I do not think it would be safe to act on these two documents as affecting the plaintiff's title. In the Muchilika Ex. E given to the Collector in 1831 the first of the executants is called a Purakudi and the next is styled Ulavadi Kani Miras. They undertake to pay as long as the lands are in their possession, and agree that their properties may be attached and sold for arrears. Nothing is said of realising the arrears by sale of their interest in the land itself. Exs. F (19) and F (12) and Exs. 13 series show that the Collector's system was to take security bonds from them for the lands actually in their cultivation. These lands do not correspond with the lands which were described as being in their possession in the Paimash register Ex. 11 (b). In another of these cases there was put in evidence a Karar or preliminary agreement by which the executants agreed among themselves as to the areas they should cultivate individually if they succeeded in getting the Collector to take the Muchilika from them. Possibly there was some arrangement of the kind in the present case.

On the whole I do not think there is sufficient evidence in the present case to rebut the inference against occupancy right which, according to so many decisions, arises from the execution of the Muchilika, Ex. E, by the persons through whom the present defendants admittedly claim. If the defendants' predecessors had not occupancy rights in 1831, I do not think they can have acquired them since by reason of the fact that the trustees have raised no objection of late years to the transfer of the holdings by sale and mortgage. In *Mayandi Chettiyar* v. *Chokkalingam Pillay* (3) the Judicial Committee question the right of temple trustees to confer permanent rights of occupancy by express grant, and I think they can still less be held to have done so by implication. It is of course very unfortunate that the temple authorities should have thought it necessary to enforce the claims of the temple by seeking to eject all the tenants in the village but this is not a matter which can affect our decision. I agree with the orders proposed by my learned brother as regards all these cases.

Sadasiva Aiyar, J.—These three appeals have arisen out of the same suit, Original Suit No. 4 of 1913 on the file of the Temporary Subordinate Judge's Court of Tanjore. The appellants are the important defendants in the suit. In Appeal No. 228 of 1916, which is the principal of the three appeals, the 43rd defendant is the 1st appellant. There are four other appellants in that appeal, namely, defendants 44, 137, 138 and 139 in the suit, but their only ground of appeal is that they should have been exonerated from all liability to the plaintiff as from the beginning they repudiated all interest in or possession of any of the properties in dispute. The plaintiff who brought the suit in April 1910 in the Negapatam Sub Court (from which Court it was transferred to the Temporary Subordinate Judge's Court of Tanjore) is the trustee of the famous and ancient Sri Navaneetha Ishwaraswami temple situated in the village of Sikkil near Negapatam. The temple owns lands in several villages. This suit was brought for re-

covery of lands, house sites and houses situated in the village of Sellur, the defendants being alleged to be tenants from year to year who refused to vacate their holdings after proper notices to quit had been given.

One hundred and fifty-seven defendants were impleaded at first and with the legal representatives of defendants who died during the pendency of the suit, the last number of the defendants became 176. The most important question in this suit is whether the tenants have got occupancy rights in the cultivable lands in the village in their respective holdings. The other minor questions need not be referred to at present, as a detailing of them will unnecessarily distract the attention from the main issue and the conclusions in respect of several of them depend upon the decision on the main issue. The principal question is covered by the first three issues framed in the suit which are as follows:

"1. Is the plaint temple the absolute proprietor of the entire village of Sellur? 2 Are the defendants tenants from year to year and is the plaintiff entitled to eject them? 3 Are all or any of the defendants entitled to a right of permanent occupancy by prescription or otherwise?"

The temple's right to and in the whole village of Sellur had its origin in such remote times that no grant or title deed is forthcoming. The earliest document Ex. ZZ, in March of the year 1806 contains accounts showing that the temple harvested the produce of the lands in the village, allowed the temporary cultivators (called Purakudis) the Waram due for their labour at varying rates for the lands in the southern half and in the northern half of the village and retained the balance. (The word "Kudivaram" means strictly the share given to or retained by the actual cultivator or "Kudi." The right of permanent occupancy, if it belongs to the "Kudi" is sometimes known in the zamindari and Inam tracts as "Kudivaram" right," but the mere receipt of Kudivaram by a tenant does not of course show he has the "Kudivaram right" in the larger sense, that is, that he has permanent occupancy right in the lands in his holding. Sometimes the Kudivaram right is shortly spoken of as "Kudivaram" and this occasionally leads to confusion).

The next documents to be considered in order of date are Exs. 46, 46 (a), PP, nd QQ. The plaintiff disputes the genuineness of Exs. 46 and 46 (a) purporting to be dated in 1811. In the copy (Ex. QQQ) of Ex. 46 (a) supplied by defendant 40 himself (who is D W. 9) the stampvendor's endorsement states that the stamp-paper was purchased in 1813, that is, two years after the date of the document. The defendants, when producing Exs. 46 and 46 (a) into Court, have produced them in such a condition that the last figure relating to the year of the purchase of stamp-paper in both the documents is obliterated and both the papers have been torn at the top in such a manner that the tear proceeds just up to the obliterated figure. The learned Subordinate Judge has considered the question of the genuineness of the documents in para. 91 of his judgment. It may be that one of the several reasons he gives for deciding against their genuineness, namely, that relating to custody is rather weak, but the other reasons given by him for his conclusion appear to be sound and I do not see my way to differ from his said conclusion. Even if Exs. 46 and 46 (a) are genuine, they merely show that the temple trustee in 1811 accepted a usufructuary mortgage of a tenancy right vesting in one of the tenants of the temple, namely, Ramaswamia Pillai, son of Muthia Pillai.

I might here at once state that several cadjan documents have been filed on both sides which I consider very unsafe to rely upon whether they are stamped or unstamped. Even stamped cadjans are easily manufactured, with endorsements of imaginary stamp-vendors showing the purpose why the stamp was required. The Subordinate Judge relies on cadjans Exs. L series, M to M4, N and O (all except O dated before 1831 which is an important date in this case) ranging from 1785, as supporting the plaintiff s case. But I am not inclined to attach any weight to these documents. So also, the defendants rely on Ex. 55 (e), a cadjan document of 1826 which is probably spurious and even if genuine is not of much value. There are a few documents like Exs. 12 F (4) to F (11), F (15) to F (18) which do not relate to the plaint village and which are therefore irrelevant. We now come to the undisputed important Paimash account of 1816 which has not been marked as one single exhibit, but portions of which have been marked in a confusing manner as Ex, H, HI,

11, and 11 (a). This Paimash account almost conclusively shows that the plaint temple was in 1816 (and had been before that) the sole proprietor of the actual soil of all the lands in the village of Sellur. The temple was paying Nelkuthagai (paddy revenue) to the Government and the village in question was known at the Nelkuthagai village belonging to the Sikkil Navaneetha Iswaraswami temple. The lands, house-sites and every bit of soil in the village are mentioned as belonging to the big temple with its two sub-temples of Kailasanathaswami and Ananthanarayana Perumal, to which two sub-temples small areas had been given by the bigger temple as Sarvamaniyam. The whole area of the village is stated to be in the enjoyment of these "three individuals," that is, the three temples.

The only "Mirasi" right recognized in any others is in 7 dwellings of tenants, other tenants' houses being 38 in number and occupied by Purakudis (7), Kasavargam holders (service tenure) (10) and Adimais (slaves or serfs) (21). Then we come to another set of undisputedly genuine documents marked Exs. F, FI, F4, F5 F13 and F14. The earliest of them is dated 30th October 1820 and the latest is dated in January 1825. It is well-known that these and other famous temples in Tanjore were managed by the Collector on behalf of Government for about half a century from about the beginning of the 19th century. The Collectors found that it was very difficult to make the cultivators (mostly fugitive) to properly cultivate the lands. So in 1820, the then Collector of Tanjore thought it best in the interest of the temples to obtain proposals from intending lessees for short periods of one to five years and to let the whole cultivable area in each temple village to that intending lessee who offers the highest rent (paddy for Nanja lands and cash for Punja lands), it being the successful offerer's look-out to bring cultivators upon the lands and to bring as much extent as he could under cultivation. Such leases are known as "proposal" leases. Exs. F (1) and F (13) relate to the Izara Muchilika executed by one Chockalingam Pillai taking up the lands in this plaint (Sellur) village and another temple village (Abhishekakattalai) under the Collector from 1st July 1820 to 30th June 1823, that is for three years. Ex. F 1) clearly shows that the actual cultivators were only Purakudis, that is, cultivators who had no definite term of incumbency and were entitled only to Purakudiwaram to be paid by the lessee out of the gross produce, that the lands themselves were let and that the Mirsai or occupation right in the lands belonged to the temple, the paddy revenue due to Government being the real Melvaram.

The Mirasidar, when he cultivated through either his Pannai or Adimai (slave or serf) cultivators, takes the whole produce minus the Government paddy revenue, paying wages to his pannaiyals and serfs. If he leases them to several Purakudies or to the proposal-lessee, what he gets from the lessee may be loosely called "Melvaram", the proposal-lessee taking the Kudivaram. In the case of the proposal lessee again as between himself and the Purakudies, what he retains will be again "Melvaram" and what the Purakudis are given will be the "Kudivaram." But as I said, such loose language leads to confusion and in the old documents, "Melvaram" is used usually for the Government paddy revenue and Purakudivaram is used for the Purakudi cultivators' share given to them out of harvested produce, what the temple Mirasidar obtains being known as Swamibhogam (a very important term) to which Thunduvaram is attached in some cases. The next document is Ex. F (4). This is one of the proposals or offers made for the plaint Sellur village and the other Abhishekakattalai village in September 1823 by one of the intending proposal-lessees.

This is for only one year. This proposer's proposal seems to have been accepted also for the three succeeding Faslis 1234 to 1236, that is July 1824 to June 1827 (see Ex. F,) because he agreed to pay 3,850 Kalams of paddy rent per year instead of 3,750 Kalams which prevailed in the preceeding 4 years. These documents, which had effect between 1820 and 1827 for 7 years, clearly establish the temple's proprietary Kudivaram right in the village lands and the fact that its lessees were changed even during this short period. See also Ex. YY (1) account of the receipts and disbursements of the temple in the last year of the proposal-lease period. Then the lands were again taken up by the temple under Amani system and Ex. N is the account of the year 1827-28. This account shows that the entire gross produce was harvested by the tem-

ple, Purakudivaram being paid out of it to the actual cultivators under the temple. (There are several mistakes in the translation of documents in this case, for instance, in this Ex. N, instead of describing the Sellur and other villages as villages paying paddy revenue to Government, they are described as villages for "paddies leased out" which is unmeaning). We now come to an important document of 1828-29, which is the Paimash Chitta of the Sellur village prepared in that year. This document again, like the Paimash of 1816 has been exhibited not as one document, but as several documents, namely, H(2) WWW series (5 in number) (11)b, 48 series (10 in number), 84 and 77.

This Paimash account was laboriously prepared, though not by the higher grade Revenue Officers. Such an account, it is well known, while fairly reliable as regards the numbers, extents and character of the lands as mentioned in it and as regards broad statements as to rights, is also found to contain statements based on the allegations of interested and ignorant residents of the village, and such statements are of very little value especially when there has been no subsequent revision or check by an officer of one of the higher revenue grades. (See observations in the judgment in a similar case of *Naina Pillai* v. *Ramanathan Chettiar* (17) found at p. 96 of 33 *M.L.J.*). There are even statements of a somewhat (what I may call) absurd character found in such preliminary Paimash accounts. In the present case for instance, while Exs. H-2, WWW and in fact every portion of this Paimash Chitta account of 1829 acknowledges the temple to be the sole Ekabhogam Mirasidar entitled to the full occupancy and cultivation right in the whole of the village lands, we find in Ex. 11 (b) (see p. 438 of the printed documents papers) that 11 persons are described as Ulavadai Kani Mirasi tenants (under the Ekabhogam Mirasidar) of the village Nanjah lands and one of these 11 persons is stated to be the temple itself, that is, the temple is a tenant of land under itself, which is absurd. Again the very next sentence in this Ex. 9 (b) is inconsistent with any Kudivaram or occupancy right in all but the temple, because it says that the custom in the village is that only Purakudivaram is entered in the Devasthanam accounts as given to tenants and that, because the Government gets its revenue in paddy, there is no Mirasivaram in the village. This sentence clearly means that the Mirasidar temple takes the whole produce under its Kudivaram or direct cultivation right and gives out of it to the Urakudi tenants the share due to them for the labour of cultivation.

Guarding ourselves then from giving too much weight to the inconsistent and contradictory statements sometimes found here and there in this Paimash account of 1829 (it seems not to have been checked by any higher Revenue Officer), the statements in this Paimash account clearly indicate that the Kudivaram right belonged to the temple alone as Ekabhogam Mirasidar. Then we come to the last set of the really important documents in this case, namely, Exs. E, F-19, F-20, 13 series, F-2 and F-3. We have seen that the proposal-leases came to an end in 1828 and that the village lands were again harvested by the temple Manager, the Collector, on the Amani system. The then Collector, Mr. Kindersley, in the year 1830 desired to substitute money payments on what was known as a "permanent commutation" rate, that is, commutation as regards the value of the paddy revenue payable by the temples. (The word 'permanent' in some of these documents denotes only the permanency of the commutation rate at which the paddy grain due to the Government as Melvaram revenue was permanently settled. See at the end of Ex. E, where the temple lessees consent to the following provisions: "As for the Nanjah Melvaram in respect of the said village, we shall pay Theervai according to the price permanently settled at 3 9/16 Pons per Kalam. Whether the price becomes more or less than that price, the profits or loss must go to us and not to the Government.") Mr. Kindersley also dropped the original Pannai, Purakudi and Adimai cultivation systems and the intermediate "proposal" system and let the entire cultivable lands in each temple village on what has become familiar as the "Tharam Faisal Muchilika" system to one or more lessees, such lessees (where there were several) being usually the prominent, influential and representative persons among the numerous cultivators in the village. Many of these Tharam Faisal Muchilikas have come in several cases before this Court.

The important and operative clauses in them have always been substantially the same. The applications to the Collector by the intending lessees in respect of these Tharam Faisal Muchilikas have slightly differred in language, some of the applicants describing themselves as Purakudis alone, some as Kudimiras, some as Purakudimiras and some as Ulavadai Purakudimiras and some (as in this case) Ulavadai Kudikani Miras. Some applications mentioned only one Fasli, and others mentioned indefinite periods and so on but the Muchilikas in which the applications culminated, and which were finally accepted by the Collector and were executed by the lessees, contained almost the same terms.

In this plaint village of Sellur the Tharam Faisal Muchilika executed to the Collector is Ex. E. It was executed on 6th February 1831 by seven persons, two of them Brahmins (including a Brahmin lady), three of them Pillais and two of some other caste. In the body of the document, the male Brahmin executant describes himself as Purakudi Samu Iyer. One other executant describes himself as Ulavadai Kanimiras Arunachellam Pillai. Another executant Suppa Pillai signs at the end as Purakudi Suppa Pillai. But all of them jointly execute Ex. E, agreeing to be jointly liable under it in identical terms. The document begings by describing the Nanjah and Punjah lands which have jointly agreed to accept from the temple for the purpose of cultivation from the current Fasli. They agree to pay the Melvaram Theerva due to the Government (the Collector, who obtained Ex. E, being both the Government agent and the temple Manager) in cash instead of grain, though the said Theerva was directly due by the lessor (the temple) to the Government. They further agree to pay the equivalent price of the paddy grain besides the Punjah cash rent due to the temple as Swamibhogam (soil proprietor's dues, see Wilson's Glossary). Then, they say that they will pay the rents as agreed upon as long as the lands are in their possession. There are also provisions for paying additional revenue to Government when garden crops such as betel, tobacco, plantain, onions, garlic, etc., are cultivated, besides an additional Thunduvaram (of the same nature as Swamibhogam or soil proprietor's share) to the temple. Provision is again made when waste lands are cultivated newly for paying additional Theerva and Swamibhogam to the Government and the temple respectively. They are also to supply Kudimaramath labour for repairs, etc., besides men for carrying the temple paraphernalia in times of festivals and so on. As I pointed out, none of the executants of the Muchilika claims a higher right in any portion of the land than any of the other executants. I have dealt in my judgment in *Nain Pillay* v. *Ramanathan Chettiar* (17), the Mangal case with the uniform interpretation which has been placed upon these Tharam Faisal Muchilikas by this High Court from *Chockalingam Pillay* v. *Vythealinga Pundara Sunnady* (4), namely, that the lessees who execute those Muchilikas and agree to cultivate lands under them do so on a terminable tenure and cannot claim a permanent right of occupancy.

It is contended that the executants could not be held to have agreed to relinquish their then existing permanent right of occupancy by executing this Muchilika, assuming that they had such a permanent right on the date of its execution. I shall shortly state three considerations which refute this argument. Firstly, the burden of proving that on the date of this Muchilika of 1831 the executants had a permanent right of occupancy lies very heavily on them and on those claiming under them. (The contesting defendants have clearly admitted in this case that they claimed only under the executants of these Muchilikas.) It is not contended that in all the lands of the village taken together, the executants had a joint permanent occupancy right. That the temple was cultivating at least about one-third of the lands through Panai Purakudies then is admitted, the Paimash of 1829, as I said already, making the statement that as regards those lands the temple was its own Ulavadaikudikani tenant. It is also admitted that these Brahmins and Pillais (who executed Ex. E) and numerous other tenants cultivated distinct plots in the village separately and not jointly. The permanent occupancy right was in fact claimed only for those who are described in the Paimash of 1829 as Ulavadai Kudikani Mirasidars and not for the numerous persons described as Purakudis, etc. Mr. T. R. Venkatrama Sastri for defendant 43 even argued strenuously that the oc-

cupancy right could not be claimed for the lands in the Vadapathi (northern half) portion of the village lands but only for the lands in the Thonpathi (southern half) portion in the holding of his client, the two halves being separated by a common irrigation channel. That the descriptions given of themselves by these tenants are of little value has been held in almost all the cases.

Mere assertion by a tenant, especially where his landlord is a temple whose trustee cannot give an occupancy right without breach of trust, would not derogate from the plain rights of the temple See *Satya Sri Ghoshal* v. *Kartik Chandra Das* (18) and *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (19). In *Chidambara Pillai* v. *Thiruvengadathiengar* (9) followed in this respect even in *Cheekati Zamindar* v. *Ranasooru Dhora* (8), the presumption against the existence of occupancy rights in a tenant, holding under a person who himself owns the Kudivaram proprietary right in the soil, is stated to be a strong presumption. In the present case, except the vague description of some cultivating tenants in the Paimash of 1829 as Ulavadai Kudikani Mirasidars and the fact recorded in that Paimash account that some lands in the possession of one of these tenants were mortgaged to the temple and to another person (even assuming such statements to be true and even assuming that the mortgage was in 1811 under Ex. 46 there is no other evidence to support the contention that in 1831, any cultivable lands, much less all the cultivable lands in the village, were held under permanent occupancy right whereas the overwhelming probabilities are against the validity of that contention.

In the second place, I think, considering the influence of the old East India Company's Collectors and even of the Subordinate Revenue Officers, the executants of the Muchilika Ex. E who represented all the cultivating tenants, must be deemed to have agreed thereafter not to claim any larger interest (assuming that they had any such plausible claims before that) when they accepted the lands for cultivation under the terms, of Ex. E, than was expressly reserved to them thereunder. It seems difficult to hold that persons intending to claim varying rights (some superior and some inferior, the superior rights again to be attached to some only of the lands and the inferior rights to other lands) would jointly execute the same Muchilika clubbing all the cultivable lands together and agreeing to hold them on the same terms (with further provisions for cultivating additional lands not then held by any of them and so on) unless, as decided in some of the cases on similar facts, they intended that the newly created lease-hold rights under the Tharam Faisal Muchilika should supersede the vague and varying old rights, if any. The permanent right, alleged to have already existed, is again claimed not under any perpetual lease granted with reference to any specific area, but because the tenants were Ulavadi Kudikani Mirasidars of the entire village lands. The arguments at p. 9 of the case *Chidambara Pillai* v. *Thiruvengadathiengar* (9) on this point are very instructive.

"Further, the provisions which the several leases contain with reference to the cultivation of Poramboke, the protection of trees and the appropriation of trees seem to indicate that this Kudikani right, if any, did not extend to other than land under actual cultivation and this is not ordinarily the case where raiyats have Kudikani right to the village as contradistinguished from a perpetual lease granted with reference to a specific area. It is not the appellants' case that they or their ancestors had a perpetual lease from the temple."

In *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi* (13), Kernan, J., says at p. 79.

"It is contended that long possession is evidence of right of occupancy. But when the right of possession or right to continue in possession is proved, as in this case, to have arisen under a written instrument which does not provide for right of permanent occupancy, then the right to possession must prima facie follow the terms of the instrument in the absence of any subsequent agreement."

In that case, the defendants had been in possession since, at all events, 1827 (see p. 78), that is before the date of the Muchilika of 1830 which gave them the right to continue in possession under certain definite terms. The learned Judge, as I said above, held that the right to so continue must be governed by the terms of the Tharam Faisal Muchilika and not by any prior circumstance. Even when there was a regular perpetual lease granted to a tenant in 1820, it was held by the first two Courts in the case decided in *Myyandi Chettiyar* v. *Chokkalingam Pillay* (3) that by applying for a fresh

18. (1912) 13 I C 596.
19. (1869-70) 13 M I A 270(P C).

grant and executing a Tharam Faisal Muchilika in 1832

"the tenant had either given up or had lost all his right to the perpetual lease granted to him by the temple authorities and that all he and his successors have to depend upon is the fresh contract made with the Collector in 1832 under which no permanent right of occupancy was conferred."

This conclusion was approved of by their Lordships of the Privy Cpuncil.

Thirdly, the areas of the holdings after the date of this Tharam Faisal Muchilika Ex. E of 1831, do not correspond to the areas mentioned in the Paimash of 1829. Ex. 11 (b). In Ex. 11 (b) for instance Appasami Appa is alleged to be the tenant of 2 Velis plus 7 Velis 5 Mahs, total 9¼ Velis .But he is content to hold after the date of Ex. E 2 Velis 2 Mahs tnd 65 Gulis (see Ex. F-20) and is described in Ex. F-20 as a mere Furakudi while in the Paimash account he is one of the eleven Ulavadai Kudikani Mirasidars. The learned Subordinate Judge has also shown how the descriptions as regards both the lands and the tenants mentioned in the Paimash of 1829 are full of inconsistencies and contradictions, adopting the statement prepared by the plaintiff's vakil in the lower Court from the records (see para. 104 of the Subordinate Judge's judgment and the statement marked A appended to that judgment).

Another contention was that the conduct of the temple trustees, in standing by when the tenants were alienating by sale and mortgage and subdividing their holdings, conferred a right of permanent occupancy on the tenants by estoppel or by prescription. I have nothing to add to what I said to a similar contention in the case of *Naina Pillai* v. *Ramanathan Chettiar* (17) and I must therefore reject the contention. As Muthusawmi Aiyar, J., said in the case of *Chidambara Pillai* v. *Thiruvengadathiengar* (9):

"seeing that the officers of Government had managed the temple villages for many years prior to 1857, it is not improbable that the consideration shown by them to Purakudies, as an incident of good management and the length of time for which the Purakudies cultvated, inspired them with a belief that they were not liable to be ejected as long as they were punctual in the payment of rent. This may account for sales and mortgages by the appellants and their predecessors accompanied with an assertion of Kudikani right, which may loosely be used to indicate a permanent tenure of some kind or other. It may be that the trustees took no notice of what the Purakudies did, as they undertook (with the Collector) not to interfere with their occupation so long as they regulary paid rent."

I shall therefore not refer in detail to the numerous documents on the defendant's side subsequent to 1831 ranging from 1838 (see Ex. 87) to January 1910 (see Ex. 4, dated about 3 months before suit), indicating voluntary and involuntary alienations of the holdings and the recognition of the alienees as tenants by the temple. In the result, I agree with the conclusions of the Subordinate Judge on the principal issues 3. The Appeal No. 228 of 1916 therefore substantially fails except in two particulars, (1) the defendants 44, 137, 138 and 139 wili be exonerated from the plaintiff's claim as they disclaimed all interest in the lands, and (2) the mesne profits awarded would be separately assessed against defendant 43 as regards the lands in his possession. In other respects, the appeal is dismissed, defendant 43 paying proportionate costs to the plaintiff in both Courts on the value of the relief decreed against him.

Appeal No. 146 *of* 1916—The appellants here are defendants 45, 136, 160 to 163 and 166 to 171. Their contentions are the same as those of the 43 defendant. The decree against them will be confirmed with costs except to this extent, that they will be made separately liable for the mesne profits of the lands in their respective possession. I might add that several pleas as to want of proper notice to quit, under valuation of the plaint, excessive mesne profits and so on were not argued or pressed before us by the appellants.

Appeal No. 230 *of* 1916.—The appellants here are several other defendants including defendant 11. The appeal, so far as it relates to the contentions of the appellants other than defendant 11, must be dismissed with costs for reasons similar to those governing the decision in *Appeal No.* 228 *of* 1916. As regards defendant 11 however he holds plots Nos. 6 and 8 in the plaint Sch. 3 as the trustee of a charity called the Ariya Pillai Thiruvasal charity. The evidence clearly shows that the charity (more than a hundred years old) is being conducted by defendant 11. (See his evidence as D. W. 2). The temple has no right to resume the charity lands from the Thiruvasal trustee and has not proved

any such right, the said charity being mentioned in the earliest documents on the plaintiff's side itself. The appeal is allowed as regards plots Nos. 6 and 8 of the plaint Sch. 3 with proportionate costs in both Courts. Defendant 11 however must pay proportionate costs in the appeal to the plaintiff so far as the appeal relates to other lands claimed by him in his own right. The mesne profits will be decreed separately against the respective defendants in this appeal also.

Lastly there are the memoranda of cross-objections filed by the plaintiff as regards the house-sites and houses in the possession of the defendants. These properties are clearly not included in the Tharam Faisal Muchilika, Ex. E, and the plaintiff has not shown any title to eject the defendants from the house sites and houses. The other contentions except interest on mesne profits in the memoranda of cross-objections are not pressed. The memoranda are therefore dismissed with costs except as regards interest on mesne profits which will be allowed at 6 per cent. per annum from date of plaint.

S N./R K. *Appeals partly allowed.*

A. I. R. 1918 Madras 56 (1)

ABDUR RAHIM AND OLDFIELD, JJ.

Korada Bottamma and *another*—Plaintiffs and Petitioners—Appellants.

v.

Korada Audinarayana and *others*—Defendants—Respondents.

Appeal No. 146 of 1916, Decided on 17th September 1917, from Appellate decree of Dist. Judge, Ganjam, in Misc. Appeal No. 46 of 1915.

Civil P. C. (1908), O. 21, R. 15—Execution—Death of one of several decree-holders—Surviving decree-holders are entitled to execute decree—Question of heirship can be inquired into, in course of execution.

On the death of one of several decree-holders, the surviving decree-holders are entitled under O. 21, R. 15, to execute the decree for their own benefit and for the benefit of the legal representatives of the deceased joint decree-holder. If in the course of execution, any person claims to be brought on the record as the heir of the deceased, the Court should inquire into the matter and dispose of it according to law. [P 56 C 2]

V. Ramesam and *B. Satyanarayan*—for Appellants.

C. S. Venkatachariar—for Respondents.

Judgment.—Plaintiff 1 is the widow of one Suryanarayana and plaintiff 2 who is now dead was his daughter by a predeceased wife and plaintiff 3 is his daughter by plaintiff 1. The suit was for partition and the rights of the plaintiff were based on a will left by Suryanarayana. There was a joint decree for one fourth share of the family property in favour of the plaintiffs and the petition is put in by plaintiffs 1 and 3 for execution of the decree. That petition has been dismissed by the District Judge, who seems to have allowed his mind to be diverted by a question as to who were the heirs of plaintiff 2 and other similar questions, though they do not seem to have been distinctly raised before him. Under R. 15, O. 21, the surviving decree-holders are entitled to execute the decree for their own benefit and for the benefit of the legal representatives of the deceased joint decree-holder, that is, plaintiff 2 in this case. The proper course would be to allow plaintiffs 1 and 3 to execute the decree under R. 15, O. 21, and then if defendant 2 who claims to be the heir of plaintiff 2 brings himself on the record in these proceedings and raises the question as to his heirship, the Court will proceed to inquire into the matter and dispose of it according to law. We set aside the order of the District Judge and remand the appeal to him for disposal according to law in the light of the above observations. Costs will abide the result.

S.N./R.K. *Suit remanded.*

A. I. R. 1918 Madras 56 (2)

ABDUR RAHIM AND BURN, JJ.

Zamindar of Kalahasti—Defendant—Appellant.

v.

P. R. Ganapathi Iyer and *another*—Plaintiffs—Respondents.

Civil Appeal No. 68 of 1913, Decided on 1st November 1916, against decree of Sub-Judge, North Arcott, D/- 9th December 1918.

(a) Trusts Act (1882), S. 23 (c)—Applicability to public trusts.

The rule laid down in S. 23 (c) though applicable only to private trusts may be adapted in the case of public trusts with such modifications as the circumstances of each case require. [P 58 C 1]

(b) Trusts—Intention of founder—Credit for expenditure of income in excess of income cannot be allowed.

The duty of a trustee is to carry out the directions of the founder and not to encumber the trust property by systematically incurring expenditure beyond the limits of its income nor can he claim credit for such expenditure. [P 58 C 2]

(c) Trusts—Removal of trustee— Continuance of hereditary trustee likely to endanger interests of institution—He is liable to be removed.

If the continuance of a person who is a hereditary trustee and a descendant of the founder in the office is likely to endanger the interests of the institution he is liable to be removed. It is not however every mistake or neglect of duty or inaccuracy of conduct that will induce a Court to remove a trustee. The acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties of the office or a want of reasonable fidelity. [P 59 C 2]

(d) Trusts—Removal of trustee—Omission to keep separate and distinct accounts will entail removal.

One of the most important duties of a trustee is to keep separate and distinct accounts of the trust property and to keep the trust property separate from his own property. The omission to perform this duty will entail the removal of the trustee, [P 60 C 1]

(e) Trusts—Removal of trustee — Trustee found guilty of misappropriation— Proper course is to dismiss him.

In order to justify the dismissal of a trustee it is not necessary to show that he has dishonestly misappropriated the trust funds. It is enough if he is a necessitous man who may not resist the temptation to misappropriate trust funds or that his want of prudence in managing his own affairs does not warrant the hope that he would successfully manage an endowment. [P 60 C 1]

Where a trustee is found guilty of misappropriation the proper course is to dismiss him and not to suspend him till he makes good the amounts misappropriated.

Judgment.—The suit in which the appeal arises was instituted under S. 92, Civil P. C., against the defendant, the Raja of Kalahasti, who is the hereditary trustee of the Kalahasti temple and its endowed property. By a preliminary decree the Subordinate Judge who tried the suit ordered accounts to be taken from Faslis 1315—1320 and objections have been taken before us in the first place to a number of items in the accounts as finally settled by the Court of first instance. Then there is the important question whether the order suspending the defendant from the office of trustee until he pays 'certain debts due to the temple is right. The contention of the appellant, the defendant in the suit is that the order of suspension ought to be set aside altogether, while the plaintiffs contend that the defendant should be removed from his office.

We shall first deal with the items of account to which objections have been taken on one side or the other. It is necessary to state that this temple was founded and endowed by the Raja of Kalahasti, and the properties which formed the endowment are mainly the village of Kalahasti and half of two other villages. There are also certain Rusums and Merahs which are payable to the temple by the tenants of the Kalahasti zamindary. Incorporated with the temple properties are the funds called Ubhayam funds which have been endowed by various persons with the object that certain festivals may be held in their honour in temple with the income of those funds. There are also the collections made in the temple and the offerings. The entire income may be taken to be about Rs. 10,000 or so a year.

The zamindary of Kalahasti as well as the trust property in the suit wereunder the management of the Court of Wards from 1899 till August 1905 on the ground of incapacity of the defendant. It was then handed over to him apparently because the Court of Wards found it a hopeless task to clear the zamindary from debts. Accounts have been taken from 1905 till 1910; when the Court of Wards made over the trust property to the Rajah there was a sum of Rs. 37,000 due to the temple from the previous trustees, the predecessors of the defendant, and a sum of about Rs, 8,000 in the hands of the Court of Wards on account of Ubhayam. This Rs. 8,000 washanded to the defendant but it appears that he used the amount for his own personal purposes and executed a mortgage on some of the zamindary properties for that sums plus R. 37,000 which was already due to the 'trust. The mortgage is Ex. C and it was executed on 22nd August 1905. It may be mentioned at once that the Subordinate Judge has acquitted the defendant of all charges of dishonest misappropriation of the trust funds and in fact those charges at the time of trial were not pressed before him. He has found however on taking accounts under various heads that altogether a sum of about Rs. 11,000 or thereabouts was due by the defendant to the temple. At the same time the Subordinate Judge found that the defendant spent something like Rs. 17,800 in performance of ceremonies and festivals in connexion with the temple over and above the income of the temple property. He says, however,that the Raja was not entitled to have credit for this amount as against what has been found due from him. In

dealing with the accounts an important fact to be borne in mind is that the defendant never kept any separate account of the trust property and the expenditure in connexion with the temple except as to the offerings and Hundi collections. So far as the income of the landed property was concerned and especially of what was received by way of Rusums and Merahs there was no separate account ; what was receivable by the temple was mixed up with the zamindars' private account. There is also the fact that the defendant did not produce all the books of account, such as they were which would have shown what was the amount under ecrtain heads to which the temple was entitled as distinguished from what was received by the zamindar on his own personal account from the zamindary. The learned vakil for the appellant has emphasized the fact that if the defendant did not keep any separate account he was only following the practice of his predecessors and of the Court of Wards which had the management of the proprety for several years. But that is no excuse in law for the defendant not keeping the moneys belonging to the temple entirely separate from his own moneys and if any difficulties in taking accounts have arisen owing to this fact every presumption is to be made against the defendant and in favour of the trust. I take shall the items in the order of the argument before us.

The next objection relates to the interest on the Rs. 8,000 which was borrowed by defendant at the time he received charge of the trust property from the Court of Wards. Ex. C provides for six per cent. interest with annual rests, and the contention is that it ought to be 9 per cent. compound interest at half-yearly rests or at least six per cent. with half-yearly rests. The question what is the proper interest to be charged against the defendant was in the discretion of the Subordinate Judge and we are not prepared to say that under the circumstances the defendant ought to have been charged a higher rate of interest than six per cent.

Our attention has been drawn to S. 23 Trusts Act. Cl. (e). The section itself applies only to private trusts and a rule of that nature can only be adapted with such modifications as the circumstances of each case require. The respondent also urged that compound interest ought to have been allowed inatead of simple interest upon the items dealt with in the judgment of the Subordinate Judge in paras. 40 and 41. We are not prepared to hold for reasons already stated that the Subordinate Judge's conclusicn is wrong. Then there is the question whether the defendant ought to be given credit for any amount which he has spent on religious worship and ceremonies over and above the income from the temple property. The Subordinate Judge has held that he is not entitled to any crediton this account and we think he is right. No authority has really been cited by the defendant for the proposition that a trustee of a public charity, who chooses year after year to spend moneys not required by the terms of the endowment out of his own pocket should be allowed credit for such expenditure. It such a proposition were accepted, it would lie in the trustee's power to put an end to the endowment by extravagant expenditure. The duty of the trustee is to carry out the directions of the founder and not to encumber the trust property by systematically incurring expenditure beyond the limits of the income of the trust property. Reference was made to *Andrews* v. *McGuffog* (1), but we do not find that the case lays down any proposition to the contrary. As stated by Lord Watson, the money which the trustees there were said to have misapplied had been spent in executing, according to the specific directions of the testator, one of the main purposes of the trust and the only administrative error which they committed consisted in their having honestly mistaken the mode in which the testator's purpose was meant to be attained. It is contended by the learned pleader for the appellant that there was, as a matter of fact, surplus left after meeting the expenditure of the Ubhayams and the defendant was justified in spending that surplus for the benefit of the temple. But such a case was never sought to be made and what is found is that the defendant spent about Rs. 17,000 in excess of the income of the temple during the six years that the accounts have been taken, and not that he utilised the surplus of one particular fund for the benefit of the other fund. Further, as it is pointed out on behalf of the respondent, these Ubhayams are special funds which have

1. (1886) 11 A C 313.

nothing whatever to do with the ordinary worship in the temple and the expenditure of the income of those funds must be regulated according to the direction of the respective founders of those funds.

The only objection to the scheme of management framed by the Subordinate Judge, which has been taken before us, relates to the question whether, having regard to the facts disclosed, the defendant should be retained at all in the office of trustee and, if so, whether the order suspending the defendant from trusteeship until payment of the amounts due under Ex. C. and what he is found liable for in this case should be upheld or what modification should be made in this connection in the scheme of management. The amount due under Ex. C is Rs. 45,000, which is charged upon some of the zamindary properties belonging to the defendant, and under the decree he is liable for a sum of nearly Rs. 12,000. Having regard to the fact that the defendant's zamindary is heavily encumbered and his financial affairs are extremely embarrassed, it is open to grave doubt, whether the condition attached by the decree to resumption by the defendant of the duties of Dharamakartha will ever be satisfied. The direction of the Subordinate Judge, therefore, practically amounts to removal of the defendant from the office of trustee, but it cannot be satisfactory in the interest of the trust that there should be no trustee for an indefinite time.

It is argued on behalf of the appellant that the order of suspension is wrong and the provision made for the appointment of a treasurer and for a proper system of accounting will be sufficient so protect the interests of the institution. No doubt these provisions provide some check on the action of the Dharmakartha, but the Dharmakartha has still certain important powers, for instance, the collection are all to be made by him and so also the expenditure, although expenses are to be regulated by a budget prepared at the beginning of every Fasli year. It is argued on the other hand on behalf of the plaintiffs that the defendant has shown want of capacity in managing the institution and its properties. Besides, he owes a large sum of money to the trust and having regard to the facts which have been proved in the case, it will be entirely detrimental to the interests of the trust to permit the defendant to continue as Dharmakartha. Much stress was laid on behalf of the appellant on the fact that the temple was founded and endowed by his own ancestors and that he is the hereditary trustee according to the terms of the dedication. He is not, however, entitled to any pecuniary benefit from the trust and the law is well established, and this was conceded before us, that if the continuance of a person who is a hereditary trustee and a descendant of the founder in the office is likely to endanger the interest of the institution, he is liable to be removed, vide *Fakurudin Sahib* v. *Ackeni Sahib* (2) and also. *Anantanarayana Ayyar* v. *Kuttalam Pillai* (3), and in *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (4) the trustee was removed mainly on the ground that he did not keep proper accounts and in *Anantanarayana Ayyar* v. *Kuttalam Pillai* (3) the trustee was removed because he systematically failed to submit accounts to the committee of management. The grounds which justify a Court in removing trustees are well expressed in Storey's Equity Jurisprudence S. 1289, adopted by the Privy Council in *Letterstedt* v. *Broers* (5). That was a case of a private trust but the principle enunciated there is applicable a fortiori to trustees of public trusts:

> "But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust. It is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of a proper capacity to execute the duties or a want of reasonable fidelity."

There can be no doubt whatever that the defendant's conduct shows a want of capacity to manage the trust properties. He does not appear to have realised the elementary duties of a trustee. He started upon his office by appropriating to his own use a sum of Rs. 8,000 belonging to the trust funds, and no portion of that money has yet been restored. The fact that the previous Rajahs acted in a similar way which resulted in their owing to the institution a sum of Rs. 37,000 does not justify the conduct of the defendant. It only shows that the duties and responsi-

2. (1878-80) 2 Mad 197.
3. (1899) 22 Mad 481.
4. (1891) 15 Bom 612.
5. (1884) 9 A C 371.

bilities of a trustee were not understood even by his predecessors-in-office. One of the most important duties of a trustee is to keep separate accounts and to keep the trust property separate from his own property. Here also the Raja failed in his duty throughout. Then his management of the trust properties cannot be said to have been at all efficient. A sum of nearly Rs. 12,000 is payable by him to the trust on this account. The defendant's own affairs are in a practically insolvent condition. Almost the greater portion of the ancient and valuable zemindari of Kalahasti is now in the hands of creditors. To what extent this result has been contributed by the defendant himself has not been investigated in this case nor was it necessary to do so. Our duty is to look entirely to the interests of the trust and we feel convinced that in the circumstances it will not be for the benefit of the institution to allow it to remain under the management of the defendant. He admits in his own evidence that he himself never looked into the accounts or the correspondence and was content to leave everything to his Dewan. And that is exactly what one would have inferred from the history of the trust. In the present impecunious condition of the appellant who still must have considerable position and influence in the locality, it would not be fair either to himself or to the institution that he should continue to hold the office of trustee. The appellant has not been found guilty of any dishonest misappropriation and without suggesting any reflection on his honesty we think that the observation of Jessel, Master of Rolls, in *Barker's Trusts, In re* (6), affords a proper guidance to the Court in cases of this character:

"A necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy and besides a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people."

We have also carefully considered whether it would not have been sufficient to safeguard the interests of the temple if we appointed a Board of Control to exercise proper check and supervision over the management or if a co-trustee was appointed to work conjointly with the appellant. But we have come to the conclusion that any such provision would not tend to the smooth working of the institution. In the result the appeal will be dismissed and the memorandum of objections allowed to this extent that the decree of the lower Court will be modified by directing that the defendant be removed from the office of Dharmakartha of the Kalahasti temple and its endowed properties. It will also be declared that the Subba Naidu Tope belongs to the temple and in addition to the amount decreed by the Subordinate Judge the defendant is liable to the temple for Rs. 156-11 0, which is the difference between the profits of the Subba Naidu Tope not accounted for by the defendant and the amount wrongly charged against him on account of straw. The lower Court will be directed to appoint a fit and proper person as trustee in place of the defendant. The appellant will bear the costs of this appeal. Each party will bear his own costs of the memorandum of objections The costs of the respondents will come out of the trust estate.

S.N./R.K. *Appeal dismissed.*

6. (1875) 1 Ch D 43=45 L J Ch 52.

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BAKEWELL AND KUMARASWAMI SASTRI, JJ.

Govindasami Pillai—Appellant.

v.

Municipal Council, Kumbakonam —Respondents.

Letters Patent Appeal No. 74 of 1917, Decided on 27th November 1917, against the judgment and order of Spencer, J., D/- 27th March 1917.

Civil P. C. (1908), O. 33, R. 5 (d)—Detailed inquiry into complicated questions of law is precluded—Inquiry on point of limitation involving taking of evidence is barred.

Order 33, R. 5 (d), applies only to cases where the allegations of the petitioner do not show a cause of action and it precludes an elaborate inquiry into doubtful and complicated questions of law during the inquiry into pauperism. A question of limitation cannot be determined at the stage contemplated by O. 33, R. 5, especially if its decision depends on the taking of evidence.

[P 60 C 2; P 61 C 1]

K. Ramachandra Ayyar—for Appellant.

N. Rajagopala Chariar— for Respondents.

Judgment.—We are of opinion that the District Munsif was not justified in determining a question of limitation, as to which there has been considerable

difference of judicial opinion, upon an application to sue in forma pauperis. O. 33, R. 5 (d), applies only to cases where the allegations of the petitioner do not show a cause of action, and we think that this should appear clearly upon the face of the petition.

We have been referred to cases where it was held that the Court can go into the question of limitation to see if the petitioner has a subsisting cause of action. The cases do not decide that an elaborate inquiry into doubtful and complicated questions of law should be raised at the stage contemplated by O. 33, R. 5. The pauper has no right of appeal if the decision on the question of law is wrong. We do not think it necessary to decide the question of limitation at this stage. This should form the subject-matter of an issue. In the present case, moreover, the question of limitation may depend upon the construction of the contract between the parties, and it is possible that other evidence may be admissible as to the rights of the parties to the deposit made by the applicant, and we think that such matters should not be considered by the Court at this stage. The appeal is allowed, the order of the District Munsif is set aside and the petition is remanded for disposal according to law. The costs in the Civil Revision Petition No. 887 of 1916 and this Letters Patent Appeal will abide the result of the suit.

S.N./R.K. *Appeal allowed.*

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SESHAGIRI AIYAR AND NAPIER, JJ.

Mankoottil Chathukutti Nair— Plaintiff—Appellant.

v.

P. P. M. Komappan Nair and *others* —Defendants—Respondents.

Second Appeal No. 746 of 1916, Decided on 29th October 1917, against decree of Temporary Sub-Judge, Tellicherry, in Appeal Suit No. 602 of 1913.

(a) Malabar Law — Karnavan — Power —Status of karnavan is more akin to manager of Hindu family than to Hindu father—There is no pious duty cast on junior members as on sons for father's debt.

The status of a karnavan in a Malabar tarwad is more akin to that of a manager of a Hindu family than to that of a Hindu father. The peculiar obligations which a Hindu son incurs in respect of the debts of his father are not those with which a junior member of a tarwad is chargeable with reference to the karnavan's debts. [P 61 C 2]

(b) Malabar Law—Karnavan— Alienation mortgage for barred debts is not binding on junior members.

A mortgage executed by a karnavan in payment of a barred decree debt is not binding on the junior members of the tarwad: 35 *All.* 207, *not Appr.* [P 61 C 2]

(c) Contract Act (1872), S. 25—S. 25 does not apply to case of mortgage by karnavan for barred debts— Tarwad must be shown to be benefited to be made liable— Malabar Law.

The provisions of S. 25 do not apply to a case of mortgage by karnavan for barred decree debt for though the mortgage might be treated as having consideration, it is not enough to charge the tarwad with liability, which must be shown to have been benefited by the transaction. [P 62 C 1]

Kutti Krishna Menon—for Appellant.

C. Madhavan Nair—for Respondents.

Judgment.—The question for decision is whether a deed of mortgage executed by a Karnavan in payment of a decree debt which was barred by limitation at the date of the mortgage is binding on the junior members of the tarwad.

Mr. Kuttikrishna Menon for the appellant relied on *Eravanni Revivarman* v. *Ittupu Revivarman* (1), in support of the proposition that the Karnavan of a Malabar Tarwad occupies a position analogous to that of a Hindu father under the Mitakshara law. We do not think that the learned Judges intended in that case to draw a distinction between the position of a father and that of a bare manager. The exact status of a Karnavan was considered more elaborately in *Achal Ram* v. *Kazim Husain Khan* (2) and in *Kunhichekkan* v. *Lydia Arucanden* (3), and we agree with the view taken in these two decisions that the Karnavan occupies a position more akin to that of a manager than to that of a Hindu father. The peculiar obligations which a Hindu son incurs in respect of the debt of his father are not those with which a junior member of a tarwad is chargeable with reference to the Karnavan's debts. It has been held in *Chinnaya Nayudu* v. *Gurunatham Chetti* (4) that the manager of a Hindu family is not entitled to revive a barred debt, and this decision has been cited with approval in *Narayansami Chetti* v. *Samidas Mudali* (5), *Kondappa* v. *Subba* (6) and *Suryanarayana* v. *Narendra*

1. [1876-78] 1 Mad 153.
2. [1905] 8 O C 155=27 All 271=32 I A 113 (P C).
3. [1912] 14 I C 480.
4. [1882] 5 Mad 169.
5. [1883] 6 Mad 293.
6. [1890] 13 Mad 189.

Thatraz (7). As regards *Kondappa* v. *Subba* (6), it is enough to point out that the widow was regarded as being under a pious duty to relieve her husband from the sin of not paying a just debt. In the case of sons, the Hindu law imposes an obligation to pay their father's debts not tainted with illegality or immorality. That is the reason of the rule in *Narayanasami Chetti* v. *Samidas Mudali* (5). We do not think that the view in *Dalip Singh* v. *Kundan Lal* (8) to the contrary is good law. As regards the English cases, the principle enunciated by Romer, J., in *Midegly* v. *Midegly* (9) is that the payment of barred debt will not enable the legatees to charge an executor with Devastavit. As pointed out by Mr. Madhavan Nair, this is a very exceptional proposition which should not be extended to Indian conditions. Moreover in England, a debtor is not bound to plead the Statute of Limitations, whereas under the Limitation Act, the Court is bound to dismiss a claim, if it is barred by limitation. One other distinguishing feature is, that an executor is directed to pay all the just debts of a testator, there is no similar obligation on the Karnavan. It is open to argument however that if a debt barred by limitation has been actually paid, the Karnavan might not be held liable for having diap it; that would stand on the analogy of an executor or trustee not being liable to be proceeded against for Devastavit under similar circumstances: see *Rowson, In re, Field* v. *White* (10). But that is not the present case. Here the holder of the mortgage has obtained only a promise and not payment. That promise has to be enforced against the tarwad and the members are entitled to plead that the promise has not been made for necessary or lawful purposes. That is the principle which Hindu junior members are entitled to invoke as against the manager.

Regarding the argument that S. 25, Contract Act can be utilized against the tarwad, the answer suggested by Mr. Madhavan Nair seems reasonable. The rtg age document may be regarded as i ng consideration; but that is not u gh to charge the tarwad with liability. e consideration must be such as to bind the members, either by showing that the transaction was beneficial or was justifiable. We are therefore of opinion that the document sued on is not binding on the tarwad and dismiss the second appeal with costs.

S.N./R.K. *Appeal dismissed.*

7. [1896] 19 Mad 255.
8. [1913] 35 All 207=18 I C 726.
9. [1893] 3 Ch. 282.
0. [1885] 29 Ch. D 358.

✻✻ A. I. R 1918 Madras 62
Full Bench

WALLIS, C. J., SADASIVA AIYAR AND SPENCER, JJ.

Samanthala Koti Reddi—Defendant—Appellant.

v.

Pothuri Subbiah and *others*—Plaintiffs—Respondents.

Second Appeal No. 1601 of 1916, Decided on 14th March 1918, against decree of Temporary Sub-Judge, Nellore, in Appeal Suit No. 13 of 1915.

✻✻ Civil P. C. (1908), S. 80—Public officer—Mala fide Act in discharge of duty—Notice is essential—What would 'purport' to be act in official capacity stated—Act whether proper and right or not is immaterial.

Where a public officer acts mala fide in the discharge of his duties, he is entitled to notice under S. 80: before suit 24 *Cal.* 584, *Appr.* and 7 *Cal.* 499 and 26 *All.* 220; *Diss. from.*

Per *Sadasiva Aiyar, J.*—An act done by a public officer would "purport" to be an act done in his official capacity not only if it was properly and rightly done by him in such capacity and within his powers but also if it has such a reasonable resemblance (though a false or pretend ed resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the act and from the nature of his official powers and duties that it was done in his official capacity. [P 70 C 1]

But if the act done is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of such on officer could allow him to do on the facts as represented and declared by such officer his mere allegation that he did the act in his official capacity would not suffice. [P 70 C 2]

The question of the good faith or the bad faith of the public officer, either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers, is irrelevant to the consideration of the question whether the officer is entitled to notice under S. 80. [P 71 C 1]

Per *Spencer, J.*—The word 'purporting' covers a profession by acts or by words or by appearance of what is true as well as of what is not true. [P 71 C 2]

T. V. Venkatrama Aiyar and *R. Rajagopala Aiyar*—for Appellants.

P. Chenchayya for *T. Prakasam*—for Respondents.

Order of Reference

Seshagiri Aiyar, J.—Plaintiffs had lent money on a mortgage to one Sankariah. Apprehending that this man was about to dispose of his property, they filed a suit in the District Munsif's Court and obtained an order for attachment of certain moveable properties belonging to him. In the meantime a destraint upon the propertis had been effected for arrears of revenue. The Village Munsif sold them and after remitting to the Taluk treasury the amount recoverable from Sankariah, paid the balance over to him. This was after the attachment by the District Munsif. The plaintiffs sue the Village Munsif who is defendant 1 in this suit for damages, alleging that defendant 1 colluded with Sankariah and paid the balance of the sale proceeds to him. The District Munsif was of opinion that defendant 1 was not aware of the attachment by the civil Court and dismissed the suit. The Subordinate Judge has found that defendant 1 was aware of the attachment by the civil Court and that he fraudulently paid over the balance of the sale proceeds to Sankariah. An attempt was made in this Court to question the correctness of this finding. But I see no reason for not accepting the conclusion of the Subordinate Judge. The first additional issue in the case was whether defendant 1 is entitled to notice as required by S. 80, Civil P. C., before action was brought. The Subordinate Judge has come to the conclusion that as the Village Munsif acted fraudulently S. 80 has no application.

It is not disputed that the action of defendant 1 was within his powers as Village Munsif. The proclamation for the arrears, the sale of the property and the payment of the balance to the defaulter were all acts which as Village Munsif he was competent to do but on the finding of the lower appellate Court, there can be no doubt that in performing these duties, defendant 1 was acting with malice. The point for decision is whether in consequence of this want of bona fides defendant 1 has forfeited his right to notice before action. Although the case was very fully argued on both sides, as we thought that this was a matter in which Government was interested, we requested Mr. Ramesam, the Government Pleader, to assist us as amicus curiae and we are very much indebted to him for his assistance. S. 80 of the present Code which corresponds to S. 424 of the old Clvii P. C., provides for notice in suits in respect of any act purporting to be done by a public officer in his official capacity. The language on the face of it does not import that unless the act is bona fide, the public officer will not be entitled to notice. There may be cases in which the public officer does acts which are not within his sphere of duties. In regard to them, he is not entitled to notice. But, when the acts are intra vires the language of the Code does not suggest that there must be also bona fides, if the protection afforded by S. 80 is to be availed of. But there are decisions which have held that the section is not applicable to persons who act maliciously. There are apparently two conflicting views regarding the meaning to be attached to the words "purporting to act." One set of authorities inclines to the view that where a public servant does the act knowingly aud dishonestly for purposes which are not within the intent, although they may be within the letter of the powers he is clothed with, he cannot be said to be acting or purporting to act as a public servant. The other view puts a literal construction on the words. In that view any one whe performs his functions within the letter of the law, whatever may be his motives or ulterior intentions must be regarded as having acted or purported to have acted as a public servant.

Now I shall examine the authorities. The earliest case in which the principle bona fides was ennuciated was in *Shahebzadee Sha hunsha Begum* v. *Fergusson* (1). Cunningham, J., in that case says that a public officer is entitled to notice only in those cases in which some inadvertant act was committed by him in the discharge of his official duty. The learned Judge relies upon the English cases in support of this proposition. *Theobald* v. *Crichmore* (2), the first case relied on, was not a case in which any question of notice arose. The point considered by Lord Ellenborough, C. J. in that case was whether a constable forfeited his right to the shorter period of limitation because he acted illegally in the discharge of his duties. The learned Chief Justice points out referring to the statute he was consturing, that it was only intended to protect per-

1. (1881) 7 Cal 499.
2. (1818) 1 B & Ald 227.

sons acting illegally but with a bona fide intention of discharging their duty. The other case is *Attorney-General* v. *Hackney Local Board* (3). That was a case relating to injunction. The Vice-Chancellor pointed out that in cases of injunctions a notice was not necessary because the object of the suit will be frustrated if an injunction cannot at once be obtained against the contemplated misfeasance by the public authority. Then he says:

"The policy of the law is that if these public bodies, entrusted with powers for public purposes in the course of executing those powers shall happen to commit any inadvertence irregularity or wrong then before anybody has a right to require payment from them in respect of that wrong they shall have an opportunity of setting themselves right: they shall have the period of a month for the purpose of making amends, or for restoring if they have taken away anything and for paying for if they have done any damage."

It is on these two decisions that Cunningham J., bases his conclusion that where any inadvertence or bona fides has not been proved the public officer is not entitled to any notiee. This decision has been sought to be distinguished in *Jogendra Nath Roy Bahadur* v. *Price* (4), but I think the learned Judges in the latter case were not satisfied that the earlier decision was right. In *Gonoda Sundary Chaudhurani* v. *Nalini Ranjan Raha* (5), Woodroffe, J., says that the section can apply only to defendants who are sued in an admitted official capacity, but not as individual trespassers. This view will have the effect of placing defendants whether they act honestly or dishonestly, at the mercy of the plaintiff on the question of notice. I may also refer to *Raghubans Sahai* v. *Phool Kumari* (6), which was relied on by Mr. Chenchiah on behalf of the respondemt. Mookerjee, J., therein points out that no notice need have been given to the secretary of State as there was no relief claimed against him on the ground of fraud. Then he refers to *Shahabzadee Shahunshah Begum* v. *Fergusson* (1) and apparently agrees with the view taken by Cunningham, J., in that case. The observations were obiter. In *Peary Mohan Das* v. *Weston* (7), Fletcher, J., quotes *Shahebzadee Shahunshah Begum* v. *Fergusson* (1) and *Raghubans Sahai* v. *Phool Kumari* (6) and lays down a proposition that a public officer sued in respect of an act done in bad faith is not entitled to notice under S. 80. The matter was taken up in appeal in *Weston* v. *Peary Mohun Das* (8). The decision of Fletcher, J., was reversed; and I find nothing in that judgment on the question of notice.

In *Muhammad Saddiq Ahmad* v. *Panna Lal* (9) Banerji, J. apparently acted upon the principle stated in *Shahebzadee Shahunshah Begum* v. *Fergusson* (1). The same learned Judge in *Bakhtawar Mal* v. *Abdul Latif* (10) distinguishes his earlier decision. In *Collector of Bijnor* v. *Munuvar* (11) the acts charged against the Collector were certainly not done by him bone fide. Still the Full Bench in that case held that the Collector was entitled to notice when he wrongfully attached and sold property as agent to the Court of Wards. In *Bachicha Singh* v. *Jafar Beg* (12), where a Police Inspector was the defendant and the complaint against him was that at the instigation of certain persons he illegally arrested the plaintiff and sent him for trial, Tudball, J., held that notice under S. 424 was necessary. The learned Judge does not examine the earlier cases upon the question of notice. But it is clear that this judgment cannot be reconciled with the judgment of Banerji J., in *Muhammad Siddiq Ahmad* v. *Panna Lal* (9). As regards Bombay in *Ranchhod Varajbhai* v. *Municipality of Dakor* (13) Sargent, C. J., says that the object of the provision about notice would appear to be to give protection to Municipal bodies or other officers who in the bona fide discharge of public duties have committed iilegal acts by their conduct. In *Cecil Grey* v *Contonment Committee of Poona* (14) the learned Judges say that in all actions of tort the public officer is entitled to notice. In *Chhoganlal Kishoredas* v. *Collector of Kaira* (15) Chandravarkar, J., says that the true test of an action for the purpose of S. 424 is

"whether the wrong complained of as having been done by the public officer sued amounts,

3. (1875) 20 Eq 626.
4. (1894) 24 Cal 584.
5. (1909) 36 Cal 28=1 I C 514.
6. (1905) 32 Cal 1130.
7. (1912) 13 Cr L J 65=13 I C 721.
8. A I R 1914 Cal 396=23 I C 25—40 Cal 898.
9. (1904) 26 All 220.
10. (1907) 29 All 567.
11. (1909) 3 All 20.
12. A I R 1915 All 358=30 I C 173.
13. (1884) 8 Bom 421.
14. (1910) 34 Bom 583=7 I C 679

first, to a distinct act on his part, and secondly whether that act purported to have been done by him in his official capacity. Both these elements must combine to render necessary the giving of notice under S. 424 as a condition precedent to it."

I find that *Shahebzadee Shahunshah Begum* v. *Fergusson* (1) was quoted before the learned Judge, yet he does not say that a further condition of the applicability of S. 424 is that the act should have been done bona fide. There are no Madras reported cases. Mr. Ramesam has referred us to an unreported judgment in Second Appeal No. 1545 of 1901 which is certainly opposed to the view taken in *Shahebzadee Shahunshah Begum* v. *Fergusson* (1). I shall now refer to the English Law on this subject. Before 56 and 57 Vic. Ch. 61, known as the Public Authorities Protection Act of 1893, there were various enactments which contained provisions for giving notice to public officers before action was brought against them. Most of them were repealed and a comprehensive enactment was passed by Parliament. The first section enunciates a uniform rule of limitation by providing that:

"the action must be commenced within six months next after the act, neglect or default complained of or in case of a continuing injury or a damage within six months next after the ceasing thereof."

The same section provides further that if before action was brought there was a tender of amends, ordinarily costs shall not be awarded against the public servant; and that if in the opinion of the Court the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding the Court may award to the defendant costs against the plaintiff. S. 2 repealed all the sections in the various Acts which provided that notice of action must be given before action was brought. Therefore, after 1893 the only question in England would be whether the public servant was given sufficient opportunity to tender amends and also whether the action had been commenced within six months of the acts complained of. The failure to afford opportunity to make amends would not entail the dismissal of the suit as in the case of failure to give notice, but may result in the plaintiff being mulcted in costs even if he succeeds in the action. This was the state of the law when the new Civil Procedure Code was enacted in this country. If I may say so with respect, the precedent set by the Parliament in repealing provisions for notice and in enacting a uniform rule of limitation might well have been adopted in this country. But that has not been done. We have various local Acts in which a shorter period of limitation is prescribed in respect of acts done under colour of a statute, and we have also the general Procedure Code which makes it a condition precedent to an action against a public servant that he should have notice. Therefore, the English decisions subsequent to 1893 can afford no assistance in the construction of S. 80, Civil P. C. The earlier decisions are all quoted in Bullen and Leake's Precedents of Pleadings (Edn. 7) at p. 814. The established rule seems to be to the effect that the public officer is entitled to the statutory privilege of notice only

"where he had grounds for believing, and bona fide believed, in the existence of facts which, if existing, would have justified him in doing the acts complained of under the statute or in the execution of his office."

In *Downing* v. *Capel* (16) the learned Judges held that unless the wrong doer believed he was acting in pursuance of the statute he was not entitled to notice. In *Selmes* v. *Judge* (17) Blackburn, J., says:

"I agree that if a person knows that he has not under a statute authority to do a certain thing and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out the statute." Lush, J., said, "it is clear that they bona fide believed they were doing what the law allowed, and that is all that is needed to entitle them to the protection of the statute." Hannan, J., said: "The question is: did the defendants bona fide intend to make a rate as surveyors of highways? If they did, they were entitled to notice of action."

Although this judgment of the learned Judges does not express it in so many words, it seems clear from it that if a public servant acted with a malicious intent, he would not be entitled to any notice. [See also *Norris* v. *Smith* (18) and *Agnew* v. *Jobson* (19).] The result of the above discussion may be stated thus:—(a) In England notice of action after 1893 is immaterial. All that is required is that sufficient opportunity should be given to the public servant to

15. (1910) 35 Bom 42=7 I C 993.

16. (1867) 2 C P 461.
17. (1871) 6 Q B 724.
18. (1839) 10 Ad & Ell 188.
19. (1877) 13 Cox C C 625.

make amends. Failure in this behalf will not entail the dismissal of the suit, but will render the successful plaintiff liable to pay the costs of the public servant. (b) Before the Act of 1893 the public servant would not have been entitled to notice if he exceeded the powers given to him by the statute. (c) He would not have been entitled to notice unless he believed he was acting within the statute although he was not justified in so acting. (d) He would have been entitled to notice in all cases where he acted bona fide although he was mistaken in his view of the law which authorized him to do the act. (e) Lastly, any semblance of acting within the statute would be enough.

In India the preponderance of authority is in favour of holding that unless the public servant acted bona fide he is not entitled to notice. Most of the judgments which have taken this view where by single Judges. *Jogendra Nath Roy Bahadur* v. *Price* (4) holds that the question of bona fides is not a matter for consideration on the question of notice. In Bombay, Chandravarkar, J., at any rate, seems to take the same view. But it must be conceded that there is not a single case in which it has been held that notice is necessary where it was found that the defendant acted maliciously. There is no such case in the English Reports or in the Indian Law Reports. When the legislature re-enacted S. 424 of the old Code in the Act of 1908, it did not think it desirable to reroncile the cnotflicting views held on this question. On principle it seems to me that to hold that notice should be given only where bona fides have been established would be to leave it to the discretion of the plaintiff whether he should give notice or not. It may be suggested in answer to this, that if the allegation as to mala fides is not proved the suit might be dismissed. But it would certainly lead to an inquiry into the merits before the question of notice is considered. In this state of authorities and having regard to the importance of the question, I propose to refer the following question for the consideration of the Full Bench:

"Where a public officer in the discharge of his duties acts mala fide, whether he is not entitled to notice before action under S. 80 Act 5 of 1908.

Napier, J.—The question raised in this second appeal is whether the defendant is entitled to notice under S. 80, Civil P. C., no notice having been given. The suit was one against a Village Munsif, the cause of action alleged being that the defendant fraudulently attached certain casuarina wood and sold the same in a clandestine manner, although it had been already attached by the plaintiffs. The facts found by the appellate Court are that certain casuarina wood belonging to a third party, a judgment-debtor, had been attached in Original Suit No. 387 of 1911 by the plaintiffs, that the Village Munsif sold the wood for arrears of revenue due, that there was some irregularity in the sale, that there was no necessity to sell the whole quantity and that after selling the wood the Village Munsif handed over the balance of purchase money to the judgment-debtor, although he had knowledge of the attachment. He sums up his view of the case as follows: Defendant 1 attached excessively all the wood belonging to the judgment-debtor so as to get it sold for revenue dues and handed over the balance secretly to the debtor for the purpose of getting rid of the two Court attachments, all of which was in abuse of his powers as Village Munsif. S. 80 is as follows:

"No suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months after notice in writing has been delivered to him stating the cause of action and the relief which is claimed."

This section was 424 in the old Code, the only important alteration being the substitution of the words "any act" for "an act." The finding of the lower appellate Court is clear that the Munsif was acting in his official capacity when he sold the wood, and as the selling is alleged as part of the cause of action, it is to my mind immaterial whether the subsequent paying over of the balance was done in an official capacity or not. It is not disputed that revenue was due and the finding of the Court is clear that it is in the excessive attachment of all the wood, that part at all events of the abuse of his powers occurred. On the plain words of the section, it would seem clear that notice was required. But it is suggested that there is strong authority for the proposition that where the officer acts maliciously, no notice is required. In examining the cases it seems to me necessary to eliminate those in

which it was found that the officer was only pretending to act in an official capacity he having no right to do the act in connexion with which the complaint arose at all. There remain two classes; (1) where he has purported to act in is official capacity but has been guilty of malice in the existence in the exercise of his powers and (2) cases in which he has caused some wrong inadvertently in the discharge of his duty. In *Shahebzadee Shahunshah Begum* v. *Fergusson* (1) it was held by Cunningham, J., sitting on the Original Side, that the cases in which notice is necessary are invariably cases in which a public officer is sued for damages for some wrong inadvertently committed by him in the discharge of his duties. The case was however one in which the plaintiff claimed to be entitled to a share in a certain trust fund, of which the Official Trustee of Bengal was the trustee, and the decision was that no notice was necessary. The point did not arise for decision, and could not on the facts whether, if he had acted maliciously, he would have been entitled to notice. The obiter dictum in this case was expressly negatived in a decision of a Bench of the same Court reported as *Jogendra Nath Roy Bahadur* v. *Price* (4). There the plaintiff sued a District Magistrate for damages for illegal and malicious arrest under a warrant. The point was taken that as the act was said to be done maliciously S. 424, did not apply, and reliance was placed on the decision above referred to. The Court pointed ont that the question did not arise in that case and stated the law as follows :

> "The section does not seem to us to warrant the drawing of any distinction between acts of this kind done inadvertently or otherwise."

In a later case reported as *Ganoda Sundary Chaudhurani* v. *Nalini Raman Raha* (5), Woodroffe, J., sitting on the original side held that where a public officer took possession of property which he had no authority to seize and was sued for trespass, the suit is not against him in his official capacity, but as a private individual, and therefore no notice is necessary. This case although relied on by the appellant has, in my opinion no bearing on the question, it being of the class first referred to, namely, those where the officer is not discharging a duty. The next case was a decision of Fletcher, J., on the original side of the High Court, in which he held that a suit against a District Magistrate and two officers of police for conspiracy and malicious arrest and search was one in which the public officer was sued in respect of an act done in bad faith, and therefore no notice under S. 80, was required. He relied on the obiter dictum in *Shahebzadee Shahunshah Begum* v. *Fergusson* (1) and also on a decision reported as *Raghubans Sahai* v. *Phool Kumari* (6). The latter case has, in my opinion, no bearing on the question at all. It simply decides that where no relief is claimed against the Secretary of State no notice is required, as it would be impossible to serve a notice fulfilling the requirements of the section. He also relied on a case in *Muhammad Saddiq Ahmad* v. *Panna Lal* (9) to which I shall refer. The learned Judge does not appear to have been aware of the decision in *Jogendra Nath Roy Bahadur* v. *Price* (4), which was binding on him. His decision was subsequently reversed by the Court of appeal on the merits and so no ruling was given on this point. So far as the High Court of Calcutta is concerned, the view that no notice is required where the public officer acts maliciously has been directly negatived.

Four decisions of single Judges of the Allahabad High Court were referred to. The first is one of Bannerji, J., reported as *Muhammad Saddiq Ahmad* v. *Panna Lal* (9). In that case the Court found that the defendant, a police officer, did not purport to act in good faith in pursuance of the law, but took advantage of his position as a police officer to commit illegal and tortious acts maliciously and without cause, the action complained of being that he searched the house of the plaintiff, dragged him to the Thana, detained and kept him in confinement for several hours. The learned Judge, following the decision in *Shahebzadee Shahunshoh Begum* v. *Fergusson* (1) held that no notice was required. The next case is one decided by the same learned Judge and reported as *Bakhtawar Mal* v. *Abdul Latif* (10). That was a suit against a police Officer to recover certain books seized by him in a search, the seizure of which was denied. The learned Judge held that notice was necessary and distinguished his prior decision as being one in which the defendant had acted not

in his capacity as a public officer, but illegally and in bad faith. He based his decision on the ruling of the Calcutta Bench in *Jogendra Nath Roy Bahadur* v. *Price* (4). The third case is one reported as *Mumtaj Husain* v. *A. E. Lewis* (20), the suit being one for damages for assault, the allegation being that the plaintiff, a Sub Overseer, was assaulted by his superior officer in a fit of anger. The Judge held that the acts complained of were not acts purporting to be done by the defendant in his official capacity. The fourth case is one reported as *Bachicha Singh* v. *Jafar Beg* (12), and was a suit brought to recover damages against a Police Officer for malicious arrest. The learned Judge held that as the officer purported to act in his official capacity, notice was necessary. Putting aside the third of these cases as belonging to the first class, viz., cases where the act does not purport to have been done, we have two decisions of Banerji, J., which, with all respect, in my opinion, are not reconcilable; and another decision in which it was held that notice was required.

Turning to Bombay, there are several decisions in which the section was construed, namely, cases reported as *Bhau Balapa* v. *Nana* (21), *Sardarsingji* v. *Ganpatsingji* (22), *Rajmal Manickchand Marwadi* v. *Anmant Anyaba* (23), *Cecil Grey* v. *Contonment Committee of Poona* (14) and *Chhaganlal Kishoredas* v. *Collector of Kaira* (15). These however dealt with the questions whether notice is required in suits against public officers arising ex contractu and suits in which no tortious act was alleged but the public officer was a necessary party for the determination of the rights of the parties. The extreme view was taken in the last mentioned case, in which it was held that even though no tortious act was alleged against the Collector, still as he had been acting in his official capacity in declaring the plaintiff's mortgages illegal in exercise of the power conferred upon him by S. 3, Bombay Act. 5 of 1862, which declaration had enabled the mortgagors to take possession of the land, notice was necessary. The Court lays down that the true test of an action for the purpose of S. 424 is, whether the wrong complained of as having been done by the public officer sued amounts to a distinct act on his part and whether that act purported to have been done by him in his official capacity. This, it may be pointed out, is the test applied by the only decision of a Bench in Calcutta, viz., *Jogendra Nath Roy Bahadur* v. *Price* (4).

Turning to the Madras Cases, *Anantharaman* v. *Ramasami* (24) was a suit to recover money due on a promissory note from a minor under the Court of Wards. The Collector, being a party as guardian ad litem, pleaded that he was entitled to notice. The Court simply stated that no notice is required unless the suit is brought against a public officer in respect of an act done by him purporting to be in discharge of his duty, and that clearly this suit was not of that class. There is however one decision, Second Appeal No. 1545 of 1901, which directly decides the point. That was a suit against a Karnam for damages for malicious prosecution. The Karnam had sold certain trees by poblic auction which were purchased by the plaintiff and cut by him. The defendant reported to the tahsildar that the plaintiff had cut down more trees than he had purchased and put in a complaint against the plaintiff. The Magistrate tried the case and found that the defendant's story was false. The plaintiff brought this suit, and the issues framed were whether the defendant prosecuted the plaintiff maliciously and without reasonable and probable cause, and whether the suit was not maintainable without notice. It was found by the District Munsif that the defendant was actuated with vindictive spirit and personal motives and did not act bona fide. The District Judge returned no finding on issue 1, but found that the acts complained of were done in his official capacity, and that therefore notice was necessary. In second appeal it was urged that no notice was necessary and the Bench held that the decision of the District Judge was right.

There are in all the Courts a large number of decisions on other Statutes where the words "purporting to act" and "official capacity" are construed. I have not thought it necessary to deal with these because the finding of the lower appellate Court is clear that the act was one

20. (1910) 5 I C 467.
21. (1889) 13 Bom 343.
22. (1890) 14 Bom 395.
23. (1896) 20 Bom 697.
24. (1888) 11 Mad 317.

purported to be done, etc., and the only question raised before us was whether malicious action took the case out of the section. Our attention has been drawn to several English cases in which the words "act done in pursuance of the Act" have been construed for the purpose of ascertaining whether the suit had been brought within a certain time after the act committed. But for the same reasons that I have not thought it necessary to examine the Indian cases other than those on this particular section, I do not propose to deal with them.

The result is that there is a distinct ruling that notice is necessary even where the action is malicious in *Jogendra Nath Roy Bahadur* v. *Price* (4) and another one in our own Court, and there is no decision of a Bench the other way. This being so, I see no reason why we should not give the construction to the language of the section which it naturally bears. I am therefore of opinion that this suit is bad for want of notice. But as my learned brother has doubts in the matter, I agree to the reference to a Full Bench in the terms suggested by him,

Opinion

Wallis, C.J.—As observed by Seshagiri Aiyar, J., in his order of reference, the point for decision is whether in consequence of his want of bona fides defendant 1 forfeited his right to notice before suit under S. 80, Civil P. C. Both the referring Judges were of opinion that the act done by the defendant came within the words "any act purporting to be done by such public officer in his official capacity." These words were introduced into S. 424 of the Code of 1877 by Act 12 of 1879, and the corresponding S. 80 of the present Code was further amended by substituting "any" for "an" and "such public officer" for "him." According to the Concise Oxford Dictionary recently published at the Clarendon Press, to "purport" in this context means to "be intended to seem-" There can be no doubt that the act of the Village Munsif in handing over the surplus proceeds of the revenue sale to the defaulting owner was an act "intended to seem" to be done by him in his official capacity so as to render notice of suit necessary, if effect is to be given to the language of the section according to the natural meaning of the words used. The legislature may well have considered it desirable to require notice of suit to be given in all such cases, and I see no reason for putting a restrictive construction upon the section. It is significant that the words "purporting to be done" are wider than "done or intended to be done under the provisions of this Act" in S. 264 of the Public Health Act, which appear to be the most comprehensive words used in any of the corresponding statutory provisions in England, seeing that they also include "acts intended to seem to be done in his official capacity;" and it is quite probable that they were chosen on that very ground and for the purpose of making the English decisions inapplicable. As observed in *Booht* v. *Clive* (25) it is not very easy to reconcile all the observations that are to be found in the English cases, and they must be read with reference to the circumstances of each particular case. Further, the current of English decisions does not, in my opinion, support the view taken in *Shahebzadee Shahunshah Begum* v. *Fergusson* (1) that notice is only requisite in the case of inadvertent acts and cannot be required where there is a want of bona fides. On the contrary in *Kirby* v. *Simpson* (26) it was expressly laid down by Parke, B., and the Court of Exchequer that:

"a person may act maliciously and yet act in the execution of his office as a Justice of the Peace,"

and that in such a case notice must be given to him. Similarly in *Royal Aquarium* v. *Parkinson* (27) in the Court of of Appeal, where *Kirby* v. *Simpson* (26) was cited for the appellants, it was not even contended on the other side that the finding of malice against the defendant disentitled him to notice if he was otherwise entitled to it. In the third and most authoritative edition of Bullen and Leake's Precedents of Pleadings, 1868, the learned authors sum up the effect of the decisions on the various English Statutes at p. 759 as follows:

"A person is entitled to notice of action as acting under or in pursuance of a statute or in execution of his office, where he bona fide believes in the existence of facts which, if existing, would justify his acting in pursuance of the statute or in execution of his office."

In the present case there were facts justifying the village Munsif in acting in his official capacity, and there was no occasion for him to resort to the defence that he bona fide, though erroneously believed in the existence of such facts. In

25. (1851) 10 C B 827.
26. (1854) 10 Ex 358.
27. (1892) 1 Q B 431.

so far as *Shahebzadee Shahunshah Begum* v. *Fergusson* (1) and the cases which follow it lay down that the section only applies to to acts done inadvertently in the course of official duty, I am unable, with great respect, to follow them, as they appear to me to be inconsistent with the plain language of the section, unsupported by the English decisions on the more restricted provisions of the English Acts, and opposed to the later decision of the same Court in *Jogendra Nath Roy Bahadur* v. *Price* (4) and to the other decisions mentioned in the order of reference. My answer is that notice is necessary in the circumstances stated.

Sadasiva Aiyar, J.—The verb "purport" is defined in the Concise Oxford Dictionary as "convey." "state," "profess," "be intended to seem;" and the Latin root signifies "carry forth." The synonym "profess" has as two of its definitions "pretend" and "openly declare." I therefore think that the expression "any act purporting to be done by such public officer in his official capacity" found in S. 80, Civil P. C. means

"any act of a public officer which is intended by him to carry forth or convey to the minds of all persons who become aware of that act the impression that he did the act in his official capacity and not as an ordinary private individual and which has the effect of conveying such an impression by its seeming or appearance."

The usual way in which such an intention is conveyed to the minds of others is by the officer openly declaring at or about the time of the doing of that act that he was acting in his official capacity, and by the "act" being in its nature such as is done by a person in such an official position and not by a mere private individual. In most cases, his conduct and declarations at or about the time of the doing of the act and the nature of the act would be conclusive as to their conveying to the minds of those who become cognisant of the act that it was done in his official capacity. An act done by public officer would "purport" to be an act done in his official capacity, not only if it was properly and rightly done by him in such capacity and within his powers, but also if it has such a reasonable resemblance (though a false or pretended resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the acts and from the nature of his official powers and duties that it was done in his official capacity. But if the act done is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of such an officer could allow him to do on the facts as represented and declared by such officer, his mere allegation that he did the act in his official capacity would not suffice.

I shall with diffidence, attempt two illustrations: (1) A Sub-Registrar carries off by force his neighbour's plough-bullocks to plough the Sub-Registrar's own lands, making at the time the loudest declaration that he was acting as Sub-Registrar and was entitled as such officer to carry off his neighbour's plough-bullocks to cultivate his (the Sub-Registrar's) lands. As there is no resemblance whatever between the Sub-Registrar's duties and the ploughing of the Sub-Registrar's lands or the carrying off of his neighbour's cattle, I do not think that it could be said that his act "purported" to be done in his official capacity whatever he might have professed. [The line of demarcation may of course become thin in many cases. In *Muhammad Saddiq Ahmad* v. *Panna Lal* (9) Banerji, J., held that a Sub-Inspector of Police who took advantage of his position as a police officer to wrongfully search the plaintiff's house, to keep him for some hours in a thana and to publicly abuse him owing to his private enmity against the plaintiff could not be said to have purported to act in the discharge of his official duty and was therefore not entitled to notice under S. 424, of the old Civil P. C., corresponding to the present S. 80. I am doubtful about the soundness of this decision so far as it relates to the acts of house-search and confinement in the thana though, as regards the act of public abuse, the decision seems to be right as such public abuse is never the duty of a police officer.]

(2) My other illustration may be stated thus: *A*, a Police Inspector, was told by his friend *B* that *B's* stolen property was in *C's* house. *A*, to help his friend *B*, forges a magisterial warrant, goes to *C's* house, and makes a search in his official uniform declaring that he does so as a police officer on the strength of the magisterial warrant. As every ordinary onlooker will take it that *A* is making his search in his capacity as a police officer, I think that his act was one purporting to be done in his official capacity, and he is entitled to notice if sued for such an

act: see *Jogendra Nath Roy Bahadur* v. *Price* (4) (Macpherson and Ameer Ali, JJ.,) and *Jugul Kishore* v. *Jugal Kishore* (28), though this latter case turned upon S. 49, Allahabad Municipalities Act (which however uses the same expression "purporting to be done" as S. 80, Civil P. C.). The English decisions construing expressions like "done in pursuance of" or "done under the authority of" or "an act in execution of a public officer" or "done in execution or intended execution of his office" and so on are not only of very little use but only tend in my opinion to confuse the mind in the interpretation of the expression "purported to be done" used in S. 80, Civil P. C.

In the present case the appellant's act in paying over the balance of the revenue sale proceeds to the defaulter was an act falling within the ordinary duties of his office as Village Munsif and he clearly professed to do it in execution of that duty and it would be quite reasonable on the part of an ordinary third person who becomes aware of the Village Munsif's act in so returning the balance to the defaulter, to receive the impression that the act was done by the Village Munsif in his official capacity. I think the question of the good faith or the bad faith of the public officer, either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers, is irrelvant in the consideration of the question whether the officer is entitled to notice under S. 80, Civil P. C. I therefore agree with my Lord in the answer given to the reference.

Spencer, J.—I agree with the two judgments just pronouced and with the opinion of the Calcutta High Court in *Jogendra Nath Roy Bahadur* v. *Price* (4), that whether the police officer's act complained of is legal or illegal, deliberate or inadvertent, notice under S. 80, Civil P. C., is necessary before a suit is instituted. I think with due respect, that the decisions of the single Judges in *Shahebzadee Shahunshah Begum* v. *Fergusson* (1) and *Muhammad Saddiq Ahmad* v. *Panna Lal* (9) were wrong. We have been asked to construe the words "any act purporting to be done by such public officer in his official capacity" as signifying "any act done by such public officer in the honest belief that he was acting in his official capacity."

"Purporting" literally means "holding out," and neither "profess" nor "pretend" is an exact synonym for it. "Profess," as its derivation suggests, generally implies an open declaration in words. "Pretend," more often than not, is used where that which is held out is not what it really is. I think that the word "purporting" covers a profession by acts or by words or by appearance of what is true as well as of what is not true. A private individual who personated a police officer by wearing a police uniform and carrying a forged search warrant proceeded to search a house would be "purporting" to act as a police officer, though not being a police officer, he would not be entitled to notice under this section. A real police officer who acted similarly would equally be doing an act "purporting to be done in his official capacity," and would be entitled to notice, even though his motives were malicious. When it is the intention of Government to protect official and judicial acts done by public servants in good faith, the legislature makes use of the words "good faith" as may be seen from Ss. 76 to 79 and 99, I. P. C., S. 156, Cl. 4, Local Boards Act, and S. 1, Judicial Officers' Protection Act. But in S. 80, Civil P. C., there is no qualification that the act must be one done in good faith to entitle the officer concerned to notice. In practice it would not always be easy at the stage of issuing notice to determine whether good faith existed before that question had been decided at the trial. Government undertakes the defence of their servants in actions brought against them personally for official acts done by them in cases where those acts are deemed defensible. The issue of notice gives time to the public officer to make amends for his act or to report the case to Government and get himself defended at the public cost. So notice is made compulsory in all suits against public servants for acts done officially. A number of English cases have been cited in the arguments and Seshagiri Aiyar, J., has referred to some of them in his order of reference. I find that little assistance is to be derived from them, as they are all pronouncements as to the meaning of the language used, in particular English Statutes, which is not identical with the

28. (1911) 33 All 540=10 I C 1.

language of the Civil Procedure Code which we have to consider.

S.N./R.K. *Reference answered.*

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ABDUR RAHIM AND NAPIER, JJ.

Chidambaram Pillai and *others*—Accused—Petitioners.

v.

Muhamad Khan Sahib—Complainant—Opposite Party.

Criminal Revn. Case No. 548 of 1917, and Criminal Revn. Petn. No. 429 of 1917, Decided on 24th January 1918, against judgment of Sub-divl. Magistrate, Palghat, in Criminal Appeal No. 51 of 1917.

(a) Penal Code (1860), S. 430—Taking water without right and cousing deprivation full supply to person entitled amounts to offence under S. 430.

An offence under S. 430 is committed when a person without any sort of right takes water to which another is entitled, whereby the latter is deprived of the full supply that he has a right to claim. Such taking, in the absence of a bona fide claim of right, evidences an intention to cause wrongful loss. [P 73 C 1]

(b) Penal Code (1860), S. 430—Deprivation or wrongful loss to rightful owner with whatever intent is offence.

Neither the prevention of the water from running waste, nor the storing of it with the intention of selling it to other landowners makes the act of taking any the less an offence when deprivation is caused to the person legally entitled to the water. [P 73 C 2]

(c) Penal Code (1860), S. 430—Cutting of bund causing loss of water amounts to offence under S. 430.

The cutting of a bund erected on a channel, whereby a person is wrongfully deprived of the use of water constitutes an offence under S. 430 [P 73 C 2]

Swaminadhan and *K. S. Vydyanadha Aiyar*—for Petitioners.

P. S Narayanaswami Aiyar—for Opposite Party.

C. NarasimhaChariar—for the Crown.

Napier, J.—The accused were convicted by the Stationary 2nd Class Magistrate of Palghat under S. 430, I. P. C., and this conviction has been upheld on appeal. The facts found are that they entered on the lands of the complainant, cut three bunds which had been erected in a channel that runs through the complainant's land, with the result that the water in that channel ran down another channel off the complainant's land and was utilized by defendant 1 for sale to aiyrots holding lands lower down. Dr. Swaminadhan applies to us to set aside the conviction and sentence on various grounds, the two chief grounds being that where water is in fact utilized for agricultural purposes and not allowed to run to waste, no offence under S. 430, I. P. C., is committed, the other, that even if it would have been an offence, if the complainant had intended to utilize the water for his own fields, it is no offence if the intention was to sell the use of it to the other persons. The first ground is one of importance, for it amounts to this: that the section is only intended to penalize the waste of water and not the deprivation of a person having the right to use it. The language of the section is as follows:

"Whoever commits mischief by doing any act which cause, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings, or for animals which are property or for cleanliness or for carrying on manufacture."

The section begins by saying "whoever commits mischief" and it is therefore necessary to ascertain from S. 425, what "mischief" is S. 425, I. P. C. is as follows:

"Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits 'mischief.'"

Now there cannot be any doubt that the removal of the bund is such a change in the situation of property as destroys its utility in a case where that bund has been erected for the purpose of holding up water, and that a person who so removes a bund must know that he is likely to cause wrongful loss to any person who is entitled to the use of that water. It has been found by a civil Court that the complainant in this case is entitled to the use of the whole of the water in the channel in question, and that finding has been accepted by both the Magistrates. Prima facie therefore on the facts an offence of mischief is made out, but it is argued that, there being no waste, there is no mischief under S. 430. I see no reason why the legislature should be supposed to have wished to import this limitation. Further, the language of the section is against it.

The water referred to is not only for irrigation but is for other useful purposes, and I think that these clearly have reference to the actual utilization of the particular water by particular persons and animals who are deprived of it by the mischief complained of. Such supply

for drinking and for cleanliness is a common system in the Presidency. Again, with regard to "any manufacture" it is impossible to argue that it means that a Court should have to find that no part of the water was used for any manufactory anywhere. Obviously it must mean the particular manufactory which was deprived of the water. Turning to decisions, Dr. Swaminadhan was able to adduce one case which he claimed to be in support of his contention, Criminal Revision Case No. 134 of 1881, reported as *Vattu Karan, In re* (1). The passage in the judgment relied on is to this effect:

"The act of the accused in diverting water to their own fields did not diminish or tend to diminish the usefulness of the water. It merely diverted it to the use of the defendants' fields instead of to that of the complainant.'

Taken apart from the facts of the case, this language seems to lend some support to the learned counsel's contention. But the facts in that case were the channel was a Government channel and was not shown to be appropriated to the use of the complainant to the exclusion of the defendants through whose fields it passed. There was no evidence that any loss had been sustained by the complainant and as the sole right of the complainant was to have his accustomed supply from Government, it followed that the act of the accused in taking water, whether they had a right to do so against Government or not, did not cause wrongful loss to the complainant, and as it was utilized by the accused did not cause wrongful loss to public. This case is therefore no authority for the proposition contended for. The leading case in our Court on S. 430 is *Ramakrishna Chetti* v. *Palaniandi Kudambar* (2). That was a decision of the Full Court, which laid down as follows:

"It is not part of the definition of the offence that the act of the accused should be in common language a mere wanton act of waste. Under S. 430, I. P. C., the physical requisites of the act are the doing of the act which causes . . . or is likely to cause a diminution of supply. He also fulfils the mental requisites when he does this with intent to cause wrongful loss, and the intention is properly held to be such when he takes it without any sort of right.'

This case clearly establishes two propositions, that the taking of water, which can only mean taking without any sort of right, is within the section and that such taking evidences the intention to cause wrongful loss. This decision was applied in a case in *Chengama Naidu* v. *Emperor* (3), where the Court held that the petitioners in taking water in violation of the order as to turns issued by the Tahsildar, so as to cause a diminution of supply to other raiyats, were guilty of an offence under S. 430, I. P. C. The same view was taken by the High Court of Calcutta in *Emperor* v. *Sheik Arif* (4). The accused in that case cut the embankment of a water-channel in order to irrigate their own fields and thereby deprived the complainant, who owned a factory, of the use of water. One of the learned Judges held that an offence under S. 430, I. P. C., had clearly been committed; the other learned Judges had some doubts whether, in view of the claim of right, the matter should have been disposed of in the criminal Court. He did not however dissent from the conviction under S. 430, I. P. C. Neither of the learned Judges had any doubt that, in the absence of a bona fide claim of right, the facts would constitute an offence under S. 430, I. P. C. The learned counsel's contention therefore fails on this point. The next point urged is that the water was not being supplied for agricultural purposes. I asked the learned counsel if he would contend that water taken down a channel and stored in a tank was not supplied for agricultural purposes and he was not prepared to go to this length. The evidence of the complainant shews that he put up the bunds to store water for irrigating his own lands and for selling it to other landowners. This point therefore fails on the facts. But, even if the water had been stored for sale to the other landowners, I fail to see how it was not being supplied for agricultural purposes if those landowners used it for such purposes. The petition fails on the point of law, but I think that the sentances are too severe. The fines will be reduced to one of Rs. 50 on accused 1, Rs. 100 on accused 2 and Rs. 5 each on accused 3, 4 and 5, who are coolies.

Abdur Rahim, J.—I agree.

S.N./R.K. *Conviction affirmed.*

1. 1 Weir 507.
2. (1876) 1 Mad 262 (F.B).
3. (1911) 12 I C 527.
4. (1908) 35 Cal 437.

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SADASIVA AIYAR AND BAKEWELL, JJ.

Chellam Chetti and *others*—Defendants—Appellants.

v.

Seeni Chetti and *others*—Plaintiffs—Respondents.

Appeal No. 129 of 1917, Decided on 23rd October 1917, against order of Dist. Judge, Ramnad, in Appeal Suit No. 1041 of 1916.

(a) Civil P.C. (1908), O. 21, R 16—Assignment of decree benami—Execution by benamidar is valid—Case is governed by Trusts Act (2 of 1882), Ss. 82, 85.

A person who gets an assignment of a decree benami for another is entitled to execute the decree in his own name, provided he is not the benamidar of the judgment-debtor himself: 9 *I. C.* 40 *Dis from*; 35 *Mad.* 659, *Dist.* [P 75 C 1]

Per *Sadasiva Aiyar, J.*—The provisions of Ss. 82 and 95, Trusts Act, should be applied to such cases. [P 75 C 1]

(b) Benamidar—Duty of, as against strangers indicated.

The doctrine that the benamidar has no title must be confined to cases where the benamidar sets up a title as against the real owner, and not so as to allow a third person to defeat or delay or evade performing his own undoubted obligations to the real owner of a right or to the benamidar who is suing to enforce the right. [P 75 C 2]

K. V. Krishnaswami Aiyar—for Appellants.

T. Rangaramanuja Chariar—for Respondents.

Sadasiva Aiyar, J.—Defendants 2 to 4 are the appellants before us. They were judgment-debtors under a decree passed in favour of Aiyyavu Chetty. Aiyyavu Chetty transferred the decree to one Choka Pathan. Choka Pathan again in his turn assigned it to Seeni Chetty. Seeni Chetty applied for execution of the decree. The appellants (judgment-debtors) contended that the second assignee, Seeni Chetty, trying to execute the decree, was only a benamidar of one Chidambaram Chetty and that therefore the Court ought not to allow a mere benamidar to execute the decree and that it was Chidambaram Chetty who was entitled to apply for execution. The appellants rely on the decision of Krishnaswami Aiyar, J., sitting as a single Judge, *In re Muthukumara Asari* (1). That learned Judge remarks:

"The law is now well settled that a benamidar is not entitled to sue; and I think it is equally clear that he cannot apply to execute a decree on the basis of an assignment in respect of which he is a benamidar for another person. I dismiss the petition."

1. (1911) 9 I C 40.

The authorities however are not quoted or discussed in the judgment. The appellants' learned vakil, Mr. K. V. Krishnaswami Aiyar, also relied on the observations of Sundara Aiyar, J., in *Ponnusawmi Nadar* v. *Letchmanan Chettiar* (2) as follows:

"I do not think that, in strictness, it is necessary for the appellant for rebutting the plaintiff's case to go further than to allege that the plaintiff is not the real transferee. If he goes further to say that he is himself the real transferee, it is only to induce the Court to believe his assertion that the transferee is not the applicant."

In that case however the direct question for decision was whether the judgment-debtor could prove that the person who obtained the transfer of the decree was really the judgment-debtor's own benamidar and hence whether he could not execute it. Sundara Aiyar, J., based his decision therefore on another ground also, namely that an assignment to the judgment-debtor which operates by merger through his benamidar as a satisfaction of the decree, may be relied on to prove that the assignee obtained no valid title to an existing decree under his assignment. Under the proviso to O. 21, R. 16, where a decree for the payment of money against two or more persons has been transferred to one of them, "it shall not be executed against the others." That is clearly because the legislature decided that the transfer of a decree for the payment of money to even one of several joint judgment-debtors should operate as an extinguishment of the executable character of the decree, and any rights as between the joint judgment-debtors should be settled in a separate suit and not in execution proceedings in the same suit. In *Bayyana Ramayya* v. *Nidamarthi Krishnamurthi* (3), while not agreeing with Sundara Aiyar, J., in all his observations in the decision above referred to, Moore, J., and myself held that:

"where the alleged transferee of a decree is found to be a benamidar of the judgment-debtor, the Court was bound by the second proviso to O. 21, R. 16, to refuse to allow the decree to be executed, in favour of the alleged transferee."

We did not decide the question in that case whether, where a transferee was the benamidar not of a judgment-debtor but of a third person, he was or was not entitled to execute the decree.

2. (1912) 35 Mad 659=12 I C 657.
3. (1916) 40 Mad 296=32 IC 952.

As regards the benamidar's right to bring suits in his own name, I do not think (with the greatest respect) that the observation of Krishnaswami Aiyar, J., in *In re Muthukumara Asari* (1) that a benamidar could never bring a suit for any relief can be supported on the authorities. That, if a benamidar did bring a suit even in ejectment and therein failed, the real owner would be bound by the adverse decision passed against his benamidar has been decided in *Shangara* v. *Krishnan* (4). In *Sethurayar* v. *Shanmugam Pillai* (5), decided by Subramania Aiyar and Davies, JJ., the provisions of Ss. 91 and 95, Trusts Act, are referred to and it was laid down that a benamidar is in the position of a trustee for the real owner. In this case Ss. 82 and 95, Trusts Act, would seem to apply. It goes without saying that a trustee is entitled to realize the moneys due to the beneficiary and as a decree is property which would become useless if the moneys due under the decree are not recovered within the prescribed statutory period, one who owns a decree as trustee is bound to take all neceesary steps for the realization of the decree amount in the interest of the beneficiary. See Ss. 12, 13 and 15, Trusts Act. The Allahabad High Court has always held that even a suit based on title to immovable property could be maintained by a benamidar and so far as title to execute a decree is concerned the recent case of *Kamta Prasad* v. *Indomati* (6) is direct authorty for the proposition that a benamidar could so execute : see also *Bachcha* v. *Gajadhar Lal* (7) and *Parmeshwar Dat* v. *Anardhan Dat* (8). I do not see why the real owner should not be allowed to sue in the name of the benamidar or to execute a decree in the name of the benamidar, at least in cases where no title to immovable property is in question, the very object of many honest benami transactions being to save the real owner of rights from the trouble of dealing with the outside world directly in respect of the rights acquired in the name of the benamidar.

I am myself of opinion, with the greatest respect to the decisions to the contrary, that the observations of their Lordships of the Privy Council in some cases that the benamldar has no title, must be confined to cases where the benamidar sets up a title as against the real owner and not so as to allow a third person to delay or evade performing his own undoubted obligations to the real owner of a right or to the benamidar who is suing to enforce the right. This principle, in my opinion, applies even to cases where the suit is in ejectment by the benamidar for possession of immovable property. However, as I said, it is not necessary to go so far for the purpose of deciding the case before us. In *Atrabanissa Bibi* v. *Safatullah* (9) Mookerjee, J., after quoting most of the important cases, says

"these cases indicate that a distinction has been recognized in this Court," (*that is, the Calcutta High Court*) "between suits for land and suits for money claim, in the determination of the question of the competence of a benamidar to maintain a suit: in the former class of cases, the right has been denied; in the latter class of cases, the right has been sustained."

In *Kuthaperumal Rajali* v. *Secy. of State* (10), decided by Subramania Aiyar and Wallis, JJ., it was held that all benamidars are not trustees entitled to sue and that it depends upon the facts in each case whether the benamidar was intended to be a trustee clothed with the legal ownership or merely intended to be an alias for the real owner. The learned Judges say :

"The case of *Bojjamma* v. *Venkataramayya* (11) was a suit on a negotiable instrument and the grounds on which the decision allowing the benamidar to sue should be supported have recently been considered in this Court. The decision in Second Appeal No. 186 of 1903, in which a benamidar mortgagee was allowed to sue for the recovery of the mortgage money and sale in default may, in our opinion, be supported on the ground that he was entitled to sue on the contract as agent of an undisclosed principal, even if the facts were not such as to entitle him to sue as trustee."

Then the learned Judges refer to *Nandkishore Lal* v. *Ahmad Ata* (12), where a benamidar was held entitled to sue for land in his own name if the legal estate be vested in him and he is therefore a trustee for the real owner. Further on, the learned Judges say that, in cases where the land is purchased benami in the name of an infant son or in the name of a mere

4. (1892) 15 Mad 267.
5. (1898) 21 Mad 353.
6. A I R 1915 All 264=29 I C 593=37 All 414.
7. (1905) 28 All 44.
8. A I R 1915 All 10=26 I C 507=37 All 113.
9. (1915) 43 Cal 504=31 I C 189.
10. (1907) 30 Mad 247.
11. (1898) 21 Mad 30.
12. (1896) 18 All 69.

peon of the beneficiary, the benamidar may not be considered a trustee. I think that in the present case it is practically admitted that the real beneficiary owner of the decree purposely obtained the decree in the name of the appellant in order to enable the latter to execute the decree for the benefit of, and as trustee for, the former. The benamidar in this case is therefore clearly a trustee entitled to execute the decree according to the reasoning in the decision of *Kuthaperumal Rajali* v. *Secy. of State* (10). In *Venkatchala Asari* v. *Subramania Chetty* (13) it was held that a benamindar against whom an order was passed under S. 335, Civil P. C , was entitled to bring a suit in his own name to set aside that order. In the result I would confirm the order of the lower Court and dismiss the appeal with costs.

Bakewell, J.—I agree with the order proposed by my learned brother and am of opinion that the question raised by the respondent is concluded by the terms of O. 21, R 16. Under that rule where a decree is transferred by assignment in writing, it may be executed in the same manner and subject to the same conditions as if the application for execution were made by the decree-holder, and under the first proviso of the rule the only matter into which the Court can inquire is any objection by the transferor or the debtor to the execution of the assignment. The debtor can obtain his discharge by payment of the amount of the decree into Court and is not concerned with the relations between the transferor and transferee of the decree, and I think that the legislature has advisedly limited the scope of the inquiry to formal proof of the right of the latter to apply in execution. As my learned brother has pointed out the Court is not precluded from inquiring whether the decree has in fact been satisfied and whether one of several debtors is attempting by means of a trick and under an alias to evade the second proviso to the rule.

S.N./R K. *Appeal dismissed.*

13. (1910) 8 I C 264.

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AYLING AND PHILLIPS, JJ.

Venkateswara Aiyar and *others*—Defendants—Appellants.

v.

A. P. Ri—Plaintiff—Respondent.

Second Appeal No. 1859 of 1915, Decided on 14th November 1917, against decree of Dist. Judge, Tinnevelly, in Appeal Suit No. 331 of 1913.

(a) Limitation Act (9 of 1908), Art. 11—Suit by decree-holder under O. 21, R. 63, Civil P. C., is governed by Art. 11.

A suit by the holder of a decree to declare an alienation as fraudulent, based on an order passed under O. 21, R. 63, Civil P. C., is governed by Art. 11, Lim. Act, and should be filed within one year from the date of the order. [P 77 C 2]

(b) Civil P. C (5 of 1908), O. 21, R. 63—R. 63 gives right of suit.

Order 21, R. 63, gives a right of suit whether the order in the claim petition is correct or not: 43 *I. C.* 651, *Expl.* and *Dist.* [P 77 C 2]

(c) Fraud—Limitation—Even if Art. 120, Lim. Act, applies cause of action accrues when decree-holder finds himself defrauded by fraudulent transfer—Lim. Act, Art. 120, *Obiter*.

Obiter.—Even if Art. 120 be held to apply, the cause of action for a suit based on fraud does not arise on the date of the alienation, but on the date when the creditor seeking to set aside the alienation knows that he has been defrauded, defeated or delayed. [P 77 C 2]

(d) Transfer of Property Act (4 of 1882), S. 53—S. 53 gives an option to avoid transfer—Suit can be brought after exercise of that option.

Section 53 does not expressly give a right to sue, but gives to a creditor an option to avoid certain transactions, and the right to sue does not accrue until he exercises that option. [P 77 C 2]

A. Krishnasami Aiyar and *S. Ramasami Aiyar*—for Appellants.

C. S. Venkatachariar—for Respondent.

Phillips, J. — Plaintiff obtained a decree against defendant 1 and attached his property, but the attachment was released on the application of defendant 1's alienees, defendant 1 having alienated the property to defendant 2 just over 6 years before the present suit was filed. The suit now is for a declaration that the alienations are not binding on plaintiff, and that he can proceed against the property in execution of the decree against defendant 1. Defendants 3, 4 and 9, alienees from defendant 2, are appellants here. The first contention raised is that plaintiff cannot bring this suit on his own behalf, but must sue on behalf of all the creditors for a declaration that the alienation is invalid as against all of them. This plea was not

taken in either of the lower Courts and is one which might have been met, if necessary, in the first Court by an amendment of the plaint. Whether the plea can be supported is doubtful [*Smith* v. *Hurst* (1) and *Blenkinsopp* v. *Blenkinsopp* (2)], but without expressing an opinion on it, we cannot allow it to be taken at this late stage. Another plea that appellants are entitled to a charge on the property must also be disallowed, because it has not been taken before, and its decision would involve a fresh consideration of the evidence. The chief ground of appeal is on the question of limitation, the contention being that the suit is governed by Art. 120 and that more than six years have elapsed since the alienation by defendants 1 and 2. The subsequent alienations to appellants need not be considered, as there is no finding that the alienation to defendant 2 was merely a sham transaction, the finding being only that it was effected in fraud of creditors.

It has been held by this Court that a suit for a declaration that an alienation is not binding on a creditor under S. 53, T. P. Act, is governed by Art. 120 [*Authikesavaloo Naicker* v. *Shah Abdulla* (3) and *Pachamuthu* v. *Chinnapan* (4)], but it is contended for respondent that the present suit is one brought under O. 21, R. 63, and that consequently Art. 11 is applicable. The plaint gives as the date of the cause of action the date of the order setting aside plaintiff's attachment and the suit is evidently intended to be one under O. 21, R. 63. Objection is however taken that the order setting aside the attachment was correct in view of a recent decision of a Bench of three Judges of this Court in Second Appeal No 691 of 1916 [*Subramania Ayyar* v. *Muthia Chettiar* (5)] that an alienation in fraud of creditors is valid until set aside and cannot be pleaded as a defence by a creditor in a suit by an alienee and that a suit under O. 21, R. 63, is really in the nature of an appeal [vide *Phul Kumari* v. *Ghanshyam Misra* (6) and *Krishnappa Chetty* v. *Abdul Khader Saheb* (7)] and that consequently the present suit cannot be treated as one under O. 21, R. 63, as it goes beyond the scope of the order in the claim petition, and asks for a relief which would be barred by limitation if the suit for that relief were brought in the ordinary course. The former case, a decision of the Privy Council upon which for this purpose the later case is based, was considered by a Full Bench of this Court in *Kovouri Basivireddi* v. *Nidumoori Ramayya* (8) and it was held that a suit in respect of moveable property, a claim to which had been dismissed in execution proceedings, was governed by Art. 11 and not by Art. 29 and that, although one of the reliefs sought would be barred under Art. 29, it could be granted as the whole suit was governed by Art. 11 which applies to suits under O. 21, R. 63. In the present suit plaintiff seeks to establish his right to proceed against the property of defendant 1, and incidentally to have it declared that the alienation to defendant 2 is not binding on him. This right was negatived in the order on the claim petition, and consequently, following *Kovouri Basivireddi* v. *Nidumoori Ramayya* (8), I would hold that the present suit is one under O 21, R. 63, being, as it is, one to establish the right which plaintiff claims to the property in dispute and is within the time allowed by Art. 11.

The fact that the decision in Second Appeal No. 691 of 1916 [*Subramania Ayyar* v. *Muthia Chettiar* (5)] shows that the order in the claim petition, if worded differently, was correct, cannot affect the question of limitation, for O. 21, R. 63, gives a right to sue whether the order in the claim petition is correct or not. In this view it is not necessary to decide whether, if Art. 120 were applicable, the suit would be barred by limitation, but I am inclined to hold that the cause of action does not arise on the date of alienation, but on the date when the creditor seeking to set aside the alienation knows that he has been defrauded, defeated or delayed. S. 53, T. P. Act, does not expressly give a right to sue, but gives to a creditor an option to avoid certain transactions, and it is in the exercise of his option that he obtains

1. (1852) 10 Hare 30.
2. (1852) De G. M. & G. 495.
3. (1915) 29 I C 62.
4. (1887) 10 Mad 213.
5. (1918) 43 I C 651.
6. (1908) 35 Cal 202=35 I A 22 (P. C.).
7. A I R 1915 Mad 495=38 Mad 53 11.
8. (1916) 40 Mad 733=36 I C 445.

a right to sue. It is not until he obtains the option that the right to sue accrues, and I do not see how it can be said that he has a right of option at a time when he is unaware of the circumstances which give him such right. In all cases of fraud, misconduct, etc., the period of limitation for a suit begins to run from the time when the fraud, misconduct, etc, becomes known (vide Arts. 90, 91, 95, 96, etc.); but no such provision could be inserted in Art. 120, for it is a residuary article and thus applicable to every variety of suit not otherwise provided for and is not confined to suits based on fraud. If such a suit coming within Art. 120 is based on fraud, the time when the right to sue accrues must, I think, be determined in consonance with the principle governing the other specific suits based on fraud, and that is that the time, when the fraud becomes known, becomes the starting point for limitation. In this case we have no evidence as to when the plaintiff became aware of the fraud, for the question of limitation was not raised in the lower Courts, but it is incumbent on defendants to show that plaintiff had clear and definite knowledge of the fraud at a time which is too remote for a suit to be brought, if they wish to make limitation operative : *Rahimbhoy Habibbhoy* v. *Charles Agnew Turner* (9) and *Sukh Lal* v. *Madhuri Prasad* (10). In this view also plaintiff's suit is within time and the second appeal must therefore be dismissed with costs.

Ayling, J.—I agree. I must confess to considerable doubt on the question of limitation; and I am not prepared to dissent from the conclusion of my learned brother that Art. 11, Sch. 1, Lim. Act, applies and that the suit is within time. The second appeal must therefare be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

9. (1893) 17 Bom 341=20 I A 1 (P C).
10. (1905) 27 All 540.

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* A. I. R. 1918 Madras 78

AYLING AND SESHAGIRI AIYAR, JJ.

P. Dasarthy Naidu—Defendant— Appellant.

v.

Palala Kumaramull Raja and *others* —Plaintiffs—Respondents.

Civil Appeal No. 283 of 1916, Decided on 22nd January 1918.

(a) Civil P. C. (5 of 1908), S. 11 —Suit dismissed on statement—No decision—S. 11 does not apply.

Where a suit is dismissed on the pleadings without any decision being rendered on the merits there is no bar of res judicata. [P 79 C 2]

(b) Civil P. C. (1908), O. 23, R. 1— Leave granted with costs— Payment not condition precedent—Non payment does not bar fresh suit.

Where leave to withdraw a suit is granted on payment by the plaintiff of defendant's costs the payment of costs is not a condition precedent to the institution of a fresh suit and non-payment will not disable the plaintiff from filing a fresh suit. [P 80 C 1]

*** (c) Civil P. C. (1908), O. 2, R. 2—Cause of action must be same—Suit on non-existent or false cause of action does not bar suit on true cause of action.**

The essential thing to be borne in mind in applying O. 2, R. 2, is that the cause of action in the subsequent suit should be the same as the cause of action in the previous suit and not that the cause of action in the subsequent suit should have been made the subject of litigation in the former suit. [P 80 C 2]

Where a suit is brought upon either a non-existent cause of action or upon a false cause of action it will not bar the institution of a suit upon the true cause of action because there is no identity of cause of action between the two suits [P 81 C 1]

*** (d) Civil P. C. (1908), O. 2, R. 2 —"Portion of his claim" implies that plaintiff must have knowledge of his right.**

A right which a litigant possesses without knowing or ever having known that he possesses it cannot be regarded as a "portion of his claim" within the meaning of R. 2, O. 2. [P 81 C 1]

(e) Civil P. C. (1908), S. 11, O. 2, R. 2 and O. 23, R. 1— Mortgagor appointing mortgagee his agent to collect rents and authorizing appropriation of it towards mortgage—Mortgagor suing mortgagee for cancellation of power and for accounts—Suit dismissed on ground that redemption suit should have been brought — Second suit on same cause of action alleging satisfaction of mortgagee dismissed on same ground— In appeal suit allowed to be withdrawn on costs—Redemption suit without paying costs held not barred under S. 11 or O. 2 R. 2—Paymemt of costs not being condition precedent suit was tenable.

Plaintiff executed a mortgage to one *R* on 12th July 1892. On the July 1898 he executed a power of attorney to *R* empowering R to collect rents from plaintiff's tenants and appropriate the net income towards the mortgage deed. In 1910 plaintfff sued *R* for cancellation of the power and for accounts. That suit was dismissed on the ground that plaintiff should have sued on the mortgage. Afterwards he filed a suit on the original side of the High Court for cancellation of the power and for accounts alleging that the mortgage had become discharged. That suit was dismissed on the ground that it was barred as res judicata. On appeal the appellate Court permitted the plaintiff to withdraw the suit with liberty to file a fresh suit on pay-

ment of defendantts cos's. The plaintiff without paying the costs of that suit brought the present suit for redemption of the mortgage:

Held: (1) that the suit wrs not barred as res judicata inasmuch as in neither of the previous suits was there any decision on the merits: (2) that the non-payment of costs in the second of the two prior suits was not a condition precedent to the order granting leave and did not bar the institution of the present suit; (3) that the suit was not barred under O. 2, R. 2.

[P 80 C 1]

T Rangachariar —for Appellant.

T. R. Ramchandra Aiyar—for Respondents.

Judgment.—This is a suit for redemption. The two main defences are that the suit is barred by O. 2, R. 2, and also by S. 11, Civil P. C. The Subordinate Judge overruled these objections and passed a preliminary decree for taking accounts. The defendant has appealed. In order to understand the contentions in appeal it is necessary to set out the history of the case. The property in suit belonged to the plaintiff 1. He executed a deed of mortgage in favour of one P. Rajaratnam Naidu on 12th July 1892. On 8th July 1898 he executed a general power-of-attorney to the same individual to facilitate the collection of rents from the tenants. One of the conditions of the power-of-attorney was that the agent should appropriate the net income towards the mortgage deed and should also pay to the mortgagor a certain fixed monthly allowance. The relation between the mortgagor and the mortgagee became strained in or about the year 1910. In that year Original Suit No. 36 of 1910 on the file of the District Court of Chingleput was instituted against Rajaratnam Naidu by the plaintiff for the cancellation of the power of attorney executed in 1898 and for accounts. The defendant pleaded in limine to that suit that as the power of attorney was part of the mortgage transaction the plaintiff should sue on the mortgage and not on the power-of-attorney. The then District Judge upheld this objection and dismissed the suit. The second suit was filed in the original side of the High Court, viz. Original Suit No. 232 of 1914, in which it was claimed that the mortgage has become discharged, that the power-of-attorney should be cancelled and that the defendant should render an account. At the time of this suit Rajaratnam Naidu had died and the present defendant who is his legal representative was impleaded as defendant. Kumaraswami Sastri, J., who heard the original suit was of opinion that it was barred by res judicata and dismissed it. An appeal was preferred against that decree. At the hearing of the appeal the plaintiff applied for permission to withdraw the suit with liberty to institute a fresh suit. This permission was granted and the present suit was instituted in the District Court of Chingleput for redemption based upon the mortgage of 1892.

The contention that the suit is barred by res judicata may be shortly disposed of. It is not denied that at no time was there any decision on the merits The suits on both the occasions were dismissed on the pleadings. It is therefore clear that the present suit is not barred by S. 11, Civil P. C. Very recently the Judicial Committee pointed out in *Abdullah Ashgar Ali Khan* v. *Ganesh Dass* (1) that where the matter has not been heard and finally decided there can be no bar of res judicata. One other objection may also be shortly dealt with. It was contended by Mr. T. Rangachariar that the order of the appellate Court permitting the withdrawal of the suit with liberty to sue again has been contravened by the plaintiff and that consequently the present suit is unsustainable. The order is in these terms:

"Leave to withdraw with liberty to bring a fresh suit on payment of defendant's costs here and below within two months in view of the decision in Original Side Appeal No. 51 of 1914.

In order to understand the import of this it must be stated that in Original Side Appeal No. 51 of 1914 it was held by a Bench of this Court that suits for redemption should be instituted in the Court within whose jurisdiction the mortgaged property is situated. Therefore what the learned Judges meant in giving leave to withdraw was that as the suit ought to be one for redemption and as the High Court can have no jurisdiction to entertain such a suit plaintiff will be given liberty to withdraw the suit and to bring a proper suit in a proper forum. In effect the order amounted to saying that the High Court had no jurisdiction to hear the suit which ought to be filed under the circumstances disclosed in District Court of Chingleput and that consequently the plaintiff should not be allowed to go on with the suit in Madras.

1. A I R 1917 P C 201=42 I C 959=44 I A 213=45 Cal 442 (P C).

If that is the correct interpretation of the order, there was no necessity at all for the granting of permission to sue again. We take it that it was given ex abundanti cautela. Consequently, the non-payment of costs within the time mentioned in the order would not disable the plaintiff from suing upon the cause of action; moreover on the grammatical construction of the order, we are not prepared to say that the payment of costs was a condition precedent to the institution of the suit within two months. We must, under these circumstances, overrule the objection based upon the withdrawal.

Now we go to the main objection. Mr. T. Rangachariar conceded at the outset that if the cause of action for the present suit can be held to have been different from the cause of action for Original Suit No. 36 of 1910 on the file of the District Court of Chingleput, he will not be able to maintain his position that O. 2, R. 2, Civil P. C. barred the present suit. It is clear on examining the plaint in the first suit that although there was a casual reference to the mortgage of 1892 in the plaint, it was solely based upon the power of attorney executed in 1898. The cause of action was stated to have accrued on the date on which notice to cancel the power-of-attorney was given, and the prayer was for the cancellation of the power-of-attorney. What was pleaded in defence was that that was not the proper suit. In the present suit, the cause of action is based on the mortgage document, and the prayer is for redemption. In our opinion, the two causes of action are entirely different. The fact that the plaintiff in the first suit had to rest his case upon an unsustainable cause of action is not a ground for holding that that cause of action is the same as the true cause of action on which the subsequent suit is based. It was held in *Pittapur Raja* v. *Suriya Row* (2) by the Judicial Committee with reference to S. 7 of the Act of 1859, which corresponded to O. 2, R. 2,

> "that every suit should include the whole of the claim arising out of the cause of action meaning the whole of the claim arising out of the same cause of action upon which the suit was brought, not that every suit should include every cause of action, or every claim which the plaintiff had against the defendant."

This was followed in *Mahomed Riasat Ali* v. *Hasin Banu* (3) and in *Nagathal* v. *Ponnusami* (4). Reference may also be made to *Khedaroonissa Bibee* v. *Boodhee Bibee* (5). In O. 2, R 2, Civil P. C. there are three distinct clauses: Cl. (1) deals with the splitting of cause of action, Cl. (2) deals with the splitting of portion of the subject-matter, and Cl. (3) to the same process in respect of reliefs arising from the same cause of action. The essential thing to be borne in mind in applying the rule is that the cause of action in the subsequent suit should be the same as the cause of action in the previous suit, and not that the cause of action in the subsequent suit should have been made the subject of litigation in the former suit. If we keep this principle in mind, there will be no difficulty in understanding the various cases that have been quoted at the Bar. Mr. T. Rangachariar relied upon *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (6). That related to the the omission of a partion of the subject-matter in the previous suit. The cause of action for the second suit was a deposit of Government promissory notes; a portion of that same deposit was the subject matter of the previous litigation. The Judicial Committee pointed out that the word omission included both accidental and deliberate omissions, and that consequently the subsequent suit was barred. In *Rangayya Goundan* v. *Ranjappa Rao* (7), another Privy Council case, two reliefs were available on the cause of action as stated in the previous plaint. One relief alone was asked for in the first litigation. The Judicial Committee pointed out that a suit for the other relief based upon that cause of action was not maintainable. The same remarks apply to *Abdal Hakim Khan* v. *Karan Singh* (8). *Naganada Iyer* v. *Krishnamurti Aiyar* (9), which was strongly relied upon by the learned vakil for the appellant, proceeded on the footing that the subsequent suit for possession arose out of the cause of action for declaration which was the basis of the first suit. As regards *A'ayi Kunhi* v. *Ayissa Bi* (10), another case relied upon

2. (1885) 8 Mad 520=12 I A 116 (P C).
3. (1894) 21 Cal 157=20 I A 155 (P C).
4. (1890) 13 Mad 44.
5. (1870) 13 W R 317.
6. (1867) 8 W R 3=11 M I A 551 (P C).
7. (1901) 24 Mad 491=28 I A 22 (P C).
8. A I R 1915 All 404=30 I C 951=37 All 646.
9. (1910) 34 Mad 97=6 I C 233.
10. (1903) 26 Mad 645.

by Mr. T. Rangachariar, it is enough to say that that decision does not seem to be reconcilable with the decision of the Judicial Cammittee in *Saminathan Chetty* v. *Palaiappa Chetty* (11). On the other hand, the decisions to which Mr. T. R, Ramchandra Aiyar drew our attention support the principle we have already enunciated. The decision of the Judicial Committee in *Amanat Bibi* v. *Imdad Hussain* (12) is one of the strongest cases on the point. The Judicial Committee said in that case:

"It appears to their Lordships that the fair result of the evidence is that at the date of the former suit the respondent was not aware of the right on which he is now insisting. A right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a 'portion of his claim' within the meaning of the section in question,"

These words are exactly applicable to the present case. The plaintiff was not aware when he sued in Original Suit No. 36 of 1910 on the file of the District Court of Chingleput that his cause of action was only to sue on the mortgage. *Raghava Chariar* v. *Seshadri Iyengar* (13) follows the decision in *Amanat Bibi* v. *Imdad Husain* (12). A Full Bench of this Court in *Thrikaikat Madathil Ramam* v. *Thiruthiyil Krishnen Nair* (14) held that where the first suit is based upon an alleged lease and fails, a subsequent suit on title is not barred, the reason of the decision being that the cause of action for the subsequent suit is not the same as the cause of action for the fresh suit. *Vasudeva Ravi Varma* v. *Athi Kottil Eazhuvan Kannanur* (15) is also to the same effect. It is not necessary to multiply citations. The principle deducible from these various cases is that where a suit is brought upon either a non existent cause of action or upon a false cause of action, that will not bar the institution of a suit upon the true cause of action, because there is no identity of causes of action between these two suits. The reason of the decision of the Judicial Committee in *Saminathan Chetty* v. *Palaniappa Chetty* (11) is decisive on that matter. That was a suit upon a document which was found to be invalid. The Judicial Committee held that a suit based upon the original title which preceded the document was not obnoxious to the rule similar to O. 2, R. 2. The observations of the learned Judges in *Ramaswami Ayyar* v. *Vithinatha Ayyar* (16) are exactly in point. For all these reasons we are of opinion that the decision of the Subordinate Judge is right; and we dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

11. (1915) 41 I A 142=26 I C 228 (P C).
12. (1888) 15 Cal 800=15 I A 106 (P C).
13. (1905) 15 M L J 374.
14. (1906) 29 Mad 153 (FB).
15. (1915) 26 I C 51.
16. (1903) 25 Mad 760.

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ABDUR RAHIM AND KUMARASWAMI SASTRI, JJ.

Kanthammal—Defendant—Appellant,

v.

Meenakshisundaramier — Plaintiff—Respondent.

Second Appeal No 1191 of 1916, Decided on 2nd October 1917, against decree of Dist. Judge, Tinnevelly in A S. No. 582 of 1915.

Hindu Law—Gift—Words "*Santhathikalam puthira powthira parampariyamaya*" **are words of limitation—Deed, Construction.**

A Hindu made a gift to his daughter in the following terms: "These properties having been gifted to you and delivered possession of to you, yourself and your "*santhathikalam puthira powthira parampariyamaya*" may enjoy the same without creating an encumbrance, sale, etc"

Held: that the words "*santhathikalam puthira powthira parmpartyamaya*" were of limitation and conveyed an absolute estate to the donee and that the restraint on alienation was a repugnant condition and therefore invalid. [P 81 C 2]

C. V. Ananthakrishna Aiyar—for Appellant.

T. R. Venkatarama Sastri and *S. Ramaswamy Aiyar*—for Respondent.

Judgment.—The property in dispute was given by the donor to his daughter in these words:

"These properties . . . . having been gifted to you and delivered possession of to you, yourself and your *santhathikalam puthira powthira parampariyamaya* may enjoy the same, without creating any encumbrance, sale, etc

These words, as laid down in *Kannu Pillay* v. *Chellathammal* (1), are words of limitation in accordance with the ruling of the Privy Council with reference to similar Bengalee words "*puthra pauthradhi kranu*." No doubt, the donor laid down a condition that the donee and her heirs should not alienate the property; but that must be treated as a repugnant condition and therefore invalid. We do not think that the gift in this case can be properly construed as conferring only a life-estate on the daughter Peria-

1. (1900) 10 M L J 203.

krishnamma. We therefore set aside the decree of the District Judge and restore that of the District Munsif with costs here and in the Court below.

S.N./R.K. *Appeal allowed.*

A I. R. 1918 Madras 82

AYLING AND PHILLIPS, JJ.

Kristnaswami Iyengar and *another*—Defendants—Appellants.

v.

Subramania Ganapathigal and *another*—Plaintiff—Respondents.

Second Appeal No. 929 of 1916, Decided on 22nd November 1917, against decree of Dist. Judge, Trichinopoly, in Appeal Suit No. 356 of 1915.

(a) Transfer of Property Act (4 of 1882), S. 55—Promissory note for unpaid consideration——Question in each case is whether it is security so as to abandon lien for unpaid purchase-money.

Where a pro-note is executed by a vendee of immovable property for part of the sale consideration, it is a question in each case whether the parties intended that the security was to be in lieu of the actual cash and whether the vendor was thereby to abandon his lien for unpaid purchase-money. [P 83 C 1, 2]

(b) Transfer of Property Act (4 of 1882), S. 55 (4)—Lien under Cl. (4) compared with equitable lien in English Law—Lien.

The lien created by S. 55 (4) is different from the equitable lien known to English law, for under the latter, though the legal estate passes at the time of sale, the equitable estate does not pass until the purchase-money has been completely discharged: *Jersey (Earl)* v. *Briton Ferry Floating Dock Co.*, (1869) 7 *Eq.* 409, *Winter* v. *Lord Anson*, (1823) 57 *E. R.* 174; *Dixon* v. *Gayfere*, (1857) 44 *E. R.* 878; *Parrott* v. *Sweetland*, (1835) 40 *E. R.* 250 and *Brentwood Brick & Coal Co., In re.* (1877) 4 *Ch. D.* 562, *Dist.* [P 83 C 1]

(c) Transfer of Property Act (4 of 1882), S. 55 (4)—Cosharer transferor cannot enforce his lien without joining others unless his share was divided.

Ordinarily one of several vendors of immovable property cannot enforce his charge on the property without making his co-vendors parties to the suit, save where the share of the party seeking enforcement thereof has been definitely fixed. [P 83 C 2, P 84 C 1]

(d) Civil P. C. (1908), S. 100—Interpretation of deed is question of law, and taken with intention of parties is mixed question of law and fact.

The interpretation of a document is a point of law which can be taken in second appeal and that taken with the intention of the parties, is a mixed question of law and fact which the High Court can itself deal with in second appeal. [P 84 C 1, 2]

(e) Transfer of Property Act (4 of 1882), S. 55 (4)—One of two vendees executed promissory note in favour of one of the two vendors—In suit on it impleading co-vendor held circumstances implied abandonment of lien under Cl. (4).

Where one of two vendees executed a pro-note for part of the sale price in favour of one of two vendors and amounts in discharge thereof were entered on the pro-note and the vendor in whose favour the note was executed sued on it without impleading his co-vendor:

Held: that the above circumstances indicated an intention to abandon the lien allowed by S. 55.

C. Madhavan Nair and *A. Krishnaswami Aiyar*—for Appellants.

T. V. Vencatrama Aiyar and *R. Rajagopala Aiyar*—for Respondents.

Judgment.—In this case the plaintiff and another jointly sold certain lands to defendants 1 and 4 for Rs. 10,000 under Ex. A. The document recites the receipt of Rs. 10,000 in cash and at the end of the document the particulars for the receipt of Rs. 10,000 are given as follows: Rs. 8,650 received in cash—Rs. 1,350 received as per two bonds executed separately in our favour by the aforesaid T. Kristnaswami Iyengar, defendant 1. One bond was executed in favour of the present plaintiff and the other in favour of his co-vendor Srinivasavaradachariar. The plaintiff now sues to recover the amount due to him on account of his sale, namely Rs 675 with interest. He also makes other claims with which we are not concerned now. The lower Courts have given him a decree for the amount due and have also given him a charge on the plaint property treating the amount as unpaid purchase-money.

It is now contended in appeal that this charge ought not to be given because the whole of the purchase money had been paid. This plea is based on two grounds: (1) that the two promissory-notes constituted part of the consideration to be paid for the land and were not merely collateral security for the unpaid purchase money, and (2) that the vendors accepted the sole liability of defendant 1 in respect of these two promissory notes and exonerated the other vendee, defendant 4. The appellant has quoted a large number of English cases in support of his plea, but it must be observed that the vendor's lien for unpaid purchase-money is of a somewhat different nature in English Law from the statutory lien granted under S. 55 (4), T. P. Act, for in England the lien is an equitable lien and is based on the assumption that although the legal estate

passes at the time of sale the equitable estate does not pass until the purchase money has been completely discharged. For this reason the two cases quoted, viz. *Jersey (Earl)* v. *Briton Ferry Floating Dock Co.* (1) and *Winter* v. *Lord Anson* (2) have no application here. Three other cases have been cited: viz. *Dixon* v. *Gayfere* (3), *Parrott* v. *Sweetland* (4) and *Brentwood Brick and Coal Co., In re* (5).

In two of those cases the consideration for the sale was the payment of an annuity to the vendor or his relations, and it was held that the vendor had no lien on the property in respect of the amount so secured. The third case was one where a consideration of £6,000 was agreed to be paid out of shares which were to be subsequently allotted by the vendee company. It was there held that the consideration had actually passed and that the balance which was due was secured by an agreement which was accepted in lieu of cash. The details of cases are not of very much importance here except as authority for the proposition that it is open to a vendor to accept security from the vendee for part of the purchase money in lieu of the actual cash and thus to lose his lien for unpaid purchase money But whether he actually does so or whether he accepts the agreement merely as collateral security for future payment is a question of the intention of the parties. Similarly in other English cases where a creditor accepted the libility of one of two or more joint debtors, it was held to discharge the other debtors in respect of the original debt due: vide *Lyth* v. *Ault* (6) and *Thompson* v. *Percival* (7). We therefore have to consider in this case that was the intention of the parties when the sale was made. When a vendor takes a promissory note from the vendee it does not necessarily follow that he has given up his statutory lien under S. 55, T. P. Act vide: *Vellayappa Chettiar* v. *Narayanan Chettyar* (8). And even when the promissory note is given by a third person it has been held in *Kampiah Pillai* v. *Hari Raw* (9) that that fact raises no presumption that the lien has been abandoned. After a careful consideration of all these cases, it appears to me that we are thrown back upon the facts of each particular case and must infer the intention of the parties from the document itself and the surrounding circumstances, giving due weight to the fact that the vendor has a statutory lien for unpaid purchase-money which he can enforce in the absence of an agreement to the contrary.

In the present case both Courts have found that the plaintiff had not lost his lien. But the District Judge has not discussed the circumstance of the case in any way than by merely saying that it has been repeatedly held that a vendor does not lose his lien by taking a promissory note as part of his purchase-money. But he omits to add that if he takes a security as part of the consideratain there is no unpaid purchase-money for which he can have a lien. The language of the document supports the appellants' plea that the promissory notes were taken as part of the consideration for the sale deed and expressly recites receipt of the whole purchase money. It is also significant that the promissory notes were executed by only one vendee in favour of the two vendors separately, one promissory note in favour of each, and in the notes there is a stipulation for a fixed rate of interest. It also appears that money has been paid towards the discharge of these promissory notes and the payments endorsed on the notes. It is also significant that the plaintiff has brought this suit without impleading his co vendor. He does not allege in the plaint to what share of the property sold he is entitled. But it is alleged now on his behalf that inasmuch as one promissory note was executed in his favour for one-half of the purchase money not paid in cash he must be deemed to be entitled to one-half of the property. There is however no evidence that the actual cash was received by the two vendors in equal shares and consequently there can be no presumption that the plaintiff is entitled to a lien for one-half of the unpaid purchase money. In the absence of the co-vendor it would be inequitable to determine the shares to which he and the plaintiff are respectively entitled, for possibly the co-vendor might have owned a very large fraction of the

1 (1869) 7 Eq 409.
2. (1823) 57 E R 174.
3. (1857) 44 E R 878.
4. (1835) 40 E R 250.
5. (1877) 4 Ch D 562.
6. (1852) 7 Ex 669.
. (1834) 110 E R 1033.
8. (1913) 18 I C 81.
9. (1911) 11 I C 890.

property sold, in which case the plaintiff would not be entitled to a lien for one-half of the unpaid consideration.

No doubt the plaintiff is entitled to the amount specified in the promissory note. But I am of opinion that he cannot enforce his lien without impleading his co-vendor. No doubt in Cl. (2), S. 55, T. P., Act, the benefit of a contract of a sale

"is annexed to and goes with the interest of the transferee as such and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested."

and it has been held in *Chidambaram Pillai* v. *Sivathasamy Thevar* (10) that one of the two co-vendees can bring a suit without impleading the other. But in that case it was found as a fact that each of the purchasers had contributed half of the purchase-money. There is no provision in Cl. 4, S. 55 similar to that in Cl. (2) and I have not been referred to any case in which it has been held that one of several vendors of immovable property is entitled to enforce his charge upon the property without making his co-vendor a party to the suit. Objection as to the non-joinder of the plaintiff's covendor was taken in defendant 1's written statement and an issue was framed as to whether theplaintiff wasentilted to c'aim a charge. In acase of this kind where the meaning of the parties is not exactly obvious, I should be reluctant to interfere with the concurrent finding of the two Courts, if it were not for the fact that the lower appellate Court has not at all discussed the questiou on which the case really turns. I am of opinion, on consideration of the language of the document, of the subsequent payments upon the promissory notes and of the plaintiff's action in bringing this suit separately from his co-vendor, that it was the intenton of the parties that the two promissory notes should form part of the consideration of the sale.

In that view there is no unpaid purchase money for which the plaintiff can have a lien. Put in this way the question at issue would seem to be one of fact as is often the case when a document has to be interpreted, but it has always been held by this Court that the interpretation of a document is a point of law which can be taken in second appeal. In this case moreover the District Judge has altogether failed to take into consideration the law on the subject when determining what was the intention of the parties, and therefore I think the question is on of mixed law and fact which can be dealt with here, and I may add that the learned vakil for the respondents has not taken any objection. I would therefore allow this appeal with costs and modify the lower Courts' decree by disallowing the plaintiffs' charge upon the land.

Ayling, J.—I agree.

S.N./R.K. *Appeal allowed.*

10. (1905) 15 M L J 396.

A. I. R. 1918 Madras 84

SESHAGIRI AIYAR AND BAKEWELL, JJ.

Theman and *another*—Plaintiff—Appellants.

v.

Kunhi Pathumma and *another*—Defendants—Respondents.

Second Appeals Nos. 1504 and 1505 of 1919, Decided on 20th March 1917, against decree of Sub-Judge, South Canara, in Appeal Suit Nos. 50 and 51 of 1916.

(a) Malabar Compensation for Tenants' Improvements Act (1 of 1900), S. 5—Act applies to South Canara—Kuzhikanom tenant is not trespasser on expiry of lease—Tenant holding over for default of payment of compensation is not entitled to notice to quit.

Section 5 applies to South Canara and only embodies the Customary law of Malabar and South Canara

Consequently, on the expiry of the period of his lease, a kuzhikanom tenant holding over does not become a trespasser: 33 *Mad.* 260, *Dist.*

Nor does he hold over as tenant when he remains on the land awaiting the compensation due to him and he is not therefore entitled to any notice to quit [P 85 C 1]

(b) Malabar Law—Kuzhikanom tenant—Suit for possession after expiry of lease is suit for redemption—Time for payment should be fixed.

A suit for possession from a kuzhikanom tenant after the expiry of his lease is practically a suit for redemption. The Court should fix a period for payment of compensation and direct a surrender thereafter. [P 85 C 1]

J. L. Rozario—for Appellants.

C. Madhavan Nair—for Respondents.

Judgment.—The Subordinate Judge is wrong on both the points decided by him. There can be no question of adverse possession in favour of the defendants because under the Customary law of Malabar, the kuzhikanom lessee is entitled to remain in possession until he is paid the value of the improvements. In this respect, the law is the same in South Canara: *Srinivasa Pillai* v. *Venkatam*

mal (1). It is true that S. 5, Malabar Compensation Act, does not in terms apply to South Canara, but as was pointed out in *Kummatha Vitil Kunhi Kuthalai Haji* v. *Antoni Goveas* (2), that section only embolies the Customary law of Malabar and South Canara. Consequently on the expiry of the period fixed, the tenant does not become a trespasser. The decision in *Subraveti Ramiah* v *Gundala Ramanni* (3), quoted by the Subordinate Judge, has no application to Malabar kuzhikanom tenants. We must therefore hold that the defendants had not acquired a title by prescription.

On the question of the reasonableness of the notice to quit we think that under the law, a tenant who remains on the land awaiting the payment of the compensation to him is not holding over as a tenant. S. 5, Malabar Compensation Act, says that he is entitled to remain on the land notwithstanding the fact that the tenancy has determined: therefore his possession is not by virtue of a tenant's right, but because there are moneys due to him which have to be ascertained and paid. In the present case the period of lease was fixed, and on the expiry of that period the tenancy came to an end. We have not been referred to any evidence showing that the landlord assented to the continuance of the tenancy. Mr. Madhavan Nair strongly relied upon a decision of this Court in Second Appeals Nos. 771 to 773 of 1914. In that case it was found that the tenant made a yearly payment. Moreover the period of the tenancy was not fixed. We do not think that decision compels us to hold that when a period is fixed, and there is no subsequent assent by the landlord, the quondam tenant is entitled to any notice. Such suits should be regarded as practically suits for redemption. The Court should on ascertaining the value of the improvements fix a time within which the compensation will have to be paid and pass a decree directing a surrender on the expiry of that period. We reverse the decree of the lower appellate Court, direct it to get the improvements revalued, to fix a time for payment and to pass a decree for surrender on the expiry of that period. The tenant in possession is bound to give credit to the plaintiffs for the rent reserved. This will be done in taking the accounts. Costs will abide the result.

S.N./R.K. *Appeal allowed.*

1. (1913) 19 I C 410.
2. (1913) 19 I C 63.
3 (1910) 33 Mad 260=4 I C 1030.

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ABDUR RAHIM AND BAKEWELL, JJ.

Chivikula Venkatasubbiah and *another* —Appellants.

v.

Gollapudi Venkateswarulu — Respondent.

Appeal No. 72 of 1916, Decided on 16th July 1918, from appellate decree of Addl. Sub. Judge, Guntur, in Appeal Suit No. 148 of 1915.

(a) Limitation Act (1908), S. 7 and Art. 182 —Major manager of Hindu family can give valid discharge to make time run against minor members.

A major manager of a joint Hindu family is competent to give a valid discharge of a decree-debt within the meaning of S. 7, Lim. Act, so as to make the time run against the minor members of the family: *Case-law discussed.* [P 85 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 56 and 57 —Execution dismissed—Whether attachment ceases depends on circumstances.

Whether the dismissal of an execution petition has the effect of removing the attachment depends upon the facts of each case. [P 86 C 1]

T. Prakasam and *P. Chenchiah*—for Appellants.

V. Lakshminarayana — for Respondent.

Judgment.—As regards the question whether S. 7, Lim. Act of 1908, has the effect of barring the application for execution, Execution Petition No. 1042 of 1912, the preponderance of authority is clearly in favour of the affirmative view. The question whether a major manager of a joint Hindu family can give a valid discharge of a decree-debt within the meaning of the above section so as to make the time run against the minor members of the family is fully discussed in *Duraiswami Sastrial* v. *Venkatarama Iyer* (1), where it was held that the dictum of Bashyam Aiyangar, J., in *Periasami* v. *Krishna Ayyan* (2) could no longer be said to be good law having regard to the change of language in S. 7 of the new Lim. Act. The same view is enunciated by Sadasiva Aiyar and Spencer, JJ., in *Planiandi Pillai* v. *Papathi Ammal* (3), and one of us followed *Duraisawmi Sastrial* v. *Venkatarama Iyer* (1) in *Ramnadhan*

1. (1911) 12 I C 503.
2. (1902) 25 Mad 439 (F B).
3. A I R 1914 Mad 1=22 I C 76.

Sivayya v. *Udatha Atchayya* (4): No doubt in *Mahomed Silar Sahib* v. *Nabi Khan* (5). Oldfield and Sadasiva Aiyar, JJ., seem to approve of Bashyam Aiyangar's observation in *Periasami* v. *Krishna Ayyan* (2), but this decision may perhaps be distinguished on the ground that no question of limitation directly arose in that case. However that may be we think that since there is express mention of applications for execution of decrees in S. 7 there is no longer room for the contention that it has no application to cases where under the Hindu law the manager can give a valid discharge simply because the liability to be enforced arises under a decree.

Another point was raised before us in second appeal, viz. that the attachment of the judgment-debtor's decree by order dated 15th April 1908 continued in spite of the dismissal of the petition on 25th April 1908. But whether the dismissal of an execution petition has not the effect of removing the attachment depends upon the facts of each case, as observed in *Raghavachariar* v. *Anantha Reddi* (6). The District Munsif points out that there was nothing to show that the petition was not dismissed in the presence of parties and the decree-holder himself has treated the attachment as having ceased to exist. In the lower appellate Court the question does not appear to have been argued and in second appeal we are not under the circumstances forced to hold that the view of the District Munsif on this point is wrong. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

4. (1913) 18 I C 723.
5. (1916) 35 I C 157.
6. (1915) 31 I C 911.

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SPENCER AND KRISHNAN, JJ.

(*Thacharath Parkum Etathatta Kannon*) *Raman Kurup* and *others*—Appellants.

v.

(*Thayath Veetil Parkum Kayathirikal*) *Chappan Nair* and *others*—Respondents.

Second Appeal No. 386 of 1916, Decided on 14th August 1917, against decree of Temporary Sub-Judge, Tellicherry, in Appeal Suit No. 488 of 1913.

(a) Limitation Act (1859), S. 1, Cl. (15) and S. 18—Right to redeem mortgage barred under S. 1, Cl (15)—Acknowledgment of mortgagor's title during two years of grace under S. 18 will not give fresh starting point of limitation.

Where the right to redeem a mortgage has become barred under S. 1, Cl. (15), Limitation Act 14, of 1859, by the lapse of 60 years from the date of the mortgage an acknowledgment of the mortgagor's title made by the mortgagee during the currency of the two years' grace period provided by S. 18 will not give a fresh starting point of limitation as from the date of the acknowledgment. The acknowledgment to have that effect must have been made before the expiry of 60 years from the date of the mortgage. [P 87 C 1]

(b) Limitation Act (1859), S. 1, Cl. (15)—Words "in the meantime" refer only to 60 years mentioned in the first part of Cl. (15).

The words "in the meantime" in S. 1 (15) refer only to the 60 years mentioned in the firt part of the clause and do not include the two years' grace period provided by S. 18: 27 *Cal.* 1004, *Foll.* [P 90 C 1]

(c) Limitation Act (9 of 1908), S. 19 and Art. 148—Right to redeem barred under Act 14 of 1859—Right to property extinguished under S. 29 of Act 9 of 1871—S. 19 and Art. 148 cannot be invoked to save limitation for redemption suit instituted after Act 9 of 1908.

Where the right to redeem a mortgage had become barred under Act 14 of 1859 and the right to the property itself had been extinguished under S. 29 of Act 9 of 1871, S. 19 and Art. 148 of the Limitation Act 9 of 1908 cannot be invoked for the purpose of saving limitation for a redemption suit instituted after the passing of the latter Act on the ground that the 60 years had not expired computing time from the date when the right to redeem accrued: 5 *Mad.* 182 and 27 *Cal.* 1004, *Foll.* [P 87 C 1, 2]

(d) Limitation Act (9 of 1908)—Revival of extinct right is not provided—Limitation Act (15 of 1877).

There is nothing in the provisions of the Limitation Acts 15 of 1877 or 9 of 1908 to show that the legislature intended to revive any extinct rights. [P 88 C 2]

(e) Limitation — Plea — Law at date of suit applies provided relief sought has not been extinguished under previous law.

The principle that the Limitation Act applicable to a suit is the one in force at the date of the suit is subject to the condition that the rights sought to be enforced have not already been extinguished under the previous law. [P 88 C 2]

C. Madhavan Nair—for Appellants.

K. P. M. Menon—for Respondents.

Spencer, J.—Exhibit A having been found by both the lower Courts to be not genuine, this suit has resolved itself into a suit to redeem a mortgage or kanom of the year 1798, corresponding to the Malabar year 974. The District Munsif found the suit to be barred by limitation. The Subordinate Judge reversed his finding on this point. I am of opinion that he was wrong and the District Munsif was right. Under S. 1, Cl. 15, Lim. Act 14 of 1859, the mortgagors had 60 years from the date of mortgage to bring a suit for the

recovery of their immovable property. Those 60 years expired in 1858. The clause however provides that if, in the meantime an acknowledgment of the mortgagor's title or of his right of redemption shall have been given in writing signed by the mortgagee the 60 years will be reckoned from the date of such acknowledgment. In this case it has been found that there was such an acknowledgment in 1861 (Malabar year 1036). The Subordinate Judge thought that because S. 18 of the Act provided two years as a time of grace for suing under the law as it existed before this Statute of Limitation was introduced therefore two years must be included in the time within which an acknowledgment, if made, would extend the period of limitation. S. 1, Cl. 15, is however quite clear to the contrary. The words' "in the meantime" can only refer to the 60 years mentioned in the first part of the clause. If authority be needed the case of *Fatimatulnissa Begum* v. *Sundar Das* (1) is quite decisive on this point. At page 1010 the Judicial Committee of the Privy Council observed that under Act 14 of 1859 the right of the mortgagors to sue was kept alive till 1862, but if they did not sue the Act remained unqualified by the proviso as to acknowledgment.

For the respondents it has been argued that, as according to the Privy Council decision in *Soni Ram* v. *Kanhaiya Lal* (2) the law of limitation applicable to the case is not Act 14 of- 1859, the law in force at the date of the acknowledgment, but Act 9 of 1908, which was in force at the time of the institution of this suit in 1911, the mortgagors must under Art. 148 of that Act have 60 years from the date when the right to redeem accrued, that is in the case of a kanom 12 years from the execution of the kanom deed. This will bring us to 1870 and the acknowledgment having been made in 1861 before the expiration of the period prescribed for the suit a fresh period of 60 years will, it is argued, under S. 19 of Act 9 of 1908 have to be computed from the time when the acknowledgment was signed and thus the mortgagors had time till 1911 within which to institute this suit. The answer to this ingenious argument is that the right of the mortgagors to sue having become barred as from 1858 by force of the Act of 1859 and their right to the land having been extinguished by S. 29 Act 9 of 1871, the subsequent Acts of Limitation contained no provision whereby a right which had previously become extinct could be revived. This is the view taken in *Mukkanni* v. *Manan Bhatta* (3) and in *Fatimatulnissa Begum* v. *Sunder Das* (1), and we must follow those authorities. The appeal is allowed. We restore the decision of the District Munsif with costs here and in the lower appellate Court to be paid by 1 and 5 respondents.

Krishnan, J.—The question raised in this second appeal for decision is one of limitation. The Subordinate Judge has given plaintiffs a decree allowing them to redeem a kanom mortgage of 1798, overruling the defendants' objection that the right to redeem had become barred by limitation so long ago as 1862. To save limitation an acknowledgment of the mortgagor's title in 1861 is relied on. The question is whether that acknowledgment is sufficient for the purpose with reference to its date as it was made more than 60 years after the date of the mortgage. Appellants' counsel argues that under Act 14 of 1859 the claim to redeem become barred in 1862 on the expiry of the period of two years granted under S. 18 of that Act in spite of the acknowledgment alleged. This argument is I think clearly well founded. Under S. 1, Cl. 15, of that Act a suit against the mortgagee of any property for the recovery of the same was not main tainable after 60 years from the time of the mortgage unless in the meantime an acknowledgment of the title of the mortgagor was given in writing signed by the mortgagee or some person claiming under him in which case the 60 years' period had to be calculated from the date of that acknowledgment. The words used are "in the meantime" which can only refer to the first 60 years provided under that section: see *Mukkanni* v. *Manan Bhatta* (3). The Subordinate Judge holds that because under S. 182 a period of two years is given for all suits as if the Act has not been passed and as at the time the acknowledgment in this suit was made, namely in 1861, a suit to redeem the plaint kanom would not have been affected by limitation by force of the section, the said acknowledgment was sufficient to start a new period of limita-

1. (1915) 27 Cal 1004=27 I A 103.
2. (1913) 35 All 227=19 I C 291=40 I A 74 (PC).
3. (1882) 5 Mad 182.

tion. In fact he has extended the scope of S. 18 to acknowledgments as well. There is really no warrant for this in the language of the section. It merely kept the right to sue alive for two years and as no suit was brought by plaintiffs before 1st January 1862, the bar under S. 1, Cl. 15, took effect. See the observations of the Privy Council in *Fatimatulnissa Begum* v. *Sundar Das* (1).

It was suggested that the words "in the meantime" should be taken as including also the period of grace of two years provided by the Act. Whatever doubts may arise if the words used were "the period prescribed" as in the later Limitation Acts, there can be no possible doubt that the words "in the meantime" can only refer to the period mentioned in Cl. 15 itself. Admittedly the acknowledgment relied on in this case does not satisfy the requirements of Cl. 15, therefore after 1st January 1862 a suit to redeem this kanom of 1798 would have failed as barred by limitation. By S. 29, Act 9 of 1871, the right to the property itself became extinguished thereby. It was however urged by Mr. Menon for the plaintiffs that we should apply Act 9 of 1908 to the present suit as that Act was in force at the time of the suit; and applying that he claimed that his suit was in time. As an alteration has been made in the law with regard to the starting point of limitation in the case of suits to redeem in Act 15 of 1877 and in the present Act, that point being now the date when the right to redeem accrues whereas under the previous Act the starting point was the date of the mortgage itself the acknowledgment of 1861, though insufficient to save limitation under the older Acts being more than 60 years from the date of the mortgage would be sufficient under Act 9 of 1908 as being within 60 years from the date when the right to redeem accrued, as a kanom is not redeemable till after 12 years from its date under the Malabar Customary law. Mr. Menon relied on the case reported as *Soni Ram* v. *Kanhaiya Lal* (2) and asked us to hold that this suit was not barred under Act 9 of 1908, ignoring the position under the previous law.

The answer to this contention is that as the right to redeem in this case had already become barred in 1862 and the right to the property itself extinguished there was thereafter no subsisting right in the plaintiffs to which the present Act could apply. No doubt the Limitation Act applicable to a suit is the Act in force when the suit is filed, and if the suit is barred under that Act no further question arises. That was the position in the Privy Council case above cited. The further question that arises here did not arise in that case. The principle that the Limitation Act applicable to a suit is the one in force at the date of the suit is subject to the condition that the rights sought to be enforced had not already been extinguished under the previous law. There is nothing in Act 15 of 1877 or in Act 9 of 1908 to show that the legislature intended to revive any extinct rights. The cases already cited, *Mukkanni* v. *Manan Bhatta* (3), and *Fatimatulnissa Begum* v. *Sundar Das* (1), are clear authorities for this view, if indeed authority is needed. It is therefore clear that the plaintiff's right to redeem the kanom of 1798 was long ago barred, and when they failed to establish the kanom of 1884 under Ex. A on which they primarily based their suit, the suit should have been dismissed. I agree with my learned brother in the order proposed by him.

S N./R.K. *Appeal allowed.*

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SESHAGIRI AIYAR AND NAPIER, JJ.

Subramania Aiyar—Plaintiff—Appellant.

v

Narayanaswami Vandyar—Defendant—Respondent.

Second Appeal No. 634 of 1916, Decided on 30th October 1917, against decree of Dist. Judge, Tanjore in Appeal Suit No. 280 of 1915, D/- 19th January 1916.

(a) Transfer of Property Act (4 of 1882), S. 83—Deposit more than due is valid under S. 83.

The deposit of a larger sum than is due to the mortgagee, from which the latter is asked to take whatever is due to him, is valid under S. 83, T. P. Act, and from the date of such deposit interest on such amount ceases to run. [P 90 C 1]

(b) Civil P. C. (1908), O. 24, R. 3—Mortgagee wrongly refusing to withdraw deposit — Redemption suit — Mortgagor is entitled to interest from service of summons — Transfer of Property Act (4 of 1882), Ss. 60 and 83.

Where a mortgage wrongfully refuses to receive the amount deposited and the mortgagor is forced to bring a redemption suit, he is entitled

to interest after the date of the service of the plaint and summons on the defendant. [P 90 C 2]

Properties in schedule A were mortgaged to defendant in 1902. A portion of these properties covered by schedule B was subsequently mortgaged to one *R. R.* sued on his mortgage and brought the schedule B properties to sale, which were purchased by the plaintiff subject to defendant's mortgage. Plaintiff paid the money due on scheule A mortgage into Court and presented a petition, requiring that defendant should accept it and give possession of all the properties or that he should take from the amount deposited whatever was due on the Sch. B mortgage and deliver to him the Sch. B properties, and that the Court should provide for the costs. Defendant refused to receive an unspecified proportionate amount, but was willing to deliver to plaintiff the title-deeds of the Sch. B lands only on receiving the entire amount due on Sch. A properties. Plaintiff in consequence, sued for redemption of Sch. B properties, the whole amount deposited remaining in Court:

Held: (1) that as a large amount was deposited in Court than was due under the Sch. B mortgage, the tender was valid and interest ceased to run from its date; that under O. 24, R 3, plaintiff was entitled to interest after the date of the service of the plaint and summons on the defendant. [P 91 C 2]

(c) Contract Act (9 of 1872), S 38—Rules as to tender is part of law of contract—Validity is not affected by offer of larger amount than due—T. P. Act, S. 83.

Per *Seshagiri Aiyar, J.*—The rule as to tender is part of the law as to performance of a contract as laid down in S. 38, Contract Act. [P 90 C 2]

If parties make a bona fide attempt at performing their contracts, the rights of the parties should not be defeated by technicalities. There is no rule that where a person tenders a large amount and asks for a change, he should not have the benefit of the tender. [P 90 C 2]

(d) Transfer of Property Act, (4 of 1882), S. 83—S. 83 gives no scope for discretion to award costs--Tender with prayer for costs or with prayer to ascertain actual amount due is bad.

Per *Napier, J.*—S 83, T. P. Act, does not contemplate the exercise of any discretion by the Court in the matter of making either party liable for costs or granting any relief. If a tender under the section is accompanied by a prayer for costs and the Court refuses to take action thereon the tender is bad. The tender is equally bad if in making the deposit the mortgagor requires the Court to ascertain the amount due on the mortgage. [P 91 C 2, P 92 C 1]

T. R. Ramachandra Aiyar and *S. Rangachariar*—for Appellant.

T. R Narayanaswami Aiyar — for Respondent.

Seshagiri Aiyar, J.—This suit is for redemption. Although the question of the priority of the two mortgages in dispute is not easy to determine, I shall proceed on the same assumption on which the Courts below have acted throughout. The defendant obtained a mortgage of the A schedule properties in 1902. On a portion of these properties which are included in the Sch. B there was a mortgage to one Bava Rowther. This Rowther brought a suit on his mortgage. The properties were put up to sale and the present plaintiff purchased Sch. B properties alone in 1908, subject to the defendant's mortgage. After he became the purchaser, the plaintiff presented an application under S. 83, T. P Act, in January 1912, calling upon the defendant to receive the amount due and to deliver up the title-deeds, This application is Ex. Q. In it petitioner states that he has paid into Court the whole of the money due on the mortgage of the Sch. A properties, and asks the defendant to accept the amount and to give him possession of all the properties. Then he makes an alternative request to the effect that, if the defendant is willing to receive the principal amount due in respect of the Sch. B properties alone, he may draw out that sum from Court and give possession of the Sch. B properties. The reply of the defendants is Ex. R. I will use his own language in referring to it. In para. 2 he says:

"As there is only an offer to pay only the proportionate amount I am unwilling to accept the same. The petition does not state how much is the porportionate amount and I am not willing to accept it."

In para. 5 he says that he is willing to hand over Sch. B lands alone on receiving the whole of the amount of the mortgage due upon Sch. A properties. As the parties were not able to come to terms the Subordinate Judge passed this order upon the plaintiff's petition.

"Counter-petitioner refuses to receive the money. Petitioner is referred to a regular suit. This petition is dismissed".

Thereupon the present suit was brought. It is admitted that ever since 9th January 1912, when the money was deposited by the plaintiff, it has remained in Court and has not been drawn out by him. In the present suit the plaintiff asked that he should be allowed to redeem Sch. B properties on payment of Rs. 1,800 odd out of the sum of Rs. 3,650 deposited by him. The defendant raised various objections. He stated the same grounds which he put forward in the counter-petitions. He also raised the plea that the plaintiff was only a benamidar and as such was not entitled to

redeem the property. The Subordinate Judge found all the issues against the defendant and gave a decree to the plaintiff as prayed for. He found that the sum of Rs. 1,852-3-10 mentioned in the plaint was the correct amount payable in respect of Sch. B properties. In appeal, the District Judge confirmed the findings of the Subordinate Judge upon all the points except upon the question of interest and mesne profits. He held that the plaintiff was the real owner, and that the defendant is only entitled to the proportionate amount due upon the Sch. B properties. But he was of opinion that the tender was not a valid one and that consequently interest did not cease to run from the date of its deposit in Court. That is the main point to be decided by us.

I am unable to agree with the District Judge on the question of the validity of the tender. S. 83, T. P. Act, says:

"The mortgagor or any other person entitled to institute such suit may deposit...to the account of the mortgagee the amount remaining due on the mortgage."

The second paragraph says:

"The Court shall call upon the mortgagee by notice to state the amount then due on the mortgage and his willingness to accept the money in full discharge of such amount."

The section does not say that nothing more than the amount actually due should be paid. Of course if the money deposited is less than the amount payable to the mortgagee, the section will not be satisfied; but where more than the amount due is paid, I fail to see anything in the section to compel me to hold that the amount remaining due has not been paid. The English authorities to which I shall presently refer support the view I have taken. In the earliest case on the subject, *Wade's case* (1), the resolution, as it is called, is thus stated: Resolution 3: "A tender of more than is due is good." This decision was followed in *Douglas* v. *Patrick* (2) by a Bench of four Judges including Kenyon, C. J. Ashhurst, J., said: "There is no doubt a tender of the greater includes the smaller sum." Buller and Grose, JJ., use almost the same language. These two cases and others were considered in *Dean* v. *James* (3). Four Judges of the King's Bench headed by Denman, C. J., accepted the correctness of the earlier decision. Littledale, J. said:

"This case falls within the third resolution in *Wade's case* (1) that if a man tender more than he ought to pay it is good for *omne majus continet in se minus*, and the other ought to accept so much of it as is due to him."

In *Bevans* v. *Rees* (4) the Chief Baron and three other Barons affirmed the proposition laid down in the earlier case. The Chief Baron said:

"I am prepared to say that, if the creditor knows the amount due to him and is offered a larger sum and without any objection on the ground of want of change makes quite a collateral objection, that would be a good tender."

I may mention in this connexion that there are some curious decisions in the English Courts to the effect that where a debtor on paying a larger sum asks the creditor to take what is due to him and return the balance with a change, that will not be good tender. I have not examined this matter very carefully to see on what principles this exception as regards a claim for change is based. Probably it is due to the idea that the creditor should not be put to any trouble in accepting a tender. I do not think that, in this country, where we are not obsessed by technicalities of such a narrow description, we shall be justified in accepting a rule that where a person tenders a large amount and asks for a change, he should not have the benefit of the tender. Apart from this rule as to the claim for a change, the decisions I have referred to affirm the principle which has been consistently laid down since *Wade's* case (1). All these decisions were passed before the Transfer of Property Act was enacted. I feel no doubt that the framers of the Act had these decisions in their mind in drafting the rule as to tender and deposit. It is to be remembered that the rule as to tender is a part of the law as to the performance of a contract. S. 38, Contract Act, which uses the term "offer", lays down three conditions. The offer must be unconditional; it must be made at a proper time and place; and the thing offered must be produced for inspection.

So far as I have been able to see there are no provisions in any English Act relating to tender. The practice is referred to in Bullen and Leake, pp. 710 and 711. There is an analogous provision in the rules of the County Court. Now I shall refer to a few Indian decisions which were quoted on behalf of the respondent. All

1. (1572) 5 Co. Rep. 114a.
2. (1790) 3 T R 683.
3. (1833) 4 B & Ad 546.
4. (1839) 5 M & W 306=8 L J (n.s.) 263.

that was decided in *Venkatrama Aiyangar* v. *Rangasawmi Aiyangar* (5) was that the mortgagee should not be compelled, before accepting the tender, to decide a dispute which has arisen between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption. I do not think that this decision is against the view I have enunciated. In *Lal Batcha* v. *Arcot Narainaswami Mudaliyar* (6) Sir Arnold White, C.J., and Ayling, J., held that an offer to pay such amount as may be due on a settlement of account, if the payee would execute an indemnity bond, is not a valid tender. To use the language of the Contract Act, in that case there was no unconditional tender. In *Sublai Goundan* v. *Palani Goundan* (7), where a tender of money which was less by nine pies was made, the learned Judges seem to have held that it was not a valid tender. If I were deciding that case, I would have applied the maxim *de mininus non curat lex*; however. that may be the principle that where a man tenders less than what is actually due it is not a good tender, is the only proposition that must be taken to have been laid down in that case. In *Ayyakutti Mankondan* v. *Periyasami Kavandan* (8) it was held by Coutts-Trotter and Kumaraswami Sastriyar, JJ., that, where a bond contains a stipulation by way of penalty and the debtor deposits in Court what he considers to be reasonable compensation for the penal claim, it is a valid tender.

The principle to be borne in mind, especially in this country, is that the parties should be given an opportunity of making a bona fide attempt at performing the contract. If that requirement is complied with, the rights of the parties should not be defeated by technicalities. Of course if the law imposes conditions we are not at liberty to disregard them on the ground they are against justice. I am of opinion that the tender in January 1912 was valid. At any rate, so far as the ceasing of interest after the date the defendant was served with the summons in the present case is concerned, I entertain no doubt about it. The defendant was informed by the plaintiff that the money was already in Court, he was told what the exact sum was which was due and payable to him; he was further told that he could draw that amount from Court.

The Ccurts below have found that the exact amount mentioned in the plaint was the sum which was payable to the defendant and nothing more. Under these circumstances the principle of O. 24, R. 3, Civil P. C., applies, and the plaintiff is entitled to interest after the date of the service of the plaint and the summons on the defendant. I would modify the decree of the lower appellate Court by giving interest to the plaintiff from the date of the service of the plaint and summons on the defendant. The parties are entitled to proportionate costs in this Court and in the Court below.

Napier, J.—I have found some difficulty in holding that there was a deposit within the meaning of S. 83, T. P. Act, for in my opinion, the petition which was filed with the deposit was not a petition contemplated by the section. The section requires that the mortgagor should deposit, to the account of the mortgagee, the amount remaining due on the mortgage, and that thereupon the Court should give written notice to the mortgagee, and he, on presenting a petition stating the amount then due on the mortgage and his willingness to accept the money so deposited, is entitled to receive the money. Now the appellant, according to the language of his petition, sought something different. He asked the Court to pass an order

"directing the counter-petitioner to hand over all the said othi lands with the produce to the petitioner on receiving the othi amount of Rs. 3,650 or directing the counter-petitioner to hand over the lands along with the produce bought in auction on receiving the proportionate amount making the counter-petitioner liable for the costs and granted other reliefs."

This petition is clearly not contemplated by the Act. This Court has, under its powers to make rules given by S. 104 of the Act, framed rules for the original side which, though not applicable to the present case, indicate the scope of the section. They require that the mortgagor should file an affidavit stating the facts of the case and in addition to depositing the amount due on the mortgage, deposit in Court a sum sufficient to provide for the cost of the mortgage, etc. They do not contemplate the exercise by the Court of any discretion, in the matter of making either party liable for costs or granting

5. (1912) 17 I. C. 368.
6. (1911) 34 Mad 320=12 I C 502.
7. (1916) 34 I. C. 825.
8. (1915) 39 Mad 579=30 I C 497.

any relief. I am clear therefore that if the Court had refused to take any action on this petition the proceeding purported to be taken under S. 83 would have been bad. However the Court did give notice to the mortgagee and I must take it that it treated the application as being in proper form. The mortgagee did not take objection that the mortgagor had not deposited the amount remaining due on the mortgage, so as to enable him to decide whether he would accept the money so deposited in full discharge of the amount as calculated by him. Just as it was the duty of the mortgagor to deposit the amount remaining due, so it was the duty of the mortgagee to state the amount then due on the mortgage. It appears to me that if he had stated the amount as some figure under the whole othi amount and had claimed to receive that amount out of the total amount deposited he would have been entitled to do so. It is on this footing alone that I can find that the proportionate amount on such properties was in fact deposited. If the petition was to be read as requiring the Court to ascertain what the proportionate amount was, I should certainly hold that there was no proper deposit, but in the view that the petitioner left it to the mortgagee to take whatever sum under the total amount, which he thought he was entitled to as proportionate, I am not prepared to say that the deposit was not good. I agree with the order of my learned brother.

S.N./R.K. *Decree modified.*

A. I. R. 1918 Madras 92

PHILLIPS AND KRISHNAN, JJ.

Sundaram Ayyangar—Defendant—Appellant.

v.

Ramaswami Ayyangar and *another*—Plaintiffs—Respondents.

Second Appeal No. 1311 of 1917, Decided on 19th April 1918, against decree of Temporary Sub-Judge, Salem, in Appeal Suit No. 135 of 1916.

(a) Madras Revenue Recovery Act (1864), Ss. 37-A, 38, Proviso and 59—Sale for arrears of revenue, confirmed by Deputy Collector and approved by Collector—Order of Collector becomes final—Board of Revenue has no powers to direct Collector to cancel such order—If being directed by Board Collector cancels his order, and purchaser sues to set aside cancellation, suit is not governed by limitation period prescribed in S. 59.

Where a revenue sale is confirmed by the Deputy Collector and approved by the District Collector under S. 3, Madras Regln. 7 of 1828, the order becomes final under S. 38 (3), Madras Revenue Recovery Act. [P 93 C 1]

The Board of Revenue has no jurisdiction to interfere with such order and direct the Collector to cancel the sale. [P 93 C 1]

Where therefore a Collector, under the Board's directions, in supersession of his order approving of a saie, cancelled it and the purchaser brought a suit for setting aside the order of cancellation and for possession:

Held: (1) that the action of the Board of Revenue was wholly without jurisdiction; (2) that the suit was not governed by the limitation period prescribed in S. 59, Madras Revenue Recovery Act, as the order cancelling the sale was only a review of the previous order confirming the sale. 33 *Mad.* 65 *Foll.*; 12 *Mad.* 168; 26 *Mad.* 668 and 3 *M. L. J* 255, *Dist.* [P 93 C 1]

(b) Practice—Revision—Authority having general powers cannot direct to pass special orders.

Where a certain power is given to the Collector by Statute, it is not open to the authority having only general powers of revision over him, to direct him to pass a special order contrary to what he has already done. [P 92 C 2; P 93C 1]

(c) Madras Revenue Recovery Act (1864), S. 38, proviso—Proviso does not give power to set aside sale after confirmation.

The proviso to S. 38 does not give power to set aside a sale after it has been confirmed under the first part of the section. [P 93 C 1]

K. Bhashyam Aiyagar—for Appellant.

B. Somayya—for Respondents.

Government Pleader—for the Crown.

Judgment.—In this case a revenue sale was held, in which defendant 1's land was sold under Revenue Recovery Act (2 of 1864). A petition under S. 37-A of that Act to set aside the sale, was dismissed and also a petition under S. 38 (1), Act 2 of 1864. These two orders were passed by the Deputy Collector, and his order of confirmation of sale was approved by the District Collector under the powers conferred on him by S. 3, Madras Regulation 7 of 1828. By this confirmation the order of confirmation under S. 38 (3), Act 2 of 1864, became final. Later on however the Board of Revenue directed the Collector to cancel the sale and he cancelled it accordingly. Plaintiff's sut to set aside this last order and to recover possession of the property purchased by him at the revenue sale, has been decreed by the Subordinate Judge. The first objection taken is that under Madras Regulations 1 and 2 of 1803 which gave the Board of Revenue power of general superintendence over Collectors, the Board had the power to set aside the sale. When a certain power i given to the Collector by Statute it is no open to the authority having only gene

ral powers of revision over him, to direct him to pass a special order contrary to what he had already done. In this case the order cancelling the sale though purporting to be passed by the Collector was really the order of the Board of Revenue who had no such power under Act 2 of 1864. We have not been referred to any authority in support of this contention and we cannot accept it.

It is next argued that as the District Collector has powers of revision over Assistant Collectors exercising the powers of a Collector, under Madras Regln. 7 of 1828, he had under S. 38 (3), Act 2 of 1864 power to pass the final order cancelling the sale. The order under S. 38 (3), Act 2 of 1864, was however passed in this case by the Deputy Collector, and when his order was confirmed by the District Collector, it became a final order passed by the Collector within the meaning of S. 38 (3) and neither he nor the District Collector, had himself power under the Act to pass any further order. We cannot accept a further contention that the proviso to Cl. (3), S. 38, gives power to set aside a sale after it has been confirmed under the first part of the section. The power given under that clause is one that must be exercised in lieu of the confirmation of the sale. The third point is that this suit is barred by limitation under S. 59, Act 2 of 1864, as it has not been brought within six months of the order complained against. The order setting aside the sale, was in effect a review of the previous order confirming the sale and therefore following *Damodar Nadar* v. *Municka Vachaka* (1), we think that S. 59 is inapplicable, for it was an order passed wholly without jurisdiction, and not under any power conferred by the Act. In this view *Venkata* v. *Chengada* (2); *Raman Naidu* v. *Bhassoori Sanyasi* (3) and *Iswara Pattar* v. *Karuppan* (4) can be distinguished. The last argument is that, on the merits, the sale should have been set aside. The finding of the Subordinate Judge that no substantial injury was proved to be due to the only irregularity in the conduct of the sale, concludes this point. The second appeal is accordingly dismissed with costs of respondent 1. The memorandum of objections is dismissed.

S.N./R.K. *Appeal dismissed.*

1. (1909) 33 Mad 65=3 I C 463=6 M L T 177.
2. (1899) 12 Mad 168.
3. (1903) 26 Mad 638.
4. (1893) 3 M L J 255.

A. I. R. 1918 Madras 93

ABDUR RAHIM AND OLDFIELD, JJ.

Appu Row—Plaintiff—Appellant.

v.

Kaveri—Defendant—Respondent.

Second Appeal No. 884 of 1916, Decided on 25th September 1917 against decree of Dist. Judge, Salem, in Appeal Suit No. 130 of 1914.

(a) Madras Estates Land Act (1 of 1908), S. 185—Proof of land being private and not raiyati how to be adduced stated.

Section 185 permits the landlord to produce any evidence other than that specified in the section to prove that the land in dispute is his private land, and not raiyati land. [P 94 C 1]

(b) Madras Estates Land Act (1 of 1908), S. 185—Presumption is in favour of tenant but it must be seen if it is rebutted.

The section raises a presumption in favour of the raiyat, but the question to be considered is whether the evidence adduced by the landlord is sufficient to rebut that presumption. [P 94 C 2]

K. R. Subramania Sastri—for Appellant.

S. Viswanadha Aiyar and *P. N. Nageswara Aiyar*—for Respondent.

Judgment.—The suit was in ejectment, and one of the questions before the lower appellate Court was whether the land in dispute was the private land of the plaintiff or the raiyati land of the defendant. The District Munsif held in favour of the plaintiff but in appeal, the learned District Judge was of opinion that S. 185, Madras Estates Land Act permitted only a specific kind of evidence to be adduced in proof of the allegation whether certain land was the private land of the landholder. Taking that view of the section, he came to the conclusion that the plaintiff failed to adduce any proof that the land was his private land. The learned pleader for the appellant points out that there were at least two documents Ex, A and B, which contained an admission of the plaintiff's title. The statement which is said to amount to an admission is to the effect that the land belongs to the plaintiff's patta. He also points out that there was evidence of the plaintiff that the land was his private land. Further there was evidence furnished by the conduct of the defendant which supports the plaintiff's case. S. 185 says:

"When in any suit or proceeding it becomes necessary to determine whether any land is the landholder's private land, regard shall be had to the local custom and to the question whether the land was before the first day of July 1898 specifically let as private land and to any other evidence that may be produced, but the land shall be presumed not to be private land until the contrary is shown. Provided that all land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act, shall be deemed to be the landholder's private land."

The legislature, whether it was necessary for it to mention certain classes of evidence or not, does lay down that evidence other than that mentioned may be produced in support of the landholder's allegation. With reference to Ex. A, which is a muchilika executed by the defendant in 1904, that is, since 1st July 1898, it is urged that S. 185 in mentioning that

"regard shall be had to local custom and to the question whether the land was before the 1st July 1898 specifically let as private land," means to exclude any evidence of letting as private land after 1st July 1898. That seems to be the view taken by Sadasiva Aiyar, J., in *Mulpuru Lakshmayya* v. *Varadaraja Apparow* (1), while Sundara Aiyar J.'s view was to the contrary. In *Chintaman Reddi Sanyasi* v. *Rajasagi Appala Narasimha Raja Garu* (2) the learned Chief justice and Ayling, J., had a similar question before them, and it is contended by the learned pleader for the respondent that they took the same view of S. 185 as Sadasiva Aiyar, J; but we do not think that this is correct. On the other hand it seems to us that in two places they point out that, besides the classes of evidence mentioned in S. 185, it is open to the landlord to produce any other evidence with may be relevant to his purpose. No doubt there is a sentence in that judgment which might perhaps be taken to lend some countenance to the argument of the learned pleader for the respondent; it is to this effect:

"What the Court has to find is, with regard to the classes of evidence mentioned in the section, whether the land was private land at the passing of the Act."

But if that sentence is read along with the rest of the judgment, it seems to us to be fairly evident that the learned Judges did not mean to lay down that, under S. 185, only certain classes of evidence are admissible, for the result of that would be that they would not be giving effect to the words "any other evidence that may be produced." We do not see any reason why we should give such a narrow construction to S. 185 as suggested by Sadasiva Aiyar, J. Besides Ex. A is sought to be used by the plaintiff not to prove the fact of letting but as containing an admission of his title to the land in question. With reference to Ex. B it is contended on behalf of the respondent that it is an agreement to lease for ten years and therefore inadmissible for want of registration. It is a razinama filed by the parties, the defendant and the plaintiff, containing several terms, one of which is a grant of lease for ten years. The passage upon which the plaintiff relies is "that this land belongs to the plaintiff's patta," which, he says, is an admission of his title. We think that the learned District Judge was wrong in his construction of S. 185 and there is evidence which has to to be considered in connexion with the question as to whether the plaintiff has proved that the land is his private land. We may point out that S. 185 clearly raises a presumption in favour of the defendant; but the question that has to be considered is whether the evidence which has been adduced by the plaintiff is sufficient to rebut that presumption.

We set aside the decree of the lower appellate Court and remand the appeal for disposal according to law. Costs will abide the result.

S N./R.K. *Appeal allowed.*

1. (1912) 36 Mad 168=17 I C 353.
2. A I R 1915 Mad 722=27 I C 50.

A. I. R 1918 Madras 94

SADASIVA AIYAR AND SPENCER, JJ.

(*Puthiyapandikasalayil*) *Abdulla Koya* —Plaintiff—Appellant.

v.

Kallumpurath Kanaran and *others*—Defendants—Respondents.

Second Appeal No. 859 of 1914, Decided on 22nd March 1917, against decree of Sub-Judge, North Malabar, in Appeal Suits Nos. 453 and 451 of 1912.

(a) Limitation Act (1908), S. 14 and Art. 36—Suit for redemption—Decree for possession—Execution proceedings for recovery of damages subsequent to decree, dismissed. Court holding that proper remedy was by suit—Art. 36 applied—Mortgagor is not entitled to deduct time taken in execution proceedings—There was no question of estoppel against defendants—Malabar Compensation

for Tenants' Improvements Act (1900), Ss. 5 and 6.

A Malabar mortgagor obtained a decree for redemption on 9th March 1907 and was put into possession of the property on 8h December 1908, and carried on execution proceedings for the recovery of damages subsequent to decree between 8th November 1908 and 22nd June 1910, which, however ended unsuccessfully by the Subordinate Judge deciding in appeal that the proper remedy for the mortgagor was to proceed not by way of execution but by a suit. He then brought a suit for damages both prior and subsequent to decree:

Held: (1) that Art. 36, Lim, Act, applied and that the mortgagor had only two years from the date of the damage to institute a suit. [P 95 C 2]

(2) that so far as damages prior to decree were concerned, the mortgagor not having prayed for them in the prior execution proceedings, the prior proceedings in execution could not be taken advantage of under S. 14, Lim. Act. [P 95 C 2]

(3) that even as regards damages subsequent to decree, the mortgagor was not entitled to a deduction of the time taken in the prior execution proceedings, as those proceedings were not in a Court which, from defect of jurisdiction or other cause of like nature, was unable to entertain it, the executing Courts being competent to award damages subsequent to decree under S. 5, Cl. 4, Malabar Compensation for Tenants' Improvements Act. [P 95 C 2]

Even assuming that a party ought not to be allowed to raise inconsistent contentions as to procedure in two successive proceedings, there being nothing to show that the dismissal of the prior execution proceedings and the direction that a suit was the proper remedy made by the Subordinate Judge, were on the plea of the defendants to that effect, there was no question of estoppel against the defendants. [P 95 C 2]

(b) Malabar Compensation for Tenants' Improvements Act (1900), Ss. 5 and 6—Intention—There should be complete settlement between lessor or mortgagor and lessee or mortgagee of their dues up to date of transfer of possession.

Per *Spencer, J.*—The intention underlying Ss. 5 and 6, is that there should be a complete and final settlement between the lessor or mortgagor and his lessee or mortgagee of all that is due from the former to the latter and from the latter to the former up to the date when the transfer of possession takes place and that the subsequent re-opening of accounts between parties whose legal relationship has ceased should be avoided. [P 96 C 1]

(c) Practice—Pleadings—Inconsistent pleas of law in two successive proceedings involving same questions, whether permissible— *Quaere.*

Per *Sadasiva Aiyar, J.*—Whether the principle that a party cannot blow hot and cold in pleadings in two successive proceedings involving the same questions of rights, applies to pleas based on abstract questions of law, substantive or procedural. [P 96 C 2]

K. Govinda Marar—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Spencer, J.—The plaintiff sued in Original Suit No. 150 of 1906, for redemption and possession of 2 items of property. He obtained a decree on 9th March 1907, and was put into possession of the property on 5th December 1908. He brought this suit on 20th June 1911, to recover compensation for damages done by the defendants both prior to the decree in Original Suit No. 150 of 1906, and between the decree and his entry upon the land. Under Art. 36, Lim. Act, he had two years from the date when the alleged damage was caused to institute his suit, and he is now out of time unless he is allowed under S. 14 to deduct the time between 6th November 1908, and 22nd June 1910, spent in prosecuting execution proceedings to obtain the same relief. As regards the damage caused before the passing of the aforesaid decree, the lower Courts were clearly right in refusing to let the plaintiff take advantage of the previous execution proceedings for extending the time under S. 14, for the reason that in those proceedings the plaintiff did not ask to be compensated for loss sustained before the decree but expressly reserved his right to make that the subject of a separate application. As regards the claim on account of damage alleged to have been caused after the decree and before possession was delivered to the plaintiff, the District Munsif in the execution proceedings refused to award compensation under this head as he did not believe the plaintiff's allegations to be true.

In appeal the Subordinate Judge did not pronounce on the merits of this claim, as he held that the plaintiff's proper remedy was to proceed not by way of execution but by a regular suit and dismissed the appeal. The plaintiff did not appeal against that order and we are not now sitting in appeal upon it so as to be in a position to decide whether the plaintiff should have been given the relief sought by him in the Subordinate Judge's Court. We have only to see whether those proceedings were prosecuted in good faith in a Court which from defect of jurisdiction or other cause of like nature was unable to entertain it. Now S. 6, Malabar Compensation for Tenants' Improvements Act, declares that in a suit brought for ejectment of a tenant in Malabar the Court executing the decree shall determine the amount due for compensation for improvements made subsequent to

the date of valuation adopted in the decree:

"as well as any sum of money accruing due to the plaintiff subsequent to the said date for rent or otherwise in respect of the tenancy,"

and the Court shall vary the decree accordingly. Under S. 5, the tenant to whom the compensation is due continues to hold as a tenant until he is ejected. I think the intention of the legislature is clear enough. It was intended that there should be a complete and final settlement between the lessor or mortgagor and his lessee or mortgagee of all that is due from the former to the latter and from the latter to the former up to the date when the transfer of possession takes place and that the subsequent re-opening of accounts between parties whose legal relationship has ceased should be avoided. I also think that the words "any sum of money accruing due for rent or otherwise in respect of the tenancy" are wide enough to include damages for injury done by the tenant to his mortgagor's or lessor's property, even though the money may not strictly be said to accrue due until the value of the damage has been ascertained. Cl. 4 of this section makes such matters to be questions falling under S. 47, Civil P. C. In this view I consider that the executing Court was not incompetent to entertain the application to award compensation to the decree-holder for damage done to his property after the passing of the decree and therefore that S. 14, Lim. Act, does not operate in this case to extend the time. The suit is barred. The second appeal should be dismissed with costs.

Sadasiva Ayyar, J.—I agree. I wish to add however, a few words on a question which, though not raised in the lower Courts or in the grounds of memorandum of second appeal, was argued before us. Mr. Gobinda Marar, vakil for the appellant, argued (1) that the Subordinate Judge having in Ex. P (the decision passed in appeal from the order of Execution Petition No. 851 of 1908) decided that the question of compensation for damages due to the plaintiff, both prior to and after the decree in Original Suit No. 150 of 1906, could not be considered in execution proceedings, the defendants are estopped from contending in this suit that the executing Court was not incompetent to consider that question and (2) that, so being estopped, the time taken in that incompetent Court must be deducted under S. 14, Lim. Act at least as regards the relief of compensation for acts subsequent to the said decree.

As regards the first point, it has been, no doubt, held in *Mallika Dasi* v. *Makhan Lall Chowdhury* (1), *Ramgati Mohurer* v. *Pran Hari Seal* (2) and *Shashi Bhusan Mandal* v. *Ram Sebak Mandal* (3) that a party cannot, as a rule, be allowed to "blow hot and cold" in pleading in two successive proceedings involving the same questions of rights and if by setting up a particular defence, he has induced the Court to decide against his adversary in the first proceeding, he cannot in a subsequent proceeding based on his own contention in the former proceeding be allowed to go against that contention. But it is doubtful whether this doctrine can be availed of as regards pleas based on abstract questions of law. Decisions on abstract questions of law are not res judicata between the same parties and if a party can be allowed to "blow hot and cold" (as it is called) on abstract questions of law, I do not see why he should not argue against his own contention on a pure abstract question of procedure law in order to defeat his adversary who, instead of appealing against the wrong decision of the Court in the former proceeding on a question of procedure, instituted the fresh proceeding, accepting the former erroneous decision as correct. However there are cases [see *Jagannadha Rao* v. *Katreddi Kurmayya* (4), *Marpal* v. *Sahib Ram* (5)] which hold that even legal contentions as to procedure ought not to be varied in a subsequent proceeding relating to the same matter. Assuming then that a party ought not to be allowed to raise inconsistent contentions as to procedure in successive proceedings, provided that the relief sought by the other party was substantially the same in the prior and in the subsequent proceedings, there is nothing in Ex. P to show that it was on the plea of the defendants that the Subordinate Judge decided against the plaintiff on the question of law whether the executing Court was or was not competent to go into the question of damages

1. (1905) 2 C L J 389.
2. (1906) 3 C L J 201.
3. A I R 1914 All 202=24 I C 81.
4. (1907) 17 M L J 314.
5. (1905) 27 All 544.

for waste. The first contention therefore fails.

As the first contention has failed, it is unnecessary to express a final opinion on the second contention. I shall therefore merely notice the arguments contra thereon. The cases quoted already only allow the plaintiff in the subsequent proceeding to adopt as correct the contention which was put forward by the opposite party and which was accepted by the Court so as to prevent the opposite party from arguing against his own previous contention. But they do not deal directly with the question whether the time taken up in the first infructuous or unsuccessful proceeding could be deducted for the purposes of calculating the limitation period for the second proceedings and whether the opposite party is estopped also from contending even in arguing the question of limitation that the first proceeding was in a competent Court, the question of the Court's competency being only a subsidiary question of law which has to be considered for arriving at a decision on the main question of limitation. It is however as I said before, unnecessary to express a final opinion on this matter

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 97

SADASIVA AIYAR AND PHILLIPS, JJ.

Doraiswami Muttiriyan and *another* —Appellants.

v.

Muttachi—Respondent.

Second Appeals Nos. 1133 and 1134 of 1916, Decided on 20th December 1917, against decrees of Temporary Sub-Judge, Trichinopoly, in Appeal Suits No. 54 and 57 of 1915.

(a) Easements Act (1882), S. 7—Right to drain water to lower land whether rain water or channel water—Right may be customary or prespective.

An owner of land may have a customary or prescriptive right to drain water coming to his land by the falling of rain or drained from upper fields or brought by himself for purposes of irrigation on to adjoining land. [P 98 C 1]

Per *Sadasiva Aiyar, J.*—An owner of land may have a natural right not only to drain rain water falling on his land on to neighbouring land where it is lower in level than his land. but also to drain water brought on his land by the custom and usages of the country along irrigation channels. [P 98 C 1]

Per *Phillips, J. (Obiter).*—An owner of land can have no natural right to pass water, which has come on his land artificially, on to adjoining land. [P 99 C 1]

(b) Easements Act (1882), S. 22—Injunction to prevent obstruction to easement must not be such as to debar advantages given by S. 22.

An injunction as to easements which have been broken should be confined to a direction to the party breaking not to obstruct the exercise of the easement and should not descend into details, so as to prevent the servient owner from taking advantage of the privilege given to him by S. 22. [P 97 C 2]

C. Madhavan Nair—for Appellants.

B. Sitaram Row—for Respondent.

Sadasiva Aiyar, J.—These two second appeals have arisen out of two cross-suits. In the earlier Suit No. 92 of 1914, the plaintiff is the owner of the upper western land and he sued for an injunction preventing the defendants from obstructing the draining of the surplus water of his upper land into the defendant's field, through a particular madai or opening which, after traversing the breadth of the eastern ridge of the plaintiff's field, passes through the breadth of the boundary ridge between the two villages of the plaintiff and the defendants respectively and then opens out into the defendant's field. He also prayed for the removal by the defendants of the bund which they had put up on their own land opposite to the madai so as to prevent water falling through the madai into the defendants' lower land. The 3rd relief claimed by the plaintiff was that he might be put in possession of the site of the madai situated on his own patta land and its entrance. The plaintiff also prayed for further reliefs by way of damages caused by defendants' acts. The cross-suit was for an injunction against the plaintiff in the first suit restraining him from discharging water through the madai into the defendants' field and for damages. I shall call the plaintiff in the first suit (who is the owner of the upper land) as plaintiff, hereafter.

The first issue raised in that Suit No. 92 of 1914 was whether the plaintiff was entitled to discharge the surplus water of his land into defendant 1's land through the madai marked A in his plan. Now the water which is collected on the plaintiff's land seems not to be merely the rain water which falls on that particular land, but also water brought on to the plaintiff's land from irrigation sources for the purpose of cultivation of sugarcane, besides the water which comes on to the plaintiff's land from fields which are still higher up and which are

also cultivated for agricultural purposes. The judgments of the lower Courts consider the plaintiff's right as of the nature of a natural right in some places, as a customary right in other places and as a prescriptive right in yet other parts of the judgments. As regards a natural right strictly so called, it may be said that it covers only the right to allow the rain water falling upon a land which is naturally higher in level than its neighbouring land to drain by surface flow by gradually flowing over, wherever and along whatever lines the water could find its way on to that neighbouring land. But such a strict interpretation of the expression "natural right" seems not to have been adhered to always by Courts. Even if the owner of the upper field reclaims or improves portions of his land in course of ordinary agricultural operations, provided the water does come upon his land naturally and in draining it off to the lower field he does not cause more injury to that lower field than would have been caused if he had left his land in its natural unimproved condition, the right conferred on him by law to so drain off the water has also been described as a "natural right."

I think also that even if the water was not merely rain water, but water that is brought according to the custom and usages of the country along irrigation channels upon the land, the right to pass it on to a land of a lower level may be spoken as a "natural right" without much violence to language. In the present case the District Munsif finds a customary right on the part of the plaintiff's land and similar lands south and north of the plaintiff's land in the plaintiff's village to throw off the water coming on to those fields for purposes of agricultural irrigation on to the lower lands in the defendants' village to the respective fields in the plaintiff's village situated opposite to and south of the first mentioned lands. The Subordinate Judge in para. 7 of his judgment notices this finding of the District Munsif that the lands in the plaintiffs village of Pallavaram have been accustomed to drain their water through madais shown in the Commissioner's plan into the lower fields in the defendant's village of Velayudampatti, but he does not expressly find that a customary right of easement to so pass on the water through madais, even though the water was brought in for purposes of agriculture, has been established. He refers mainly to natural rights strictly so called, that is, those rights which relate only to the drainage of rain water and the passing on of the water by surface flow to the lower land without a definite outlet. He might have intended to find a customary right of easement also. However I think that it is better to request the lower appellate Court to submit a definite and clear finding on this customary right and as to the extent of such customary right, though the defendants contented themselves in their written statement with denying the plaintiff's right altogether and did not in the alternative set up that the plaintiff has been trying to exceed his customary right. I may also here refer to the fact that the District Munsif in drawing up the decree has not given sufficient consideration to the right given to a servient owner by S. 22, Easement Act, which says:

"the dominant owner must exercise his right in the mode which is least onerous to the servient owner; and when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner be so confined."

The decree gives an injunction directing the defendants to remove the heap of mud put up by the defendants opposite to the madai A and to restore the original level of the defendants' lands. Injunctions as to such easements when they have been broken, should in my opinion be confined to a direction to the defendants not to obstruct the exercise of the easement and should not descend into details, as that will prevent the defendants from taking advantage of the privilege given to them by S. 22, Easements Act. As regards the site of the madai, though the defendants in para. No. 8 of their written statement denied the plaintiff's ownership of the madai, it is clear from the plan that between the defendants' patta land and the plaintiff's patta land there is the boundary ridge between the two villages and I take it that it does not belong to either party. The decree when it restores possession of the site of the madai to the plaintiff, must be interpreted as confined to the ridge and opening in the survey boundary of his field No. 243 as shown in the Commissioner's plan, and not to the eastern village boun-

dary ridge or to the ridge further east belonging to the defendants' field. The issue on which the lower appellate Court has to find is:

"Is the plaintiff, by custom or prescription, entitled to drain the water coming on his land by the falling of rain or drained from upper fields or brought by himself for purposes of irrigation, to the defendants' land and if so in what mode and to what extent?"

The finding will be submitted on the evidence on record in four weeks from the receipt of records. Ten days will be allowed for objections.

Phillips, J.—I agree. I do not think it is necessary in this case to express a definite opinion as to the nature or extent of natural rights. For the purposes of this case it is sufficient to hold as I do that an owner of land can have no "natural" right to pass the water, which has come upon his land artificialy, to the adjoining land. In this case it is admitted that the upper field is watered from irrigation sources and therefore a right to pass such water away from the field cannot be a natural right. It is therefore necessary that the question as to whether the upper owner has a prescriptive right or a customary right to pass away that water should be decided. In compliance with the order contained in the above judgment, the District Judge of Trichinopoly submitted the following.

Finding.—I am required to submit a finding on the following issue:

"Is the plaintiff by custom or prescription entitled to drain the water coming on his land by the falling of rain or drained from upper fields or brought by himself for purposes of irrigation to the defendants' land and if so in what mode and to what extent?"

2. The plaintiff in the issue is the plaintiff in Original Suit No. 212 of 1914 (Additional District Munsif's Court, Trichinopoly) and the owner of S. No. 243 (4), of Pallavaram. The defendants own S. No. 145 (2c) immediately east of the plaintiff's land and included in Velayuthampatti village. The plaintiff claims a right to discharge water coming on his land on to the defendants' field and the District Munsif has found that he is entitled to do so by custom and by prescriptive right (para. No. 19 of his judgment). The case of the defendants is that the water from the plaintiff's land is carried southwards through other fields of Pallavaram to a point where the Krishnapuram channel (shown on Commissioner's plan) approaches the village boundary and is there discharged into that channel. It is further the plaintiff's case that from other fields of Pallavaram situated similarly to his own water is discharged on to the fields of Velayuthampatti lying immediately to the east of them. The water is said to be carried off in each case by means of a "madai" in the ridge which forms the boundary between the two villages. The defendants do not state expressly how drainage is effected in the case of Pallavaram fields to the south of the bend in the channel but defendant 1 in his deposition denies the existence of madais. 3. The District Munsif has rightly pointed out that the evidence on both sides comes from interested sources. Ramaswami Chetti however who owns land adjoining that of defendant 1 in Velayuthampatti, supports the plaintiff's case. His statement is entitled to some weight as being against his interest, although he owes defendant 1 a grudge. Reference has been made to statements by this witness and by Gurunatha Muthirian in cross-examination as indicating that the water discharged on to Vellayuthampatti fields is rain water only. I do not think that this is the right interpretation of the answers. I think they really refer to the irrigation season. It would be impossible to discriminate between rain water and other water and I do not believe the witnesses intended to draw any such distinction.

4. If the evidence for the plaintiff is accepted, I think it establishes a custom to discharge water from the Pallavaram lands in the block now in question on to the adjacent lands of Velayuthampatti and also that the plaintiff has in fact so discharged water from his field in a manner and for a time long enough to give him a prescriptive right. 5. Which version is to be accepted must depend in a great measure on a consideration of general probabilities. The Commissioner's report and the other evidence establish that the Pallavaram lands slope mainly towards the east. Their irrigation source is the channel on the west. It is admitted that water is discharged from some of these fields into the Krishnapuram channel in Velayuthampatti limits. The flow would naturally be in this direction and I think it is probable that each landholder did discharge water in this direction by the most direct method, i. e., into the adjacent fields of Velayuthampatti.

Until recently there was no reason why this method should have been objected to. I do not think that the fields being situate in different villages makes any difference. The Commissioner saw a number of madais in existence and it seems very unlikely that the defendants' party would have permitted these to have been formed simply for the occasion. If the defendants' story were true that the discharge is concentrated at one point, there would have been signs of this but nothing of the kind is referred to in the evidence nor does the Commissioner's attention appear to have been called to it. 6. I think the probabilities are in favour of the plaintiff's contentions and I accordingly accept the evidence on his side. I find that the plaintiff is entitled by custom and prescription to drain the water coming on his land in the ways mentioned in the issue on to the defendants' land. The mode authorized is through a madai in the ridge at the eastern limit of his land. All water coming on to the plaintiff's land by means of drainage from fields between his land and the channel on the west may be discharged in this way as well as water brought on to plaintiff's land by himself for purposes of irrigation. These second appeals coming on for final hearing after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following.

Judgment.— *In S A. No.* 1133 *of* 1916. The second appeal is dismissed with costs. *In S. A No.* 1134 *of* 1916. We accept the findings. In the result the decree of the District Munsif (confirmed by the lower appellate Court) is modified in the following respects.

Instead of Cl. (1), substitute:

"(1) That the defendants do restore the Madai A as shown in the plaint plan to its original condition and allow the flow of water in the mamool manner through the said opening."

Add at the end of Cl. (2) "A in the plaint plan."

For "the madai" at the end of Cl. (3), substitute:

"the site of the ridge and opening in the boundary of the field No. 243 as shown in the plaint plan so far as it is included in plaintiff's holding."

The appellants must pay the respondent's costs in this second appeal and bear their own.

S.N./R.K. *Appeal No.* 1133 *dismissed.*
Decree in No. 1134 *modified.*

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SESHAGIRI AIYAR, J.

Vaithilingam Chetty—Plaintiff—Petitioner.

v.

Kaliaperumal Mudali and *another*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 1189 of 1916, Decided on 18th December 1917, against order of Small Cause Court Judge, Kumbakonam, in O. P. No. 24 of 1916.

Civil P. C. (1908), S. 24 (1) (b) (2) and O. 47, R. 2—Court newly constituted and empowered to try cases presented to it is not competent to try and dispose under Cl. (1) (b) (2)—Nor is it successor within O. 47. R. 2.

The Court of a District Judge has no power to transfer suits or petitions filed in a Court subordinate to it to another subordinate Court newly established thereafter, which is only empowered to hear cases presented to it from a psecified date after its establishment. [P 101 C 1]

The latter Court is not a Court "competent to try and dispose of the same" within the meaning of Cl. (1) (b) (ii), S. 24; nor can it be regarded as 'successor' to the Court which originally entertained the suit or petition within the meaning of O. 47, R 2. [P 101 C 1]

The Subordinate Judge of Kumbakonam issued notice, on a review petition presented to him, on 19th November 1915, to the opposite party to appear on 27th November 1915. The petition not having been disposed of on the latter date, the District Judge transferred the petition to a new Small Cause Court established at Kumbakonam on 1st January 1916, with jurisdiction to try all Small Cause suits from that date:

Held: that the order of transfer was ultra vires. [P 101 C 2]

K. Aravamuda Ayyangar—for Petitioner.

C. Madhavan Nair—for Opposite Parties.

Judgment.—The suit was originally instituted on the Small Cause Side of the Subordinate Judge's Court at Kumbakonam. He pronounced judgment on 27th October 1915. A petition for review was presented to him on 19th November 1915. He directed the issue of notice to the opposite party on 27th November. On the 1st January 1916 a Special Small Cause Court was established at Kumbakonam which was invested with jurisdiction to try all small cause suits within a specified area. The High Court issued a circular, R. O. C. No. 3656 of 1916, dated 31st October 1916, in which it was stated that the Special Small Cause Judge alone shall have jurisdiction to hear all small cause suits instituted after 1st January 1916. Apparently on this circular the District Judge transferred the review petition from the Kumbakonam Sub-

ordinate Court to the new Small Cause Court. The question for consideration is whether this transfer was right. This petition was presented by the plaintiff and as I found that the opposite side was not represented before me, I requested Mr. Madhavan Nair to help me, as a question of considerable importance regarding the procedure was raised by the point taken before me. I am very much indebted to Mr. Madhavan Nair for his assistance.

Mr. Madhavan Nair supports the order of the District Judge by a reference to S. 24, Cl. (1) (b) (ii). He concedes that the High Court circular can only affect cases which were instituted after 1st January 1916. But he argues that the District Judge had power to withdraw the case from the file of the Subordinate Judge and to direct its disposal by any Court subordinate to the District Court which was competent to try and dispose of small cause suits. The difficulty arises in construing the words 'competent to try and dispose of the same' in Cl. (1) (b) (ii), S. 24. There can be no doubt that the Special Small Cause Judge, according to the circular of the High Court, was only competent to hear cases which were filed after the new Court was established. O. 47, R. 2, Civil P. C. provides that after notice has been issued by the Judge on an application for review the successor of that Judge is competent to dispose of it. Mr. Madhavan Nair's contention is this—that the Special Small Cause Judge is the successor of all those Judges who exercised Small Cause Court's jurisdiction within the limit which was subsequently assigned to him and, therefore, he became the successor of the Subordinate Judge of Kumbakonam and as notice was directed to be issued by the Subordinate Judge in respect of this matter, the new Small Cause Court Judge must be taken to be a successor competent to dispose of the review petition, within the meaning of S. 24 (b) (ii). As pointed out by the learned vakil for the petitioner, it seems to me that the new Small Cause Court Judge should be regarded as the successor of the existing Small Cause Court Judges, only in respect of cases filed after the 1st January 1916. Having regard to the express wording of the High Court circular he cannot be regarded as the successor of the Small Cause Court Judges in respect of matters which were pending on their file at the time when the new Court was established. There can be no doubt on the question of convenience and justice that the Subordinate Judge of Kumbakonam would be the proper person to dispose of this review petition.

He is cognisant of all the facts which transpired before him, and it would be very inconvenient that a new Judge who had nothing to do with the original trial should be asked to hear the review petition. The observations of the Judicial Committee in *Ram Nath* v *Gowhur* (1) support this view. I have, therefore, come to the conclusion that the order of the District Judge transferring the case from the file of the Kumbakonam Subordinate Court to the new Small Cause Judge is ultra vires. On this ground, I must reverse the order in this case and direct the Subordinate Judge of Kumbakonam to dispose of the petition on the merits. Costs to abide the result.

S.N./R K. *Order reversed.*

1. (1870) 2 N W P H C R 230.

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SESHAGIRI AIYAR AND NAPIER, JJ.

Dhulipalla Kanakam — Defendant—Appellant.

v.

Nadipalli Venkataraju and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 1036 and 1037 of 1916, Decided on 22nd October 1917, against decrees of Addl. Temporary Sub-Judge, Guntur, in Appeal Suits Nos. 166 and 159 of 1915.

***Hindu Law—Joint family—Trade carried on by manager in partnership with stranger, for benefit of family—All members are liable for debts contracted by him — Liability of minor is not restricted to partnership assets under Contract Act (1872), S. 247.**

All the members of a joint Hindu family are liable for debts contracted by the manager for the purpose of a trade carried on by him for the benefit of the family in partnership with a stranger, although the manager alone can exercise the powers of a partner. The liability of a minor co-parcener in such a case is not restricted to his share in the partnership assets under S. 247, Contract Act, but arises under the Hindu Law and the joint family property is liable for the debt. 35 *Mad* 692 and 43 *I C* 9, *Dist.* [P 102 C 2]

P. Narayanamurthy—for Appellants.

P. Somasundaram—for Respondents.

In S. A. No. 1036 *of* 1916

Judgment.—The plaintiff sues on a promissory note executed by defendants 1 and 3. Defendant 2 is joined as being

the undivided brother of defendant 1. The father of the first two defendants carried on a trade in timber with one Naganna. On his death, defendant 1, as the manager of the joint family, carried the stock in trade left by his father into a similar partnership with defendant 3. The debt evidenced by the promissory note was contracted in the course of this trade and it has been proved to have been incurred for the benefit of the family. Defendant 2 pleaded that the joint family property should not be held liable for the debt. The Courts below have rejected this contention and have given a decree against the family property. Mr. Narayanamurthi in an elaborate argument contended that the objections of defendant 2 are governed by S. 247, Contract Act, and that the liability, if any, should be restricted to the assets of the partnership; on the other hand Mr. Somasundaram, for respondent 1, argued that the liability of defendant 2 is under the Hindu law and the fact that the debt was incurred in the course of a partnership concern should not make any difference in his liability. If the position of defendant 2 were to be looked at from the point of view of a person who was admitted to the benefits of the partnership, a great deal can be said in favour of the contention raised by the learned vakil for the appellant. Prima facie, his case would be governed by S. 247 of the Act. The asset of the father in which he had a share was brought into the new partnership and consequently he must be regarded as a person admitted to the benefits of the partnership in which his elder brother and defendant 3 were the active partners.

If this position is established, we are not prepared to say that the ancestral family property can be regarded as partnership assets. The definition given in Lindley on Partnership, P. 384, is against the view that the family property was a part of the assets. One essential consideration for such a position is that all the partners, during the continuance of the business, must have the right to deal with that property. We do not think that the family property was an asset of the partnership. The definition given in S. 20, English Partnership Act, is against holding properties not directly associated with the business as assets of the firm. Therefore, defendant 2, regarded as one to whom S. 247 is solely applicable, could not be made liable in respect of the ancestral property. But, in our opinion, the true view of the case is to regard the liability claimed as against him as proceeding from his position as a member of the joint family. We fail to see why a person who is liable on an ordinary contract entered into by his elder brother as manager should be placed in a more advantageous position, because the manager happens to carry on partnership business with a stranger on behalf of the family. The decisions in *Ramlal Thakursidas* v. *Lakhmichand Muniram* (1) and in *Ramchandra Padayachi* v. *Kondayya Chetti* (2) recognise that the position of a member of a joint family is not changed by the fact of the manager carrying on trade Mr. Narayanamurthi contended that *Sanka Krishnamurthi* v. *Bank of Burma* (3) is against this view. We do not think so.

In that case the sole representative of a Hindu family who was a minor was admitted to the benefits of a partnership with a stranger. It was held that his property was not liable for the partnership debt. The reason of the rule is this: Any liability incurred by a minor is unenforceable and void against him. If he is to be held liable at all, it can only be to the extent to which by Statute he is charged with liability. S. 68, Contract Act, furnishes one illustration, S. 247 another. In the case of a minor in whose behalf the borrowing is made by a person who, under the Hindu law, is competent to pledge the credit of the family, the additional obligation which that law imposes is not rendered inefficacious by the fact that the debt was incurred in the course of the trade. We think that there is no reason for not making defendant 2 liable in respect of the family property, as the debt has been found to have been incurred for the benefit of the family. We do not think that the cases dealing with the relationships of the members of a family inter se in respect of a family trade have any bearing on this question. There is no question of partnership in such cases, but one of joint ownership of a business. Nor does the decision in *Grandhe Gangayya* v. *Grandhe Venkataramiah* (4) affect the present case. The conclusion that in a partnership with a

1. (1862) B H C R App 51.
2. (1901) 24 Mad 555.
3. (1911) 35 Mad 692 = 11 I C 79.
4. (1917) 43 I C 9.

stranger the manager is the only person who can exercise the powers of a partner does not show that the Hindu law liability of the other members is not to be recognised. For all these reasons we are of opinion that the Courts below are right and we dismiss the second appeal with costs.

In S. A. 1037 *of* 1916.

Second Appeal No. 1037 of 1916 follows and is dismissed with costs.

S.N./R.K. *Appeals dismissed.*

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ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

afterwards

ABDUR RAHIM AND OLDFIELD JJ.

Muthammal—Plaintiffs—Appellants.

v.

Razu Pillai and *others*—Defendants—Respondents.

Civil Appeal No. 398 of 1914, Decided on 14th November 1917, against decree of Temporary Sub-Judge, Ramnad, in Original Suit No. 54 of 1914.

Transfer of Property Act (1882), Ss. 51, 68 and 74—Puisne mortgagee selling property in his mortgage and purchasing same and then redeeming prior mortgage—In suit by subsequent mortgagee he is entitled to interest up to date of redemption but he is liable to account for profits from date of possession to date of redemption—Assignee from such mortgagee purchaser is not entitled to costs of improvement — Such mortgagee's position explained—Doctrine of subrogation discussed—Civil P. C. (1908), O. 34, Rr. 1 and 5.

Defendants 1 to 3 mortgaged some houses to the Hindu Permanent Fund on 29th March 1899. On 26th September 1899 they mortgaged the same houses and certain lands to *S*. On 9th February 1901 they again mortgaged the houses to plaintiff's husband. *S* sued on his mortgage, obtained a decree for sale, purchased the lands and houses and soon afterwards obtained possession. His decree was satisfied except for a small sum of Rs. 95. *S*. then redeemed the mortgage to the Fund. In 1906 plaintiff's husband, who was not a party to *S*'s suit, claimed to redeem *S* but did not prosecute his suit. After his death plaintiff sued on her mortgage, offering to redeem *S* or his assignees, but she claimed to do so only on what would be found due on the prior mortgage up to the date of delivery of possession to *S*. In the meantime *S* had sold the properties to defendant 6:

Held: (1) that *S* and his assignees were entitled to the principal and interest due on foot of the two mortgages dated March and September 1899, but were bound to account for the rents and profits of the properties from the respective dates on which *S* obtained possession through Court, the account being carried up to the date fixed for payment; [P 105 C 1, 2]

(2) that defendant 6 was not entitled to the value of the improvements effected by him after his purchaser. [P 110 C 1]

If the owner of on equity of redemption is a party to a suit to enforce a mortgage, but a puisne encumbrancer is not, the purchaser becomes the assignee of the mortgage sued on, as well as the transfer of the equity of redemption, subject to the mesne mortgage, and if the purchaser obtains possession on sale from the owner he must account for the profits at least in cases where the price he pays is not more than sufficient to pay the mortgage sued on; for in such a case the purchaser pays nothing for the equity of redemption and the profits of the land are to be considered as the money of the mortgagor placed in the hands of the purchaser to discharge the mortgage pro tanto [P 105 C 1, 2]

Principles affecting the doctrine of subrogation and revivor of discharged mortgages discussed.

M. D. Devadoss, T. V. Gopalaswami Mudaliar, A. Ganesa Aiyar—for Applt.

K. Bhashyam Aiyangar and *A. Krishnaswami Aiyar*—for Respondents.

Judgment.—This is an appeal by the plaintiff from the decree of the Temporary Subordinate Judge Ramnad, dated 21st September 1914. in a suit to enforce a mortgage. The question is what amount is due to defendant 4 on two prior mortgages which, it is agreed, should be deemed to be still outstanding against the plaintiff. On 29th March 1899, defendants 1 to 3, the owners of certain houses in the town of Madura, mortgaged them to the Hindu Permanent Fund of that town to secure the repayment of the sum of Rs. 1,500 and interest. On 26th September of the same year they again mortgaged the same houses and certain lands of theirs to Sevugan Chetty, defendant 4 to secure the repayment of Rs. 1,000 and interest. On 9th February 1901, they again mortgaged the houses alone to the plaintiff's husband (deceased) to secure the repayment of Rs. 500 and interest. Sevugan Chetty sued on his mortgage in the Madura Munsif's Court, obtained a decree for Rs. 1,265-10-0 and further interest till payment, and for sale of the mortgaged properties, brought them to sale and purchased the houses on 15th April 1904 for Rs. 1,100 and the lands on 21st August 1905 for Rs. 500, and soon after obtained possession. His decree was satisfied except for a small sum of about Rs. 95. As the Fund had a first mortgage on the houses, Sevugan Chetty after his purchase paid to the Fund Rupees 2,537-6-11 on 18th June 1906, that being the sum then due for principal and interest, and redeemed the mortgage. Plain-

tiff's husband was not a party to Sevugan Chetty's suit, and was not bound by the proceedings therein. He, in September 1906, claimed to redeem Sevugan Chetty, unless he was himself redeemed; Sevugan Chetty was quite willing to be redeemed on payment of the sum due on foot of both his mortgages, but nothing was done as plaintiff's husband probably found that the properties were not worth more than the value of the prior mortgages. Sevugan Chetty has subsequently sold the properties and the purchasers of the houses are parties to this suit. Plaintiff's husband died in August 1912 without taking any steps to enforce his mortgage. In the meantime house property in Madura had risen considerably in value and the plaintiff instituted this suit in December 1912, claiming over Rs. 5,000 on her mortgage offering to redeem Sevugan Chetty or his assignees, but claims to do so on payment of what would be found due on the prior mortgages up to the date of delivery of possession to Sevugan Chetty. Sevugan Chetty and his assignee on the other hand claim the whole amount that would be found due according to the terms of the deeds of mortgage up to the date of payment, without taking into account the profits or the income which they have received from the lands and houses. The learned Judge in the Court below has substantially accepted the contention of Sevugan Chetty, and allowed the amount due up to the date of the written statement in this suit—why that particular date was fixed is not clear though in calculating the sum due he made a mistake. The question then is, on what basis is to be calculated the amount due on the prior mortgages which must be deemed to be still outstanding as against the plaintiff.

A number of cases were referred to in which the question has come up for decision, but before we deal with them let us first consider how the matter stands on principle. A mortgagee who sues for foreclosure of the equity of redemption or for the sale of the secured properties, if he succeeds, gets the title of the mortgagor as it stood on the date of his mortgage or transfers that title to the purchaser, free from all interests or liens subsequently created by the mortgagor, provided he makes the owners of such interests or liens parties to the suit; but if he omits to make any of them parties, their rights or liabilities are not affected, but the purchaser (we are concerned in this case only with sales, though the same principle would apply to foreclosure also) would acquire the rights in the mortgaged properties of all the persons who were parties, just as if he had obtained an assignment from all of them, without however a merger of the interests or extinction of the liens so acquired. It is immaterial whether the purchaser is the mortgagee who sued, or another person except that the latter would be subrogated to the rights of the mortgagee only to the extent to which the debt was paid out of the price. It must however be remembered that the several interests or liens so acquired are kept distinct or kept alive only against the excluded party; for example, the purchaser at a first mortgagee's sale in a suit against the mortgagor to which the puisne incumbrancer is not a party, cannot by subrogation claim to keep alive the first mortgage debt against the mortgagor.

This is a matter of substantive rights and no mere conveying device can give a larger right; and the same result would follow if instead of a purchase in a Court sale, the purchaser had obtained by private treaty a transfer of the first mortgage and the equity of redemption subject to that mortgage. In such a case as between himself and the mortgagor, the purchaser assumes the payment of the mortgage and whether on payment he extinguishes the debt or takes a transfer, cannot in any way affect the mortgagor. Further, if a purchaser agrees with the mortgagor to pay all the encumbrances, he cannot by paying an earlier mortgage keep it alive as against a puisne encumbrance, for he has got all he bargained for, and by merely performing his own obligation cannot get a larger right. The matter may also be viewed in another aspect which brings it closer to the present question. The mortgagor having given money's worth to the purchaser to pay all the encumbrances, when the purchaser pays them or any of them, he does so really with the money of the mortgagor and the mortgage is extinguished in just the same way as if it had been paid by the mortgagor himself, provided that the purchaser is not deprived of the property given to him. If, before he is deprived of the property given to him by the mortgagor, he has derived any benefit from it, to that extent it is the mortgagor'

money in his hands for which he must account in a suit to redeem it. It follows therefore that if the mortgagor or the owner of the final equity of redemption is not made a party to the suit, the purchaser at the sale at the best acquires only the interest of the mortgagee and he can be redeemed on payment of whatever is due on the mortgage at the time of payment, on taking accounts, as if such purchaser was a legal assignee of the mortgage. *Sivathi Odayan* v. *Ramasubbayyar* (1), *Dadoba Arjunji* v. *Damodar Raghunath* (2). If the mortgage was a simple mortgage the purchaser would be entitled to the whole of the principal and interest then due. If however such a purchaser takes possession claiming to do so as purchaser of the enquity of redemption, though he did not obtain the title, he would be accountable for the profits derived from the property, for such profits would be money of the mortgagor in his hands. If after such purchase he does not get possession as purchaser of the equity of redemption, but by subrogation by paying a mortgagee with possession, he can only be called on to account on foot of the mortgage with possession when that mortgage is sought to be redeemed.

If the owner of the equity of redemption is a party to the suit, but a puisne encumbrancer is not, the purchaser becomes the assignee of the mortgage sued on, as well as the transferee of the equity of redemption subject to the mesne mortgage, and if the purchaser obtains possession on sale from the owner, he must account for the profits at least in cases where the price he pays is not more than sufficient to pay the mortgage sued on; for in such a case the purchaser pays nothing for the equity of redemption and the profits of the land are to be considered as the money of the mortgagor placed in the hands of the purchaser to discharge the mortgage pro tanto. If beyond the value of the mortgages a price is paid for the equity of redemption and the purchaser gets possession from the owner of the equity of redemption who is, and who is entitled to be, in possession, it may be the purchaser would not be bound to account for the profits (Jones on Mortgages, Vol. 2, S. 1118-a); but we think justice requires that there should be an apportionment of the profits between the value of the mortgage and of the equity of redemption. In this case all the three mortgages are simple mortgages and the mortgagees as mortgagees were not entitled to possession either before or after default. The price paid at the Court sale was not sufficient even to pay the mortgage sued on. Defendant 4 and his assignees would therefore be entitled to the principal and interest due on foot of the two mortgages dated March and September 1899 and be bound to account for the rents and profits of the properties from the respective dates on which defendant 4 obtained possession through Court, the account being carried up to the date fixed for payment.

This view is consistent with and we think, supported by the authority of the cases binding on us. In *Umes Chunder Sircar* v. *Zahur Fatima* (3) Zahur Fatima sued on a mortgage dated 29th July 1873 executed to her predecessor-in-title, obtained a decree in 1875, brought the mortgaged property to sale, purchased it herself in 1879 and soon after obtained possession. She did not join, as parties to her suit, the owners of the encumbrances created before the institution of her suit. The plaintiff became the assignee of these mortgages and sued to enforce them. Zahur's mortgage carried 24 per cent. interest which was reduced to 6 per cent. per annum after it had passed into a decree. The trial Judge held that her mortgage was not extinguished by the decree and she was entitled to the amount due under it irrespective of the price paid at the sale, but was entitled to interest only at 6 per cent. per annum the rate fixed in the decree after its date, and that no interest was to be calculated after the date of the purchase, as the profits of the land were to be considered a fair equivalent for further interest. Their Lordships in the Privy Council altered the rate of interest to that provided in the bond, and the reason given by their Lordships for their alteration is this:

"The Court's power to regulate interest is given by S. 10, Act 23 of 1861, which answers to the S. 209 of the present Civil Procedure Code. That power is given when a plaintiff sues for money due to him, and it is a discretionary power to give such rate as the Court may think proper by decree. The decree can only operate between the parties to the suit and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahur the benefit

1. (1898) 21 Mad 64.
2. (1892) 16 Bom 486.
3. (1891) 18 Cal 164=17 I A 201 (P.C.)

of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of the decree. His case is, that as to him Zahur is still but a mortgagee, and if so, she would be allowed such benefit as her mortgage gives her. If Zahur had not got a decree, and the plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to, and the Court would have had no jurisdiction to cut it down; and that is the position in which the parties are placed by the decree in this suit."

That to our minds is conclusive to show that the mortgage which is revived against the puisne mortgagee, though extinguished against the mortgagor, is kept alive to the fullest extent as if no action had ever been brought on it. The price of redemption must be the same, whether it is the puisne incumbrancer or the mortgagor who redeems. It is on this principle that the purchaser in the prior mortgagee's execution sale is required to account for the profits. On the same principle if the purchase was for a sum less than the amount due on the mortgage sued on and if the mortgagor paid the balance, the puisne mortgagee would be entitled to redeem on payment of the price, i. e., the amount due on the mortgage less the amount paid by the mortgagor: see *Bradley* v. *Snyder* (4). As to the other rule, viz., that the profits should be taken as equivalent to the interest, their Lordships observe that the rule appears just and convenient and is not objected to by either party, will relieve Zahur from giving an account of her receipts and will deprive her of interest from the time she took possession.

We understand that observation to mean that in that particular case, the profits and the interest were taken to be fairly equal as a matter of fact—that obviously must be the reason for the parties not objecting to it—and we do not think their Lordships meant to lay down, as a matter of law, that even if either party insisted, there should be no account of profits or allowance of interest. This was the view taken in two cases in this Court after discussion: *Thenappa Chettiar* v. *Marimuttu Nadan* (5), *Ponnambala Chetti* v. *Muthuswami Pillai* (6) and it is materially strengthened by what happened in *Ganga Pershad Sahu* v. *Land Mortgage Bank* (7), a decision of the Privy Council after *Umes Chunder Sircar* v. *Zahur Fatima* (3). There also the rights of the parties as finally settled by the decision were exactly the same as those in the previous case. The decree of the High Court directed accounts of profits to be taken and allowed interest up to the date of redemption at the rate fixed in a previous decree against the mortgagor: see the decree set out at p. 370 of the report in 21 *Calcutta*. The Privy Council altered the rate of interest to that in the bond and confirmed the rest of the decree, namely, that portion which directed the taking of accounts. The judgment in both the cases was delivered by Lord Hobhouse. It is to be observed that the amount of profits is to go in reduction of the amount due for principal and interest and not to be set off against the interest alone. The same principle appears to have been adopted in Calcutta: *Girish Chunder Nandi* v. *Kedar Nath Kundu* (8), *Sat Narain* v. *Sheobaran Singh* (9).

Counsel for the appellant however relied on a later case in this Court, in which the learned Judges apparently adopted the rule of disallowing interest after the date of purchase: *Ibrahim Sahib* v. *Armugathayee* (10). There the plaintiff's father had a first and second mortgage of which the first was a usufructuary mortgage, the profits being taken in lieu of interest. He purchased the property from the mortgagor, the price settled being Rs. 900, of which Rs. 830 was the amount due till then for the principal of the two mortgages and interest on the simple mortgage, Rs. 55, due to the mortgagee for certain taxes and other small sums lent to the mortgagor; the balance Rs. 15 was paid in cash. Before the sale the mortgagor had mortgaged the same property to the defendant, who sued the plaintiff who had succeeded to her father, brought the properties to sale and purchased them himself subject to the previous encumbrances of the plaintiff. The plaintiff in her turn sued to recover the amount due on her mortgages and claimed interest till payment on the simple mortgage at the rate fixed in the bond. The learned Judges held that during the period the plaintiff or her father was in possession as vendee, interest should cease. The reasons given for this conclusion are (1): that as the

4. 58 Am Dec 564.
5. (1908) 31 Mad 253.
6. (1912) 17 I C 291.
7. (1894) 21 Cal 566=21 I A 1 (P C).
8. (1906) 33 Cal 590.
9. (1911) 11 I C 649.
10. (1912) 38 Mad 18=16 I C 877.

mortgagee and mortgagor agreed that after the sale the property should be enjoyed for the price settled, the mortgagee is not entitled to any compensation in the shape of interest for his money so long as he had the enjoyment; (2) that the prior mortgage is kept alive only to a limited extent, and in each case the Court is to determine how far it is kept alive for doing justice. We very respectfully differ from both these propositions.

It is to be observed that it is because the agreement is not binding on the mesne incumbrancer, that he is entitled to ignore it, and it is difficult to see why he should have any benefit out of it. It often happens that a person is willing to pay much more to obtain an absolute title than what he would be willing to lend on the same property as usufructuary mortgagee. The mortgagee may pay a large price for the equity of redemption which he may wholly lose by the action of the puisne encumbrancer. On principle we do not think that it is possible to sustain the doctrine of partial revivor against the puisne mortgagee and the illustration given by the learned Judges, viz., a stipulation for lower rate of interest, does not support it. Such a stipulation operates to extinguish or release a portion of the debt and there is no question of merger against the mortgagor and no merger against the mesne encumbrancers. The puisne mortgagee pays the same price for redemption as the mortgagor and that, as we have said already, is the test, namely, what amount the mortgagor could have to pay if there had been no sale. If, for instance, in the case under reference the mortgagee had the transfer of the equity of redemption made to a trustee for him, there can be no merger in law and there would apparently be nothing to prevent the mortgagee from recovering the whole amount due on the mortgages if a subsequent mortgagee brings the equity of redemption to sale. So long then as the prior mortgage is kept alive, the senior mortgagee is entitled to the rights and is subject to the liabilities under his mortgage against the puisne encumbrancer. We therefore think that in that case the plaintiff was entitled to the interest on the simple mortgage, as she was entitled to take the profits in lieu of interest on the usufructuary mortgage, and there was no money of the mortgagors in her hands for which she was bound to account. The attention of the learned Judges does not appear to have been drawn to *Thenappa Chettiar* v. *Marimuthu Nadan* (5) and *Ponnambala Chetti* v. *Mutlhuswami Pillai* (6), the latter decision had not then been reported. They however refer to certain decisions which we shall consider now. The first is the decision of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima* (3) to which we have already drawn attention.

In *Gangadhara* v. *Sivarama* (11) the mortgagor borrowed Rs. 3,500 in May 1878 on the security of certain lands and paid Rs. 1,900 out of it to discharge a mortgage decree on a mortgage of 1866 on some of the lands. Plaintiff in the suit was an intermediate mortgagee. It was held that the later mortgagee had priority over the plaintiff to the extent of Rs. 1,900, the sum paid to discharge the previous mortgage. Apparently no subsequent interest was allowed. It does not appear from the report whether the subsequent mortgagee or the mortgagor had possession. If the former had possession the interest on his mortgage was being discharged from the usufruct and as he was not entitled to interest against the mortgagor, he was not entitled to it against the puisne mortgagee. If the mortgagor was in possession then even according to the decision in *Ibrahim Sahib* v *Armugathayee* (10), interest should have been allowed, for the decision in *Syamalarayudu* v. *Subbarayudu* (12), where interest was allowed, is distinguished on that very ground. In *Seetharama* v. *Venkatakrishna* (13) the suit was, as finally decided, by a prior simple mortgagee against the mortgagor and the puisne encumbrancer who had sued on his mortgage and purchased the property without making the first mortgagee a party. There was a remand for a finding as to the amount due and the finding was that the plaintiff was entitled to Rs. 300 for principle and interest thereon at 9 per cent, and this finding was accepted. In the report no mention is made of the interest. Curiously enough the decree as drafted here omits mention of interest, though apparently the judgment allowed it. In *Vanamika-*

11. (1885) 8 Mad 246.
12. (1898) 21 Mad 143.
13. (1893) 16 Mad 94.

linga Mudali v. *Chidambara Chetty* (14) the mortgagee who claimed priority by subrogation had a usufructuary mortgage.

Under the bond there was no interest payable and the usufruct was to be taken in lieu of it. It is to be observed that in this last case as well as in *Chetwynd* v. *Allen* (15) and in other cases where a mortgage was executed in renewal of or to pay off a previous mortgage, the mortgage was in force against the mortgagor himself and the agreement charging a lower rate of interest or no interest accrued to the benefit of the mortgagor, as well as the puisne mortgagee. The mesne encumbrancer in such cases does not repudiate the subsequent transaction between the mortgagor and the mortgagee but seeks to avail himself of it as a discharge or extinguishment of the debt, while such is not its effect as between the parties to the transaction. A number of decisions of the Allahabad High Court were cited, in which it appears to have been held that the profits should be taken in lieu of interest after purchase. In the first of these cases, *Dip Narain Singh* v. *Hira Singh* (16), Banerji and Aikman, JJ., held that the puisne mortgagee can only redeem on payment of the full amount due on the prior mortgage, just the same amount as the mortgagor himself would have to pay if a suit had not been brought against him, and refer as authority to the judgment of the Calcutta High Court in *Ganga Pershad Sahu* v. *Land Mortgage Bank* (7) and of the Bombay High Court in *Dadoba Arjunji* v. *Damodar Raghunath* (2): in the former, interest was allowed at the bond rate and accounts were directed of the profits, and in the latter interest was allowed at the bond rate till decree without accounts as the mortgagee had no possession.

In answer to the contention that the profits should be accounted for, the learned Judges say that considering the amount of profits arising from the property it would be fair not to take the profits into consideration at the same time not to allow interest on the mortgage money, i. e., not, as we understand it, as a rule of law, but as being fair in that case. In a later case of *Sri Ram* v. *Kesri Mal* (17) it was ruled that the prior mortgagee cannot claim interest after the purchase, giving credit for the profits realized; the reason given being the same as that given in *Ibrahim Sahib* v. *Armugathayee* (10), viz., that every person who purchases property for a certain value must be presumed to pay such value as would yield to him a sufficient return for the money invested by him in the property. In this case there were three mortgages. An intermediate mortgagee purchased the property by private sale for a price enough to pay all the three mortgages, the price being reserved with the vendee for that purpose. The vendee paid the first mortgagee and paid himself the amount due on his. He did not pay the third mortgagee who sued to enforce his security. We do not understand how the vendee was allowed to set up the prior mortgages which were extinguished by payment of the money belonging to the mortgagor, the party primarily liable to pay, and how by merely performing his duty the vendee obtained an advantage. The third mortgage under the circumstances became the first.

It is not a case of a person who did not get what he bargained for and the vendee was not entitled to even the principal of the mortgages which he paid, much less to interest. This case however was followed in *Jugal Kishore* v. *Bahal Rai* (18) in the same Court and the learned Judges held, setting aside the accounts taken by the lower Court, that the profits and interest must be deemed equal. But in the latest case in that Court, *Phul Chand* v *Roshan Lal* (19), under circumstances precisely similar to those in *Ibrahim Sahib* v. *Armugathayee* (10), the learned Judges, one of whom was Banerjee, J., came to just the opposite conclusion, and held that a purchaser at a senior mortgagee's execution sale, who obtains possession from a prior usufructuary mortgagee whom he redeemed after his purchase, was entitled to the whole of the principal and interest at the contract rate till the date of the suit. The purchaser in this case, who knew of the previous usufructuary mortgage subject to which he bought, must on the reasoning in *Sri Ram* v. *Kesri Mal* (17) be presumed to have paid such value for the property, i. e., the equity of redemption and the first mortgage, as

14. (1906) 29 Mad 37.
15 (1899) 1 Ch 353.
16. (1897) 19 All. 527.
17. (1904) 26 All. 185.
18. (1913) 21 I C 593.
19. (1916) 36 I C 703.

would yield a sufficient return for his money, in which case he should not get any interest after the date of the purchase. We do not propose to deal with the other cases as they follow one or other of the cases mentioned above.

The conclusion then we come to which is supported by preponderance of authority, is that if either party insists, accounts of the profits must be taken, allowing interest on the mortgage as provided in the bond. It is however unnecessary to express dissent from *Ibrahim Sahib* v. *Armugathayee* (10) as the learned Judges do not lay down an inflexible rule, but say that each case should be dealt with on the merits. The circumstances here strongly support the suggestion of the learned Judge in the Court below that owing to the considerable increase in the value of house property in Madura, the plaintiff in this suit is now attempting to revive a claim which was practically abandoned by her husband. Defendant 4 and his assignees have made considerable improvements in the property and it would not be fair to them not to allow interest on the prior mortgages, as it is fairly certain that the income from the properties even in the improved condition would be wholly insufficient to meet the interest. We are therefore unable to accept the contention of the appellant. We are equally unable to accept the contention of defendant 4, who claims the whole of the principal and interest due on the mortgages without accounting for the profits. The learned Judge in the Court below misunderstood the decision in *Ponnambala Chetti* v. *Muthuswami Pillai* (6) which he purported to follow, but the learned pleader for defendant 4 argues that as his client was entitled to and obtained possession of the mortgaged properties only as purchaser of the equity of redemption (for which however he paid nothing), he was entitled to the enjoyment of the properties as the transferee of the mortgagor; and inasmuch as the mortgagor, if he had remained in possession, would not be accountable for the profits; similarly he too should not be obliged to account for them. He relied on a passage in S. 1118 (a) of Jones on Mortgages, Vol. 2, and a similar passage in Dr. Ghose's book which appears to be really based on Jone's book. He was not able to refer us to any report. It is to be remembered that in some States, the English theory of mortgages as a conditional transfer of the fee with an equitable right to redeem is adopted, in others, probably the largest number, a mortgage is considered to be merely a security though for certain purposes, as between the parties, it is considered to be a conveyance of the property and in yet others a mortgage is only a lien, the mortgagee not being entitled to foreclosure under any circumstances: see *Brobost* v. *Brok* (20), *McMillan* v. *Richards* (21), *Goodenow* v. *Ewer* (22) and *Frische* v. *Kramer's Lessee* (23).

It would therefore be necessary to examine with care any particular decision which may be reliedon as supporting an incident of the mortgage relation in India, as our statute recognizes different kinds of mortgages. In *Moulton* v. *Cornish* (24) from New York, where sale is the ordinary remedy, in a case similar to the present, it was held that the purchaser was bound to account, though he obtained possession from the owner of the equity of redemption after sale. To the same effect is the decision in *Anson* v. *Anson* (25) from another State. In *Harrison* v. *Wyse* (26) the mortgagee had first entered on the property and then purchased the equity of redemption. It was held he was bound to account as mortgagee in possession, though the mortgagor would not be if he was in possession. It would therefore appear that there is no authority in support of such a broad contention as that raised here by the respondent. However that may be, the decision of the Privy Council and the decisions of this Court to which we have already referred are conclusive on this point and there is no need to speculate on the theoretical basis of this doctrine, though we have ventured to point out that on principle the purchaser may justly be held liable to account for the profits in cases like the present.

Two further points were raised, one by the appellant and the other by respondent 6. As we have already stated, the purchase by defendant 4 included the lands on which the plaintiff has no lien. In these lands defendant 4 acquired

20. (1870) 10 Wallace 519.
21. (1858) 70 Am Dec 655.
22. (1869) 76 Am Dec 540.
23. (1847) 47 Am Dec 368.
24. (1893) 20 L R A 370.
25. (1865) 89 Am Dec 514.
26. (1853) 63 Am Dec 151.

absolute rights and he has sold them to persons who are not parties now. The plaintiff claims that the mortgage money due to defendant 4 on his mortgage should be apportioned among the several properties according to their value and the plaintiff allowed to redeem on payment of that portion of the mortgage-debt that is chargeable on the houses on such apportionment. He has not laid any basis in his plaint or evidence to claim marshalling, and he has not made the owners of the lands parties to the suit so as to claim contribution. We have tried to see if the plaintiff cannot be allowed to redeem a portion of the mortgage, on the ground that the mortgage has been split by the mortgagee purchasing the equity of redemption in a part of the secured property (see last clause of S. 60, T. P. Act) but on consisideration we think the plaintiff is not entitled to a decree for partial redemption. As she sues to redeem ignoring the purchase, she cannot be allowed to treat it as good in part against the prior mortgagee-purchaser.

Respondent 6, the transferee of the houses from respondent 4, claims the value of improvements. According to the decision in *Ibrahim Sahib* v. *Armugathayee* (10) she is not entitled to them: see also *Rangayya Chettiar* v. *Parthasarathi Naikar* (27). It is argued that she is entitled to them as a bona fide purchaser for value under S. 51, T. P. Act. Assuming that that section applies to this case, respondent 6 cannot be considered to be a bona fide purchaser, as the sale certificate to defendant 4, of which defendant 6 had notice before her sale, distinctly mentions the encumbrance to the plaintiff's husband as a subsisting lien. In determining the amount due to defendant 4 on the mortgage to the Fund, the learned Judge in the Court below allowed compound interest at 2 per cent. per annum. The bond provides only for simple interest after the period fixed for repayment and the amount due to defendant 4 should be calculated on that basis. Before passing a final decree it would be necessary to have a finding on the amount due to defendant 4 on taking accounts on the basis above set out. New evidence may be allowed as to the amount of profits. Time for the submission of the findings will be till the re-opening of this Court after summer recess and 7 days will be allowed for objections. The memorandum of cross-objections filed by respondent 6 will be dismissed with costs.

[In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Ramnad submitted the following]

Finding.—

The amount paid by defendant 4 on mortgage to the Fund is Rs. 2,537-6-11 on 18th June 1906, from that date interest up to 31st August 1917 at two pies per rupee is Rs. 3,553-4-9 So the total is Rs. 6,090-11-8. The total of the amounts due under both heads is Rupees 12,389-10-11. I find the amount due to defendant 4 to be Rs. 12,400—in round figures.

(This appeal and the memorandum of cross-objections filed by respondent 4 coming on for final hearing after the return of the finding of the lower appellate Court upon the points referred to it for trial, the Court delivered the following.)

Judgment.—The first objection to the finding is as to the calculation of compound interest on the bond of Rs. 1000. It is argued that that is a penal provision and ought to be relieved against. But no such question was raised before one of us and Srinivasa Aiyangar, J., when the appeal was first heard and it cannot be gone into now. The second objection relates to the question whether interest ought to be allowed on that portion of the amount paid by defendant 4 to the chit fund which consisted of interest on the original bond. There is nothing in our judgment to show that defendant 4 who paid the amount due was to be deprived of interest on any portion of the money paid by him. That objection also fails. Then Mr. Devadoss argued that some of the properties had been sold, and so the amount of the sale-proceeds must be debited against the respondents. But that is quite a mistake. The plaintiff is seeking to redeem the properties on the ground that the sales are invalid. He cannot get the properties as well as the sale-proceeds.

We confirm the finding of the Subordinate Judge and there will be a decree in accordance with that finding. Time for redemption will be extended to three months from this date and the accounts

27. (1897) 20 Mad 120.

will be continued on the basis of the finding of the Subordinate Judge up to the date of redemption. As regards costs, the ordinary rule will be followed for we do not see why the appellant should be made personally liable for the costs of respondent 4.

S.N./R.K. *Decree modified.*

** A. I. R. 1918 Madras 111

AYLING AND PHILLIPS, JJ.

E. D. Smith—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 474 of 1917, Decided on 8th November 1917, against order of Chief Presidency Magistrate, Egmore, in No. 11426 of 1917.

**** (a) Evidence Act (1 of 1872), Ss. 24, 25; 26—In criminatory statements to officer assisting in police investigation — Admissibility—Statements made at police search and before arrest held made while in custody.** (Per *Ayling J. Phillips J. contra*).

The accused, a tailor, was charged with being in possession of certain stolen shirts and bales of canvas, alleged to be the property of the Army Clothing Factory. The shirts were seized by the police in a brougham in which the accused was travelling. The accused was then driven to his shop in a motor car belonging to the Commissioner of Police, who also accompanied him, and the shop was searched: Captain Phillips, a Subordinate Officer in the Army Clothing Factory, assisting the police in the search. Captain Phillips told the accused at the search: 'Smith, make a clean breast of it. I want to get hold of the men in the factory.' The accused said: "If I do I shall implicate clerks, Mahomedans and guard peons." On being questioned as regards the canvas bales, accused asked Captain Phillips if he had never had thefts reported to him from the goods station. The accused was then arrested, tried and convicted for an offence under S. 411, I. P. C.

Held : Per *Curiam*, that the statements made by the accused were 'confessions' within the meaning of S. 24. [P 112 C 2]

Per *Ayling, J.* (*Phillips, J.* dissenting).—That the statements were made to a person in authority, as Captain Phillips who represented the Army Clothing Department, spoke to the accused as one in authority and was the potential prosecutor in the case, and that the statements were made by an accused person, though not formally arrested, and that the statements were therefore inadmissible. [P 113 C 1; P 114 C 1]

Per *Phillips, J.*—The statement made by the accused to Captain Phillips was not made by an accused person as the accused was not under restraint or under custody, nor was it made to a person in authority as the conduct of the investigation was in the hands of the Police and Captain Phillips was only assisting them. [P 118 C 1]

(b) Evidence Act (1 of 1872), S. 24—"Confession" need not be full and explicit admission of guilt.

A confession is something more than a mere admission. In order to make a statement a confession, it is necessary that the inference as to the criminality of the person making it should be gathered from the statement itself. If the statement itself is not incriminating, it is doubtful whether the fact that it does become incriminating owing to subsequent events would make it a confession. [P 116 C 2]

To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit admission of his guilt, so clear as to leave no other hypothesis tenable. [P 112 C 2]

*** (c) Evidence Act (1 of 1872), Ss. 24, 25 and 26—"Accused person" includes person subsequently becoming accused.**

The words 'accused person' in Ss. 24 to 26 should not be limited to a person against whom a formal complaint, charge or information has been laid. The expression includes any person who subsequently becomes accused; provided that, at the time of making the statement criminal proceedings were in prospect. [P 113 C 2]

*** (d) Evidence Act (1 of 1872), S. 24—"Person in authority"—Test laid down.**

The expression 'person in authority' includes not only the prosecutor, but also the wife of the prosecutor, or one of the prosecutors and even, in some circumstances, relations of the same. The test is, has the person authority to interfere in the matter, and any concern or interest in it is sufficient to give him that authority. 8 *Bom. L. R.* 507, *Dist.* [P 113 C 2]

(e) Criminal P. C. (5 of 1898), Ss. 342, and 256—Absence of explanation by accused of incriminatory evidence—Presumption to be drawn enunciated.

An accused person is always entitled to hold his tongue; but, where the only alternative theory to his guilt is a remote possibility, which if correct, he is in a position to explain, the absence of any explanation must be considered in determining whether the possibility should be disregarded or taken into account. [P 115 C 1]

(f) Evidence Act (1 of 1872), S. 114 (a)—Mode of drawing inference, illustrated.

Illustration (a), S. 114, is only an example of the manner in which inference can be drawn from the common course of events, human conduct, etc. [P 115 C 1]

(g) Penal Code (1860), S. 411—Possession of stolen property—Lapse of time after theft—Guilty knowledge — Presumption — Force of, depends on particular facts — Evidence Act S. 114, (a) ill.

In a prosecution for the possession or retention of stolen property under S. 411, lapse of time after the article was stolen, is usually an important factor in determining the guilt of the accused, but the importance to be attached to it must vary with the circumstances of the individual cases and will depend largely on the frequency with which the property is likely to have changed hands. No maximum period can be suggested as that beyond which no inference of guilt can be drawn. 6 *All.* 224 and 16 *I. C.* 164, *Dist.* [P 115 C 1,2]

Nugent Grant—for Appellant.

W. Barton—for the Crown.

Ayling, J.—This is an appeal by Mr. E. D. Smith, a tailor doing business in the Mount Road, Madras, against a conviction by the Chief Presidency Magistrate for

dishonest possession of stolen property under S. 411, I. P. C. The property consists of various articles (Material Objects Nos. 1 to 6 and 9) alleged by the prosecution to have been stolen from the Army Clothing Factory situated close to accused's premises. The facts are fully set forth in the judgment of the Chief Presidency Magistrate and it is unnecessary to recapitulate them here. In support of the conviction the Chief Presidency Magistrate has largely relied on certain statements made by accused at the time of the search of his shop to Captain Phillips, an officer of the Army Clothing Department examined as second prosecution witness. On behalf of accused it was argued by Mr. Grant in both Courts that these statements are confessions and that their admission in evidence is barred by Ss. 24 and 26, Evidence Act. The Chief Presidency Magistrate has held that they are not confessions within the meaning of these sections; and it seems convenient to dispose of the question of the admissibility of this evidence before proceeding further.

The statements relate to 88 flannel shirts (Material Object No. 1) which were seized in accused's brougham near Neill's statue and to 20 bales of canvas (Material Object No. 6) which were found in a well at the back of his shop. They were made privately to Captain Phillips at about 4 p. m. in the cutting room while the search of the shop was still incomplete. The conversation began by Captain Phillips saying to accused:

"Smith, make a clean breast of it; I want to get hold of the men in the factory."

On this accused told him that he had got the shirts from two tailors employed in the Army Clothing Factory for 8 annas each, and apparently being pressed to give names and particulars said: "If I do, I shall implicate clerks, Muhammadans and guard peons." On being questioned as regards the canvas bales (Material Object No. 6) accused asked Captain Phillips if he had never had thefts reported to him from the Salt Cotaurs.

Accused added: "that is where that material came from," and said he purchased it a piece or two at a time and intended selling it to some upcountry Rajah. Now it seems to me that these statements regarding Material Object No. 1 as well as Material Object No. 6 are incriminatory statements implying not only that the property was stolen property but that accused knew it to be such at the time of acquisition. He says he purchased the shirts from two tailors in the factory for what appears to be quarter of their cost price; and his reference to implicating people disposes of any suggestion that he thought the tailors were entitled to thus dispose of the shirts, if indeed such a contention could be seriously set up. As regards the canvas, there is a definite admission that the stuff was stolen property belonging to the Army Clothing Factory. By the Salt Cotaurs, the main goods depot of the M.S.M. Ry. is referred to: and the meaning is that the bales were stolen therefrom. Accused's words to Captain Phillips, "Have you never had thefts reported to you from the Salt 'Cotaurs,'" show that they were the property of the Army Clothing Factory and of no other owner. I cannot follow the Chief Presideney Magistrate in his view that these simply are explanatory statements. As already stated, they are highly incriminatory; and as he himself says in introducing them, have an important bearing on the case.

In fact towards the close of his judgment he says the case against accused is "doubly proved" when we consider accused's statement to second prosecution witness that he bought the shirts for 8 annas each from two tailors in the Army Clothing Factory. Accused must have known that he had no right to buy shirts from the Army Clothing Factory tailors. The Magistrate's view can only be based on the idea that nothing is a "confession within the meaning of the Evidence Act which does not amount to a full and explicit admission of guilt—so clear as to leave no other hypothesis tenable. This view or something very like it has in fact been put forward by Mr. Barton in support of the conviction. For authority to the contrary I need only refer to *Imperatrix* v *Pandharinath* (1) and *Queen-Empress* v. *Nana* (2). Taking it, then, that these statements are confessions, are they rendered inadmissible in evidence by the provisions of Ss. 24 and 26, Evidence Act? S. 24 runs thus:

"A confession made by an accused person is irrelevant in a criminal proceeding if the making

1. (1881-82) 6 Bom 34.
2. (1890) 14 Bom 260.

of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceedings against him."

Captain Phillips has given his evidence regarding these confessions in the most candid and straightforward manner; and the effect is to leave no doubt whatever in my mind that the making of them was immediately preceded by an intimation on his part, which accused would naturally interpret as reasonable grounds for supposing that by making them he would gain an advantage of a temporal nature in reference to the proceedings against him. Both Captain Phillip's words and, as he says, his tone implied that he "was after the men in the factory" and not after accused. He says:

"I took it that accused would be highly interested in bringing the hands to light for his own good. I intended to convey to Smith the impression that by my adopting this friendly attitude it would be for his own good to make a disclosure to assist me."

Of course he adds:

"I had no intention of leading accused to believe that he would get off free. It was my impression that accused, if he made a clean breast of it would get off easier than he would otherwise."

I think the effect of all this, the impression which this witness intended to convey (and doubtless did convey) to accused was that he (witness) was chiefly anxious to run in the men in the factory: and that if accused assisted him in this respect, he would be let off light, if he did not escape prosecution altogether. This intimation was conveyed as the witness says at the outset of the conversation: and I can only regard it as the cause of the confessional statements which followed. It is objected: (1) that Smith was not an accused person at the time he made the statements, (2) that Captain Phillips was not a person in authority and that accused had no reasonable ground for believing that his assurances were worth anything. As regards (1) Mr. Barton argues, that no one is an accused person within the meaning of this section until a formal complaint, information or charge has been made against him. I should be inclined myself to hold that the phrase "accused person" in this connection included any one who subsequently became accused, provided that at the time of making the statement, criminal proceedings were in prospect (otherwise an inducement regarding them could not be held out). To limit it in the manner suggested would obviously rob the section of much of its protective effect. But however this may be, there can be no doubt that accused in the present case stood in precisely the same position as if the police proceedings by way of search had been preceded by a formal complaint. Some of his property, the shirts in the brougham, had already been seized, he had been brought from the police station to the shop in the Deputy Commissioner's car and his shop was in process of being searched for other property, which he was perfectly aware was alleged to have been stolen from the Army Clothing Factory. Then as regards the position of Captain Phillips, Mr. Barton in his argument represents him as a mere underling, a master tailor, whose word could carry no weight with accused and who could not be regarded as a "person in authority."

I cannot accept this view. There is little or no evidence as to his exact position in the factory, but he is a Commissioned Officer who was on the spot representing the Army Clothing Department—the potential prosecutor in the case, and who was telephoned for by the police as soon as brougham and its contents were seized. He certainly spoke as one in authority to Smith and also in the witness box. He said to Smith, "I want to get hold of the men in the factory" and implied that Smith would gain "by assisting me." In cases such as these it is always an open question, whether the person in possession of the property will be prosecuted as well as the thieves" and Smith could not have failed to attach great weight to any indication of policy made by such an officer. The expression "person in authority" has, I think, always been widely interpreted: vide: Woodroffe and Amir Ali's Law of Evidence, Edn. 6, p. 258, and Taylor on Evidence, Edn. 10, p. 614. The rule is the same in India as in England, where it has been held to include not only the prosecutor, but also the wife of the prosecutor, or one of the prosecutors and even, in some circumstances, relations of the same, vide: *R.* v.

Warringham (3) and *R.* v. *Taylor* (4). An attorney engaged in an endeavour to get up a prosecution has also been treated as a person in authority, vide; *R.* v. *Croydon* (5). For authority in India I may refer to the remarks of Sargent, C. J., in *Reg.* v. *Navroji Dadabhi* (6). He says;

"The test would seem to be had the person authority to interfere with the matter; and any concern or interest in it would appear to be held sufficient to give him that authority."

I think the position of Captain Phillips in the present case satisfies this test—certainly as much as that of the auditor under consideration in that case. Mr. Barton has quoted, on the other side, *Emperor* v. *Mahamadbuksh Karimbuksh* (7), but in that case the person offering the inducement, while the superior officer of the accused, had absolutely nothing to do with the proceedings against them; and it was on this very ground that the confession was admitted. I must therefore hold that accused's statements are irrelevant under S. 24, Evidence Act and must be altogether excluded from consideration in the case. Whether they are also excluded by S. 26 will depend on whether accused should be regarded as in custody at the time he made them. The Chief Presidency Magistrate has held that he should and there is much to be said for this point of view, though for my purpose it is unnecessary to decide the question.

It remains to consider whether apart from these confessional statements there is sufficient evidence to support the conviction. Mr. Grant's chief contention in respect of all the property is that the prosecution has failed to prove that it is stolen property; and this, if established, of course goes to the root of the case. The question has to be considered with reference to each of the various articles or groups of articles: and it is convenient to begin with Material Object No 1, the 88 shirts which were seized out of the brougham afther leaving accused's shop. Possession of these shirts is not denied by accused. These shirts are all marked with a broad arrow, the letter "M" for Madras and a number, and it is not denied that 20,000 shirts of an identical quality, description and mark were made in or for the Madras Army Clothing Factory between March 1917 and 17th July 1917, when the last supply was delivered into store. The seizure from accused was on 31st July 1917 and stock-taking finished on 10th August 1917 revealed a shortage of 101 shirts in the Army Clothing Factory stock. As no shirts have been disposed of by sale from the factory (vide P. W. 1), it seems to follow that the said 101 shirts must have been stolen and according to the prosecution, the 88 shirts forming Material Object No. 1, were part of them. A good deal has been said as to the value of the broad arrow mark as evidence. It is admitted that Government property marked with the broad arrow is occasionally sold to the public without the broad arrow mark being obliterated (vide P. W. 2), and it must be conceded that this practice deprives the broad arrow mark of a significance which would otherwise be claimed for it. It is still evidence that the article stamped with it was at sometime the Government property: but it is not evidence that possession was transferred to an outsider by theft or criminal misappropriation. In the present case there can, I think, be no doubt that the 88 shirts seized were originally made for the Madras Army Clothing Factory, and formed part of that factory stock. The question is whether they formed part of the 101 shirts shown to have been stolen. The only alternative theory which has been or, I think, can be suggested is that they formed part of one of three consignments despatched to Jhansi, Bombay and Poona respectively on 10th April 1917, 17th April 1917 and 14th May 1917.

The fact of these consignments appears from the ledger Ex. I and they are shown as sent to the O. I. C. supplies, Jhansi, the Superintendent Army Clothing Factory, Bombay, and as "supply reserved, Poona." No attempt seems to have been made by the defence to develop this point, by indicating what possibility existed of any of the consignments having got on the market without theft. It was elicited from Captain Phillips in a general way that articles for which the department have no use are sometimes sold to the public, and he also refers to a regimental sale by a quarter master and individual sale by a soldier. The last named would presumably be a dishonest misappropriation. But no reason is sug-

3. 2 Den C C 447 n.
4. 8 C & P 733.
5. 2 Cox C C 67.
6. (1872) 9 B H C R 358.
7. (1906) 8 Bom L R 507.

gested why new flannel shirts should be disposed of by authority within so short a time of their issue: and after careful consideration it seems to me that the possibility of the 88 shirts seized from accused having been obtained in this way is so slight that a reasonable man would disregard it. We have on the one hand the fact that a larger number of shirts of identical description had been stolen from a factory within a few yards of accused's shop. On the other hand we have the bare possibility that shirts to this number may have been legitimately disposed of in such distant places as those mentioned and found their way into accused's possession. No indication is given of how this may have occurred, and accused has, apart from the excluded confessions, attempted no explanation of how he came by the shirts.

No doubt an accused person is always entitled to hold his tongue; but where the only alternative theory to his guilt is a remote possibility, which if correct, he is in a position to explain, the absence of any explanation must be considered in determining whether the possibility should be disregarded or taken into account. The provisions of Ss. 106 and 114, Evidence Act, are not without bearing on this point. I think the evidence justifies the inference that the shirts seized formed part of the 101 shirts stolen from the Army Clothing Factory. The next question is whether accused had reason to believe it to be stolen property. Mr. Grant argues that it is not shown that the theft of the shirts occurred recently before their seizure from accused's possession and therefore the principle of S. 114, Evidence Act, Illus. (a), has no application. The shirts may, it is said have been stolen at any time after 6th March 1917, when the first consignment was received in the factory; so that it cannot be said that accused was in possession "soon after the theft," to quote the words of the illustration. I do not think this argument carries much weight. The illustration is only an example of the manner in which inferences can be drawn from the common course of events, human conduct, etc., and while the lapse of time is usually an important factor, the importance to be attached to it must vary with the circumstances of the individual case, and will depend largely on the frequency with which the property is likely to have changed hands. The wording of the illustration must not be read as limiting the application of the section to which it is attached. In the present case all that can be said is that the theft of the shirts may have occurred at any time from March to July. That is no sufficient reason for refusing to draw the usual inference.

Mr. Grant has referred to two cases in which the lapse of time has been considered as a reason for refusing to require explanation: *Queen-Empress* v. *Burke* (8) and *District Magistrate of Bellary* v. *Obbava* (9), but in both cases this was only one of several reasons for acquittal and I am not aware of any case in which a maximum period has been suggested beyond which no inference of guilt can be drawn. The shirts therefore being stolen property and seized from accused's possession within what may be considered a reasonably short time after they must have been stolen, there is no reason why, in the absence of any attempt to explain his possession (apart from the excluded confessional statement) the usual inference should not be drawn against accused. There is no need to strain against the accused the curious circumstances in which the shirts were being taken from his shop in a closed brougham (I accept the evidence of P. W. 7 in this respect) but they certainly tend to suggest guilty knowledge. I consider that in respect of these articles the conviction is justified. (His Lordship then discussed the evidence as to the possession of the khaki shirts in pieces and the bales of cloth and concluded:) I find it impossible not to hold accused responsible both for the presence of the property in his shop and its concealment: and the latter is so entirely incompatible with honest possession; that I think it justifies his conviction. I do not propose to deal with the case of the other articles, Material Object Nos. 2—5. These were found in accused's shop with no attempt at concealment: and Material Objects Nos. 2 and 4 were even pointed out by accused himself. The case regarding them is much weaker than as regards the other articles dealt with above, and as I have found the charge established in relation to the latter it is unnecessary to proceed further. In the result, I would confirm

8. (1884) 6 All 224.
9. (1912) 16 I C 164.

the conviction and sentence and dismiss the appeal.

Phillips, J.—The accused E. D. Smith, a tailor in the Mount Road, has been convicted under S. 411, Penal Code, for re-retaining stolen property. The facts are briefly as follows. On 31st July 1917, a constable was posted to watch Smith's shop and saw a brougham drive up. Certain bundles were placed inside and the brougham drove down the Mount Road. The constable ran after the carriage and stopped it, and it was taken to the police station opposite Spencer's Buildings. The Deputy Commissioner of Police and the Inspector, prosecution witness 13 were telephoned for and came and also prosecution witness 2, Captain Phillips, master tailor of the Army Clothing Factory. The carriage was examined and in it were found 8 shirts which have been identified as shirts belonging to the Army Clothing Factory. The accused came to the police station, and from there the whole party went to the accused's shop which was searched and in that search various articles, which are said to belong to the Army Clothing Factory, were found, Material Objects Nos. 2 to 9. These articles consisted of various pieces of cloth and articles of clothing. The evidence in regard to the various articles is that they belonged to the Army Clothing Factory and were removed from there by theft or criminal misappropriation. On these facts, the accused has been charged.

(His Lordship then discused the evidence). The next question for consideration is whether the accused was in possession of the articles knowing them to be stolen. The fact that they were found in his carriage and in his shop is not disputed and we have the statement of the accused as regards their possession. This statement is objected to as being a confession and therefore inadmissible in evidence under Ss. 24, 25 and 26, Evidence Act. The statement was made to Captain Phillips in the cutting room of the accused's shop after the search had been made. Captain Phillips said to accused, "Smith, make a clean breast of it. I want to get hold of the men in factory." Smith said, "if I do, I will implicate clerks, Mahomedans and guard peons," and also in answer to a question as to where he got Material Object No. 6, the accused asked Captain Phillips if he never had thefts reported to him from Salt Cotaurs and said that was where that material came from. He said he purchased a piece or two at a time and intended selling it to some upcountry Raja. With regard to shorts Material Object No. 9 he said he had bought one or two here and there from different men. The question is whether this statement amounts to confession. There is no definition of confession in the Evidence Act, but I take it that it must be something more than a mere admission. In *Queen-Empress* v. *Nana* (2) statements were held to be a confession on the ground that thay suggested the inference that the prisoner committed the crime. In *Imperatrix* v. *Pandharinath* (1) it was held that an admission of a criminating circumstance on which the prosecution mainly relies and forming the important part of the evidence against the accused, as showing that he did not come by the property honestly, would come properly within the rule of exclusion in regard to confessions made by a person in the custody of the police. In *Emperor* v. *Kangal Mali* (10), when dealing with the admissibility of statements it was said that a useful test was to ascertain the purpose to which they were put by the prosecution. If the prosecution relies on the statements of the accused as being true, then they may and probably in many cases would be found to amount to confessions. Accepting both these propositions I would add that in order to make a statement a confession, it appears to me to be necessary that the inference as to the criminality of the person making the statement should be gathered from the statement itself, for I think it is quite possible that in many cases a statement which by itself does not contain any inference of criminality may in the light of subsequent events or of subsequent evidence strongly support such an inference. If the statement in itself is not incriminating, I am doubtful whether the fact that it does become incriminating owing to subsequent events would make it a confession. A statement may be such as is compatible either with the innocence or guilt of the person making it and if subsequent events show that it leads to an inference of guilt, I do not think that it could necessarily be a confession if it is originally of such a nature that a different series of subsequent events

10. A I R 1915 Cal 256=26 I C 161=41 Cal 601.

would show it to be not only compatible with, but also evidence of, the innocence of the accused, I do not think it is necessary in this case to labour this point, for if we take the statements as a whole, I think there can be no doubt that they do lead to an inference of criminality without any additional evidence. The statement of the accused that if he made a clean breast of it, he would implicate several other men goes to show that he was aware that there was somthing in which they might be implicated, thus showing his knowledge that the property was connected with some offence in which he or others might be implicated. Again his question to P. W. 2, whether the latter had never had thefts reported to him from Salt Cotaurs from where these articles came, would at once suggest an inference that he knew that the property came from a place where stolen property was likely to be sold. In this view, I have no doubt that the statements as a whole do amount to a confession.

A further question arises whether they are admissible in evidence. The statements were made to Captain Phillips in the cutting room of the accused's shop. The Deputy Commissioner of Police was present at a distance of 14 yards and P. W. 2 says that he could not have been overheard when he was talking to the accused. They certainly cannot be deemed to be statements made to the police and S. 25 is therefore inapplicable. The next question is whether they were made by the accused whilst he was in the custody of the police. No doubt a person is very often in the custody of the police before he is actually and formally arrested. It is not disputed that at the time the statements were made the accused had not been formally arrested. Shortly after his carriage was stopped at the police station, the accused went to the place and explained what he was going to do with the shirts. From there he was taken in the Deputy Commissioner's motor car to his shop where a search was conducted. It is suggested that the accused was then taken in custody because the Deputy Commissioner told him to go in the motor car. This, I think, may well be explained by the fact that the Deputy Commissioner was going to search his shop and naturally wished the accused to be present and therefore took him along in his motor car. A police constable was posted at the door of the shop, but that was necessary in order to prevent people from a busy thoroughfare like the Mount Road pressing into the shop and connot be said to imply that the accused was not to be allowed to leave the place. The accused does not appear to have been put under any restraint while the search was proceeding and it is therefore difficult to say that he was actually in the custody of the police at that time. When a house is searched, it is general practice, if possible, to secure the presence of the owner at the search, and Smith's presence in the shop is accounted for by that practice.

None of the witnesses have been asked whether Smith's liberty was in any way interfered with, and there is not a particle of evidence on record to show that his movements were restrained and no doubt if the accused had given a satisfactory explanation of the presence of the property in his shop, no further action would have been taken by the Police and Smith would have remained at liberty, after their departure. Can it be said that Smith was actually in custody before the police knew whether or not he could give a satisfactory explanation of his possession of the property? To hold that he was in custody would on the evidence before us be to hold that any person whose house is searched for stolen property on suspicion is in custody as soon as the search begins. It was only after the search was over and the accused had not given a satisfactory explanation that he was arrested. In these circumstances I can find nothing to show that the accused was in the custody of the police at the time he made the statements. The defence then rely on S. 24 and say that the statement was one made under an inducement from a person in authority, and it is said that Captain Phillips was a person in authority with reference to this prosecution. Apart from his position in the Army Clothing Factory, of which he is admittedly not the head, the only evidence relied on is his statement:

> "I have been mainly responsible for assisting the police in the prosecution of this case. I have gone through books and records with P. W. 1,"

and the statement of P. W. 13 the Police Inspector "P. W. 2 was helping me to investigate." When the statement was made, the whole affair was in the hands

of the Deputy Commissioner of Police, a responsible Police Officer who cannot be said to be in any way subject to the influence of P. W. 2, and P. W. 2 had up to that time nothing to do with the case and knew nothing about it. Can it then be said that as an official of the Army Clothing Factory from which the goods are said to have been stolen, P. W. 2 was a person in authority ? He was not the head of that factory : nor does it appear that he had anything to do with its general management, beyond his own tailoring department, and consequently, it is difficult to understand how he could have interfered in the prosecution of this case in any way. The police had started the investigation without his knowledge and without his authority and he was merely called in in the course of the investigation to assist the police. In these circumstances, I can see no reason to hold that he was a person in authority within the meaning of S. 24. Even apart from that, I do not think that he held out any inducement to the accused sufficient to give grounds which would appear to him reasonable for supposing that he would gain any advantage or avoid any evil of a temporal character in reference to the proceedings against him. What P. W. 2 said to accused was,

"Smith, make a clean breast of it. I want to get hold of the men in the factory."

No doubt he says that he adopted a friendly tone which implied that he was after the men in the Army Clothing Factory and not after the accused. He also says that he intended to convey to Smith the impression that, by his adopting this friendly attitude, it would be for his own good to make a disclosure. We must however look to the words of inducement uttered by P. W. 2 and in the words themselves, there is no inducement whatever. There is no doubt a suggestion that P. W. 2 was not anxious to prosecute the accused, but only to get hold of his own employees, but P. W. 2 says that he had no intention of leading the accused to believe that he would get off free. In these circumstances, can it be said that there was such an inducement as would give the accused grounds for believing that he would secure any advantage or avoid any evil of a temporal nature ? P. W. 2 made no suggestion that the accused would be any better off if he made the confession, certainly did not suggest any definite improvement in the accused's position if he did so, so that even if Captain Phillips be deemed to be a person in authority, I do not think it can be said that he gave any inducement and even if some vague promise might be implied from the tone in which the words were spoken, it is difficult to believe that the inducement was such as to cause the accused to believe that it would be for his own temporal good to make a confession. In these circumstances, I would agree, although for different reasons, with the Presidency Magistrate that the statement is admissible in evidence : and if the statement is admissible, and if, as I hold, it is proved that the property was stolen property, there can be very little doubt of accused's guilty knowledge.

If we exclude this statement as inadmissible, I think there is sufficient evidence to bring home guilty knowledge to accused that the goods were stolen property; and this knowledge must be inferred from the circumstances of the case. We see that the accused put the goods Material Object No. 1 into his carriage, which then drove off along the road. He may or may not have seen the carriage stopped, but at any rate we find him going of his own accord to the Police station about 20 minutes or half an hour after the carriage had been stopped. He had not been sent for and it does not appear how he knew that the carriage had been stopped. If he saw it stopped, and taken to the Police station, it is difficult to understand why he did not at once go up and ask why there had been this unwarranted interference with his property. There was a delay of 20 minutes or half an hour. When the shop was searched, some of this property, namely, Material Object Nos. 6 and 9 and some other property, was found in a well in the accused's shop. No doubt this well is accessible to anybody in the shop and it is suggested that the tailors working there might have put the property down the well. We have evidence however that the property had only very recently been put into the well because the water had not soaked through the convas. Material Object No. 6 consists of 20 large rolls of canvas and once we concede that Smith was the sole owner and proprietor of the shop it is difficult to believe that these rolls could have been introduced into that well or even into his shop without his knowledge.

When the property was pulled out of the well it does not appear from the evidence that the accused said anything except the alleged confession. But in his statement at the trial he said "the property found in the well I do not claim nor did I ever have them." In the interval between the time when the carriage was stopped and the accused's appearance at the police station, there was plenty of time for accused to put the property down the well and I think that if accused said nothing when this property was pulled out it is not an unnatural inference to draw that he had nothing to say. If it was a surprise to him that the property should have been found in that place I think that the reasonable inference to be drawn from the ordinary course of conduct would be that he would have expressed that surprise, and it is difficult to believe that an innocent person who saw this property being produced from his well for the first time would not have at once disclaimed all knowledge. Under S. 106, Evidence Act, when any fact is especially within the knowledge of any person the burden of proving that fact is upon him and I think that if this had been a civil case and the accused had at the trial tried to prove that the property was put in the well without his knowledge, no Court could have disregarded the inference to be drawn from his omission to put forward that theory when the property was first discovered. We have also the fact that the property recovered from Smith's possession is of varied nature and large in bulk

It is difficult to believe that he could have been in possession of this property innocently and not knowing how it had been come by. No doubt some of the bulky articles were found down the well: but I think that these articles also must be deemed to be in Simth's possession. The cases relied on by the defence go to show that the prosecution must prove that the place where the property was found was in the exclusive possession of the accused and this I think has been made out in this case. Had the articles been of small nature which a person could have surreptitiously introduced into the well the inference against the accused would have been considerably weaker and very likely would not have been sufficient to infer his exclusive possession. Considering the nature of the articles, I have no doubt that they could not have got into the well without accused's knowledge or permission. That being so it is for him to explain his possession. He has not done so and the only inference that we can draw is that he knew the nature of the property which had been found. Another suggestion has been made that the property was not found soon after the theft. The question of the length of time that elapsed between the theft and the discovery of the property no doubt has a bearing on the presumption that should be drawn. But each case must be determined on its merits. In this case it is possible that the property was stolen even three or four months before it was discovered and even taking it to be that period I do not think that the interval is so long that in the circumstances proved, a presumption under S. 114, Evidence Act, should not be drawn.

In this view I think that the accused's guilt has been satisfactorily established and I would dismiss the appeal and confirm the conviction and sentence.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 119

WALLIS, C. J. BAKEWELL AND KUMARASWAMI SASTRI, JJ.

Asha Beevi and *others*—Defendants—Appellants.

v.

S. K. M. Karuppan Chetty—Plaintiff—Respondent.

Letters Patent Appeal No. 47 of 1917, Decided on 12th September 1917, against judgment of Sadasiva Aiyar, J., D/- 7th February 1917.

Mahomedan Law—Succession—Renunciation before accrual is prohibited.

A transfer or renuciation of the rights of inheritance by a Mahomedan before that right has vested in him is prohibited under the Mahomedan law : 4 *S D A* 210, *Foll* ; 17 *W R* 108 (*P C*), *Expl*, 19 *Mad* 176 and *A I R* 1915 *All* 486, *not Appr*. [P 119 C 2]

A. Krishnaswami Aiyar and *E. Duraiswami Aiyar*—for Appellants.

C. V. Ananthakrishna Aiyar—for Respondent.

Judgment.—We agree with the conclusion arrived at by Sadasiva Aiyar, J., in this case on the ground that a transfer of an expectancy of this kind is not permitted by the Mahomedan law. That was decided in accordance with the

opinion of the numerous law officers consulted in *Mt. Khanum Jan* v. *Mt. Jan Beebee* (1). Case No. 11 cited at p. 89 of Macnaughten's Principles and Precedents of Mahomedan law is to the same effect. This view has also been taken by the text-writers on Mahomedan law (Sir Roland Wilson's Digest of Anglo Mahomedan law, p. 268, and more particularly Vol. 2, pp. 50 and 51, Edn. 3 of Mr. Amir Ali's Mahomedan Law where the subject is more fully dealt with). Tyabji, J's. Principles of Mahomedan law is to the same effect.

On the other hand reliance has been mainly placed on the decision of the Privy Council in *Mt. Hurmutoolnissa Begum* v. *Allahdia Khan* (2) by which Spencer, J., appears to have been mainly influenced in dissenting from the conclusion come to by Sadasiva Aiyar, J. On examining that case we do not think that their Lordships intended to lay down that a Mahomedan could renounce his right of inheritance before that right had become vested on the death of the person to whom he was entitled to succeed. In that case there had been a very great delay in putting forward the plaintiff's claim to succeed as heir of the deceased and their Lordships observed at p. 112 :

"They may further remark that according to the Mahomedan law, there may be a renunciation of the right to inherit and that such a renuciation need not be expressed but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another."

Having regard to the word "right to inherit" and the words "prosecuting a claim," which claim would only arise after the succession had opened, we think that these observations of their Lordships may be taken as dealing with a renunciation after the right of inheritance has vested and are not authority for the proposition that prior renunciation is authorized by the Mahomedan law. Mr. Amir Ali in the passage referred to deals with renunciation after the inheritance has vested. Reliance has also been placed on a decision of this Court reported in *Kunhi Mamod* v. *Kunhi Moidin* (3). That decision has been questioned by all the text-book writers who have since dealt with the subject. As pointed out in Wilson's book, the recital that all the law officers were not agreed in the case in *Mt. Khanum Jan* v. *Mt. Jan Beebee* (1) is not accurate. Further the respondent was not represented and therefore the case was not so fully argued. The learned Judges also proceeded upon the footing that the right of inheritance had vested. We are not prepared to accept this case as an authority for the proposition that under Mahomedan law a right of inheritance can be renounced before it vests. The decisions in *Mt. Khanum Jan* v. *Mt. Jan Beebee* (1) has since been referred to with approval by this Court in the judgment of Benson and Sundra Aiyar, JJ.. reported as *Meerangani Rowther* v. *Karupathi Nagur Meera Lubbai* (4) and the same view appears to have been expressed by Sir Lawrence Jenkins C. J., in *Sumsuddin* v. *Abdul Husan* (5) though the judgment in that case proceeded upon the construction of the provisions of the Transfer of Property Act. Reliance has also been placed upon the decision in *Mohammad Hashmat Ali* v. *Kaniz Fatima* (6) but there is no discussion of the authorities in that case.

On the whole, we think that there is a large preponderance of authority in favour of the view that a transfer or a renunciation of the right of inheritance before that right vests is prohibited under the Mahomedan law. The rules of Mahomedan law are not affected by the Transfer of Property Act and it is therefore unnecessary to consider whether this transfer or renunciation would not also be invalid under the provisions of S. 6, T. P. Act, itself. For these reasons the Letters Petent Appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

1. 4 S D A 210.
2. (1872) 17 W R 108 (P C).
3. (1896) 19 Mad 176.
4. (1913) 18 I C 185.
5. (1907) 31 Bom 165.
6. A I R 1915 All 486=27 I C 701.

A. I. R. 1918 Madras 120

AYLING AND PHILLIPS, JJ.

Srinivasa Upadya—Plaintiff—Appellant.

v.

Ranganna Bhatta and *others*—Defendants—Respondents.

Second Appeal No. 1098 of 1916, Decided on 29th November 1917, against the decree of Dist. Judge, South Canara, in A. S. No. 286 of 1915.

(a) Easements Act (1882), S. 15—Term "belong to Government" refers to time of enjoyment — 40 years' enjoyment of easement against Government does not make it abso-

lute and binding against transferee from Government—20 years' enjoyment against transferee must be proved.

The words "belongs to Government" in the last paragraph of S. 15 refer not to the time of suit but to the time during which the easement is enjoyed. [P 121 C 1]

Where therefore after 40 years' enjoyment of an easement as against Government, the latter transfers the property to a private party, the easement does not become absolute, but the person claiming it must make good his title by 20 years' enjoyment against the transferee after the transfer. [P 121 C 1, 2]

(b) Easements Act (1882), S. 15—60 years' period nearly expired—Subsequent transfer by Government—Acquisition becomes complete when deficiency is made up.

Semble—Where the 60 years' period has nearly expired during Government ownership of the land and the land is then transferred by Government to a private party the acquisition of the easement might be held to be completed if the deficiency was made up by subsequent enjoyment against the transferee. [P 121 C 1]

K. Y. Adiga for *B. Sitarama Rao*—for Appellant.

K. Sundara Row—for Respondents.

Judgment.—The subject of dispute is an easement claimed as acquired by prescription. The servient tenement belonged to Government till 2 years before suit and was then assigned by Government to the defendant. At the time of assignment the easement had been exercised only for 30 or 40 years and had, therefore, not become absolute as against Government. Appellant contends that the transfer of ownership had the effect of rendering it absolute, inasmuch as the servient tenement became the property of a private individual against whom the previous 30 or 40 years' enjoyment would be sufficient under S. 15, Easements Act. The point is a novel one and is not covered by authority. But we think appellant's contention cannot be admitted. We think the words "belongs to Government" in the last paragraph of S. 15, must refer, not to the time of suit, but to the time during which the easement is enjoyed. An easement can only be acquired by 20 years' enjoyment against a private person or by 60 years' enjoyment against Government. Here neither condition is satisfied.

It may be that where the 60 years' period has nearly expired during Government ownership of the land and the land is then transferred by Government to a private party, the acquisition of the easement might be held to be completed when the deficiency was made up by subsequent enjoyment against the transferee, but subject to this the person claiming the easement must make good his title by 20 years' enjoyment against the transferee after the transfer. If we adopt the view contended for by the appellant, we should have to hold that the transfer of the servient tenement by a private owner to Government would have the effect of destroying any easement right, which had been legitimately acquired by 20 years' enjoyment but which had not been enjoyed for the period of 60 years required as against Government. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 121

SESHAGIRI AIYAR AND NAPIER, JJ.

P. V. Madhavan Vydiar—Plaintiff—Appellant.

v.

Lakshmana Pattar and *another*—Defendants—Respondents.

Second Appeal No. 846 of 1916, Decided on 30th October 1917, against the decree of Sub-Judge, South Malabar, in Appeal Suit No. 454 of 1915.

(a) Transfer of Property Act (4 of 1882), S. 60—Redemption suit—Primary burden of existence of mortgage is on plaintiff—On admission by defendant he is to prove that it is irredeemable.

In a suit for redemption of a mortgage, the plaintiff has to prove, ordinarily, that there is a subsisting mortgage capable of being redeemed. The rule however is subject to exceptions. Where the defendant admits the existence of the mortgage, the onus is shifted to him to prove that he subsequently acquired an irredeemable right. [P 122 C 1]

(b) Civil P. C. (5 of 1908), O. 6, R. 17—Suit on specific mortgage—Amendment of plaint can be allowed on defendant's admission.

A plaintiff in a redemption suit may be permitted to amend a plaint which is based on a specific mortgage and claim a decree on the defendant's admission. 13 *M. L. J.* 274 and 28 *I. C.* 69, *Expl.* [P 122 C 2]

C. V. Ananthakrishna Iyer—for Appellant.

K. P. M. Menon, K. V. Madhavan Nair and *P. V. Parameswari Iyer*—for Respondents.

Judgment.—The plaintiff's allegations are that a Nair Tarwad was the jenmi of the plaint property, that it was mortgaged to the ancestors of defendants 1 and 2, that the said persons sub-mortgaged it to a person not before the Court who transferred his rights to defendant 3, that defendant 3 subsequently purchased the jenm right from the Nair Tarwad and gave the plaintiff a 2nd mortgage in 1912, (Ex. H.) He sues to redeem the 1st mort-

gage. He does not give the date of the 1st mortgage, but relies upon the admission of the ancestor of defendants 1 and 2 contained in Ex. A and upon the statement of defendant 2 contained in Ex. L. In Ex. A. while granting a sub-mortgage, the ancestor mentioned that the property was held by him under a kanom from the Nair Tarwad. In Ex. L. which was a statement filed in proceedings taken by the plaintiff under S. 83, T. P. Act, defendant 2 stated that the amount due and payable to him under the mortgage was not the amount deposited in Court. How far this admission is evidence against defendant 1 and to what extent defendant 2 himself is bound by it are questions for the appellate Court. The case for the defendants is that the mortgage sought to be redeemed is not subsisting and that the burden is on the plaintiff to prove that there is a redeemable mortgage.

The District Munsif held that the suit was not barred by limitation, but that as the plaintiff failed to prove the mortgage sued on, he was not entitled to a decree. On appeal, the Subordinate Judge held that the burden of proving that the mortgage sought to be redeemed is subsisting was on the plaintiff and that as he failed to prove that fact, the suit was rightly dismissed. Mr. K. P. M. Menon, for the respondent, has placed before us certain considerations which, if we were hearing the appeal, might have considerable weight with us. Defendant 3 is certainly in a position to throw light on the date and nature of the mortgage and it may be that the plaintiff ought to have summoned him to produce the mortgage deed, if it exists but that is a matter to be considered by the appellate Court. On the point decided by the Subordinate Judge we are unable to agree with him. As we read Ex, L, defendant 2 admitted that at that time there was a mortgage capable of being redeemed. If the defendants have acquired an irredemable right subsequently, they ought to prove it: see *Dip Singh* v. *Girand Singh* (1) and *Daia Chand* v. *Sarfraz* (2).

Mr. Menon sought to support the decision on the authorities cited in the judgment of the District Munsif. The proposition enunciated in *Krishna Pillai* v. *Rangasami Pillai* (3) is that where a plaintiffs fails to establish the specific mortgage sued on, he should not be given a decree on a mortgage to be spelled out from documents or pleadings to which the defendant was a party. This view was followed in *Vasudevan Namludri* v. *Krishna Pisharoti* (4) and in *Kalliani Amma* v. *Narayanan Nambiar* (5). As a general proposition there can be no objection to this statement of the law: but there may be exceptions. The plaintiff might have been under a bona fide mistake and might have been led into the error by the conduct of the defendants. In such cases notwithstanding his failure to prove the specific mortgage, he may be permitted, by allowing him to amend the plaint, to claim a decree on the admission of the defendant: see *Paykat Manakkal* v. *Theyyankaran* (6) and *Kadakamvalli Sankaran Mussad* v. *Mokkath Ussain Haji* (7). In no case may a plaintiff who has fabricated a document be allowed to obtain a decree on the admission of the defendant. But in the present case both the plaintiff and the defendant had but one mortgage in their minds: see Ex. L. The only question was whether that mortgage was subsisting or has become irredeemable. In this class of cases, the point for consideration is on whom does the burden of proof lie to prove that it is subsisting. Ordinarily on the principle that the mortgagee must be aware of the date of the transaction to which he or his predecessor was a party, the burden of proof will lie on the defendant. What quantum of evidence may displace this burden will depend on each case: see *Khiali Ram* v. *Taik Ram* (8). The view taken by the Subordinate Judge is therefore wrong. We must set aside his decree and remand the appeal to him for disposal according to law. Any application for fresh evidence must be made to him. Costs will abide the result.

S.N./R.K. *Appeal allowed.*

1. (1904) 26 All 313.
2. (1875-78) 1 All 117.
3. (1895) 18 Mad 462.
4. (1903) 13 M L J 274.
5. (1915) 28 I C 69.
6. (1916) 32 I C 624.
7. (1907) 30 Mad 388.
8. (1916) 38 All 540=36 I C 452.

* A. I. R. 1918 Madras 123
Full Bench

WALLIS, C. J. SADASIVA AIYAR AND KUMARASWAMI SASTRI, JJ.

Vaddadi Sannamma—Appellant.

v.

Koduganti Radhabhayi and *others*—Respondents.

Appeal No. 132 of 1916, Decided on 21st November 1917, against appellate order of Dist. Judge, Vizagapatam, D/- 2nd August 1916, in Appeal Suit No. 414 of 1915.

* (a) **Civil P. C. (1908), S. 47—Defendant against whom suit is dismissed on account of relinquishment of certain relief is party to suit.**

Where a party has been properly impleaded as one of the defendants in a case and the case as against him would have proceeded to judgment but for the fact that the plaintiff elects to abandon part of his case and the suit is in consequence dismissed as against this defendant, he is a defendant against whom the suit has been dismissed within the meaning of the explanation to S. 47; 40 *Mad.* 964, *Dist.* [P 125 C 1]

(b) **Civil P. C (1908), O. 1, R. 10 (2)—Claim abandoned as against particular defendant —His name should be struck out.**

The proper course is for the Court to exercise its discretion under O. 1, R. 10 (2), and to order the name of the defendant to be struck out instead of dismissing the suit as against him. [P 125 C 1, 2]

(c) **Madras Proprietary Estates Village Service Act (1904), S. 17— Enfranchised inam—Execution of inam deed—Alienation before notification is invalid.**

A mortgage of village service inam lands in a proprietary estate executed after the grant of the title-deed of enfranchisement but before the notification referred to in S. 17, Act 2 of 1894, is invalid and inoperative. [P 126 C 2]

(d) **Contract Act (1872), S. 23—Scope.**

No equities arise out of a transaction which is prohibited by law on grounds of public policy: 19 *I. C.* 881; 21 *I. C.* 600; 30 *I. C.* 889 and 29 *I. C.* 241, *Foll.* [P 126 C 1]

B. N. Sarma - for Appellant.

C. Rama Row, for *P. Narayanamurthy* —for Respondents.

Order of Reference

Abdur Rahim, J. — The lands to which the dispute relates appertain to a village service inam and are situate in a proprietary estate. The authorities having decided to enfranchise the inam, the inam title-deed was granted on 18th August 1906, but the notification spoken of in S. 17, Madras Act 2 of 1894 fixed 1st April 1911 as the date from which the enfranchisement would take effect. Between these two dates, i. e., on 23rd January 1909 these lands described by the mortgagors as 'the enfranchised mirasi and inam lands belonging to us' were mortgaged to the appellant, who subsequently in 1915 obtained an ordinary mortgage decree. Respondent 1 also had a mortgage on the same property and sued to enforce it making the appellant a party; but being advised that a mortgage of service inam lands was unenforceable, he gave up his claim on the mortgage and obtained a simple money decree against mortgagors, his suit being dismissed as against the appellant. Respondent 1's decree was in 1914, i. e., before the decree of the appellant. The properties being attached in execution of the former money decree, the latter asked by a petition in the execution proceedings that the lands may be sold subject to his mortgage decree. That petition has been rejected and the appeal is against that order.

The respondent has taken the preliminary objection that no appeal lies, contending that although the appellant was impleaded as a party to the suit and his name is borne on the decree, he is not 'a party to the suit in which the decree was passed' within the meaning of S. 47, Civil P. C., inasmuch as he ceased to be a proper party when the respondent gave up his claims on the mortgage. This proposition is laid down by Ayling and Kumarswami Sastri, JJ., in *Krishnappa Mudaly* v. *Periaswami Mudaly* (1), but Sadasiva Aiyar and Phillips, JJ., held otherwise in an unreported case (Second Appeal No. 888 of 1916). It seems to me with all respect that in the former decision sufficient effect has not been given to the plain language of the section, which is made still clearer by the explanation attached to it. The explanation says:

"For the purposes of this section, a defendant against whom a suit has been dismissed is a party to the suit".

Nor can it be said that it is the duty of a Court charged with execution of a decree to see that a defendant against whom the suit has been dismissed was properly made a party or not. Having in view however the conflict of views expressed in *Krishnappa Mudaly* v. *Periaswamy Mudaly* (1) and *Second Appeal No.* 888 of 1916, the question should be solved by a Full Bench. Upon the merits, S. 43, T. P. Act, has been invoked to validate the mortgage in favour of the appellant. But it has been ruled by this Court that that section has no application to

1. (1917) 40 Mad 964=38 I C 297.

alienations which are prohibited by law on the grounds of public policy. The matter is fully discussed by the learned Chief Justice in *Kakaralapudi Lakshmi Narayana* v. *Kandukuri Veera Sarabha* (2), with which I respectfully agree. The same view of the law is expressed in *Narhari Sahu* v. *Sira Korithan Naidu* (3), *Batchu Ramayya* v. *Dara Satchi* (4), *Karri Ramayya* v. *Villoori Jagannadham* (5), while a difierent view prevailed in *Angannayya* v. *Narasanna* (6).

The decision in the last case is in direct conflict with the other decisions, all relating to alienations of service inam lands. And, in my opinion, the present case cannot be effectively distinguished from these by reason of the fact that on the date of the appellant's mortgage the inam title-deed had been issued, though the notification was not issued till long afterwards. When S. 17, Madras Act 2 of 1894, expressly says that the enfranchisement shall take effect only from the date of the notification, it seems to me that before that date the legal incidents attaching to the property including its inalienability remained unaltered. It could not be said that by issuing the title-deed the Government bound itself by way of contract to issue the notification, though the notification was certain to issue in ordinary course and in the latter sense it would be right to say that this expectation of the inam holder was not a 'mere possibility'. If the mortgagee could not rely on any contract in favour of the mortgagor, I find it still more difficult to say that the inam title deed by itself created some sort of inchoate interest in the property free from all restraint of alienation, although the Act says that the enfranchisement shall have no effect except from the date of notification. But as there is a conflict of decisions on the applicability of S. 43 to village service inams, I think this question also should be referred to the Full Bench. I would therefore refer the following questions to a Full Bench for opinion:

(1) Is a person who was impleaded as a defendant in a suit and against whom the suit is dismissed by the decree, a party to the suit in which the decree was passed within the meaning of S. 47, Civil P. C., if the dismissal of the suit against him was due to the fact that at the trial the plaintiff abandoned that part of his claim by reason of which the defendant would be a proper party to the suit?

(2) Is a mortgage of village service inam lands in a proprietary estate, executed after the grant of the title-deed of enfranchisement but before the date of the notification contemplated under S. 17, Madras Act 2 of 1894, valid and operative?

Bakewell, J.—By S. 17, Madras Proprietary Estates Village Service Act, 1894, the Government was empowered to enfranchise lands granted as remuneration of a village office from the condition of service, but "such enfranchisement" was declared to

"take effect on or after the date fixed in the notification issued under S. 19 for the levy of a village service cess."

That is to say, the Government might perform the act constituting an enfranchisement but its operation was suspended until provision had been made for the remuneration of the services on which the land had been previously held. The holder of the office therefore retained the land on the former tenure until such provision had been made, but he acquired a further interest in the land which on the occurrence of the prescribed event would ripen into an absolute interest. In my opinion, such an interest is assignable, and is not a mere possibility of a like nature with a chance of an heir-apparent succeeding to an estate or the chance of a relation obtaining a legacy on the death of a kinsman within the meaning of S. 6, T. P. Act, 1882, since it would become an absolute interest in the ordinary course of business.

In the present case the holder of the lands, after the execution of a deed of enfranchisement but before a notification had been issued by Government for the levy of cess, purported to transfer by way of mortgage "enfranchised mirasi and inam lands" held on service tenure, and I think that this was a transfer of the inchoate interest which I have described. The transfer could not operate to convey the subsisting interest in the lands in so far as it consisted of a service tenure (Madras Act 3 of 1895, S. 5) but on the issue of the notification that interest became extinguished and the interest which passed under the mortgage

2. (1915) 39 Mad 554=29 I C 241.
3. (1913) 19 I C 881.
4. (1913) 21 I C 600.
5. (1915) 39 Mad 930=30 I C 889.
6. (1908) 18 M L J 247.

became absolute, without any further act of the parties. The petitioner had therefore a valid security and was entitled to apply to the Court that an attachment of the lands should be declared subject thereto. The decree under which the attachment was issued contains the name of the petitioner as party defendant, and recites the plaintiff's claim as being for a sum due on a mortgage and the decretal portion directs that the suit be dismissed as against the petitioner. The petitioner was a proper party to the suit as framed and the form of the decree was due to the relinquishment by the plaintiff of his claim under his mortgage and his acceptance of a simple money decree. The case, in my opinion, falls precisely within the explanation to S. 47, Civil P. C., and the petitioner was a party to the suit and this appeal accordingly lies. Having regard to the differences of opinion mentioned by my learned brother, I agree that the questions framed by him should be referred to a Full Bench.

Opinion.

Wallis, C. J.—I am clearly of opinion that, when a party has been properly impleaded as one of the defendants in a case and the case as against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed as against the defendant, he is "a defendant against whom a suit has been dismissed," within the meaning of the explanation to S. 47, Civil P. C. The case which came before the Court in *Krishnappa Mudaly* v. *Periaswamy Mudaly* (1), of a misjoinder of causes of action and of the plaintiff being required to proceed with one cause of action only and the suit being dismissed as against the defendants who had been joined in respect of the other cause of action only, may possibly stand on a different footing, as to hold that the cause of action which the Court was prohibited from trying may be gone into in execution by virtue of S. 47 goes far to defeat the prohibition of joinder, and such a construction of S. 47, should therefore be avoided if it is possible to do so. As that question is not before us, I express no opinion upon it, and will only say that the proper course in these cases appears to be for the Court to exercise the power which it now has under O. 1, R. 10 (2), of ordering at any stage of the proceedings the name of a defendant improperly joined to be struck out, instead of dismissing the suit as against him. That will, as held by the Full Bench in *Ramaswami Sastrulu* v. *Kameswaramma* (7), have the effect of taking him out of the operation of S. 47, which ought not to apply to him seeing that he has no real concern with the suit. I would answer the first question in the affirmative.

As regards the second question, under S. 4, Madras Hereditary Village-Offices Act, 1895, the word "emoluments" includes "lands and assignments of revenue payable in respect of such lands," and according to the finding the emoluments in this case included both the lands and an assignment of revenue arising out of them. Under S. 5 these emoluments are "not liable to be transferred or encumbered in any manner whatsoever," reproducing in substance the provisions of Regn. 6 of 1831 which made such alienations null and void. S. 17, Madras Proprietary Estates Village-Service Act, 1894, provides that:

"if the remuneration of a village-office consists in whole or in part of lands, or assignments of revenue payable in respect of lands, granted or continued in respect of or annexed to such village-office by the State, the Government may enfranchise the said lands from the condition of service by the imposition of quit-rent. . . . . such enfranchisement shall take effect from such date as the Government may notify."

Government in this case issued an inam title deed, which recited that the inam consisted of an assignment of land revenue and commuted its right to resume the assignment in consideration of payment to Government of a quit-rent in addition to the existing jodi payable to the proprietor. It said nothing about the enfranchisement of the inam or the lands from the condition of service and they remained liable as before, and continued to form the emoluments of the village-office until the issue of the notification, which was after the date of the alienation now in question. The lands therefore continued subject to the prohibition against the encumbrance in any manner whatsoever and the alienation in question was undoubtedly void at the time it was made. As pointed out in the Order of Reference, there is a conflict of decisions in this Court as to whether the subsequent enfranchisement has the

7. (1900) 27 Mad 361 (F B).

effect of validating such alienations. In 1907 it was held by White, C. J., and Miller J., in *Angannayya* v. *Narasanna* (6) that, though the transfer was null and void under Regn. 6 of 1831, yet after enfranchisement the transferee was entitled under S. 43, T. P. Act, to require that the transfer should operate on the alienable interest subsequently acquired by the transferor. No authority was cited, and the original illegality of the transfer was not referred to. On the other hand in *Narhari Sahu* v. *Sira Korithan Naidu* (3), it was held on Similar facts by Sundra Aiyar and Benson, JJ., that S. 43 has no application to cases where the transfer is forbidden by law on grounds of public policy, referring to *Ramasami Naik* v. *Ramasami Chetti* (8).

This case was approved and followed in *Batchu Ramayya* v. *Dara Satchi* (4) *Karri Ramayya* v. *Villoori Jagannadham* (5). The decision in *Ramasami Naik* v. *Ramasami Chetti* (8), on which reliance was placed, has since been followed in *Kakaralapudi Lakshmi Narayana* v. *Kandukuri Veera Sarabhai* (2). We have not been referred to any English decisions pointing other way, and on the whole I think the sound position for us to proceed on is that no equities arise out of a transaction which is prohibited by law on grounds of public policy. The present case, no doubt, differs from the earlier cases because the transfer by way of mortgage purported to be of "enfranchised mirasi and inam lands" and was made after execution of the inam deed by which a quit-rent was imposed on the lands, a step which was intended to be followed, and was followed at an early date, by a publication of the notification enfranchising the lands. The transfer was nonetheless illegal when it was made, and on the whole I do not think there are sufficient reasons for departing from what I understand to be the general rule, especially in the absence of English authority in point. In *Bettesworth* v. *St. Pauls Dean* (9), which is referred to by Lord Macnaghten in *Tailby* v. *Official Receiver* (10), where a covenant in a lease to renew for ninety-nine years which was lawful when made was rendered illegal by subsequent Statutes, it was held by the House of Lords that, as the Statutes permitted leases for forty years, specific performance by executing a fresh lease for forty years might be decreed, but in that case the original agreement was lawful, and it does not cover the present case where the transaction was illegal at the time it was entered into. As regards the second question my answer is that the transfer was clearly illegal and inoperative when it was made and did not become operative on the subsequent enfranchisment of the lands.

Sadasiva Aiyar, J.—I agree with my Lord in the answers to be given to the two questions referred to us.

Kumaraswami Sastri J.—I agree.

S.N./R.K. *Reference answered.*

8. (1907) 30 Mad 255.
9. 1 Bro P C 240.
10. (1888) 13 A C 523.

A. I. R. 1918 Madras 126

WALLIS, C. J., SADASIVA AIYAR AND KUMARASWAMI SASTRI, JJ.

Keelangoti Narayana Tantri — Plaintiff—Appellant.

v.

Nagappa and *others* — Defendants — Respondents.

Letters Patent Appeal No. 76 of 1917, Decided on 14th November 1917, from the judgment of Bakewell, J. in Second Appeal No. 669 of 1915.

Civil P. C. (1908), O. 23, R. 1—Application under R. 1 endorsed as "permitted" —Order can be construed to mean fresh suit is allowed.

Where on a petition praying for withdrawal of a suit with liberty to bring a fresh suit, the Court simply endorsed the word 'permitted':

Held: that the order should be construed as having impliedly granted leave to file a fresh suit. 25 *Cal* 990, *Foll.* [P127 C 1]

A. Srirangachariar for *T. Rangachariar*—for Appellant.

B. Sitarama Rao—for Respondent.

Facts.—In the course of proceelings in a suit the plaintiff applied for leave to withdraw a suit with liberty to file a fresh suit. On the petition the Court simply endorsed the word 'permitted.' Plaintiff then instituted a fresh suit, when it was objected by the defendant that it was not maintainable as no leave had been granted under O. 23, R. 1, Civil P. C. In appeal, Seshagiri Aiyar and Bakewell, JJ., differed in the construction of the order, the former holding that the Court impliedly granted leave, and the latter being of opinion that no leave was granted.

Judgment.—In the original vernacular petition it is quite clear that what the petitioner asked for was the liberty to withdraw with permission to bring a fresh suit. In these circumstances, following *Golam Mahomed* v. *Shibendra Pada Banerjee* (1), we think that the order "plaintiff is permitted to withdraw from the suit" must be read with the petition and construed as granting it. On the other construction the order was most misleading to the petitioner and not an order contemplated by the Code. We allow the Letters Patent Appeal with costs, set aside the decree of the District Judge and remand the appeal to the District Judge for disposal according to law. Other costs will abide the result.

S.N./R.K. *Appeal allowed.*

1. (1908) 35 Cal 990.

✻✻ A. I. R. 1918 Madras 127
Full Bench

WALLIS C. J., AYLING, AND KUMARASWAMI SASTRI, JJ.

Annamalai Chettiar—Defendant—Appellant.

v.

Palamalai Pillai and *others*—Plaintiffs Nos. 2 to 4—Respondents.

Second Appeal No. 990 of 1915, Decided on 26th October 1917, against the decree of District Judge, Tanjore, in appeal Suit No. 40 of 1914.

✻✻ Civil P. C. (1908), Ss. 64, and 73—Non attaching decree-holders applying for rateable distribution cannot question private alienation made during continuance of attachment.

Non-attaching decree-holders, who have applied for rateable distribution of assets that may be realized by a sale to be held in pursuance of a subsisting attachment, which has since been raised by satisfaction of the decree or otherwise, are not entitled to question a private alienation made during the continuance of such attachment. [P132 C 1]

Per *Wallis, C. J.*—An alienation, by means of which a decree in execution of which the attachment was made is satisfied, cannot be regarded as an alienation 'contrary to the attachment' within the meaning of S. 64, Civil P. C.

Per *Kumaraswamy Sastri, J.*—S. 64, Civil P. C. [P 131 C 2] can protect decree-holders entitled to rateable distribution against a private alienation only where assets have been realized, in which case they will be entitled to share the proceeds in preference to the aliene. [P 135 C2]

K. Rajah Aiyar—for Appellant.

T. Rangachariar; *E. Doraiswami Aiyar* and *K. R. Narayanswami Aiyar* — for Respondents.

Order of Reference

Seshagiri Aiyar, J.—Defendant 29 was heavily indebted and a large number of decrees were passed against him. A number of execution applications were presented under those decrees. We are concerned at present only with three of them, namely, applications in the decree in Original Suit No. 22 of 1909, in the decree in Original Suit No. 8 of 1910 and the decree obtained by defendant 25 in Original suit No. 32 of 1909. The allegation of this last decree holder is that defendant 29, with a view to defraud him and the other creditors, executed a sale-deed nominally in favour of the plaintiff. The deed is dated 15th June 1910. When an application for attachment was made against the properties in suit, the plaintiff put in a claim petition alleging that they were his and that they should be released from attachment. The Subordinate Judge of Kumbakonam held that the claim was fraudulent and dismissed it. Thereupon the present suit was instituted for a declaration that the sale is valid. The first Court held that no consideration passed for the sale and that the plaintiff and defendant 29 colluded together to defraud the creditors. On appeal, the District Judge differed from the Subordinate Judge on this question and held that the sale was supported by consideration. Hence this second appeal by defendant 25. The learned Advocate-General does not contest the finding as to consideration.

He contended that even on that finding, the sale should be held invalid. The question of law now argued was raised in both the lower Courts, but has not been adequately dealt with by either of them. The contention of the learned Advocate-General is that as at the time of the sale to the plaintiff an attachment of the properties was subsisting, although his client was not the attaching creditor, he is entitled to take advantage of the attachment as his client had applied under S. 73, Civil P. C., for rateable distribution. The attachment referred to was in Original Suit No. 22 of 1909. Ex. DDD is the execution application. On that application the properties were attached on 22nd January 1910. On that day, the application was adjourned for taking further steps to 9th February 1910. The application was ultimately dismissed on 29th March 1910.

The contention of Mr. Rangachariar, the learned vakil for the respondents, is that this dismissal operated to put an end to the attachment made in January 1910 and that, therefore, at the time of the sale to the plaintiff, there was no subsisting attachment. It may be mentioned that against this dismissal, the decree-holder in Original Suit No. 22 of 1909 appealed to the High Court. The order of the High Court is Ex. DDD2. The dismissal was confirmed, It was argued before us that the appeal was really withdrawn. But as the matter has not been enquired into, I prefer not to express any opinion on that question. Notwithstanding the dismissal of the petition by the Subordinate Judge and the dismissal of the appeal by the High Court, the properties were directed to be sold under the original execution application. Thereupon the present plaintiff put in a claim petition, Ex. 7-C, for releasing the property from attachment and to prevent the threatened sale. The claim was enquired into by the Subordinate Judge and it was contended before him that the attachment ceased to exist by the dismissal of the petition on 29th March 1910. He however held that the attachment subsisted. It may be that this conclusion is not res judicata as the present appellant was not a party to the proceedings.

It has however to be found whether there was default on the part of the decree-holder and whether in consequence of that default, his application was dismissed. Consequently, if it is necessary to express a final opinion on that question, I would ask the lower Court to return a specific finding as to whether the dismissal of 29th March 1910 was due to want of prosecution on the part of the decree-holder in Original Suit No. 22 of 1909. Another disputed point should also be mentioned before dealing with the question of law. The present appellant's decree was obtained in Original Suit No. 32 of 1909. It is dated 22nd September 1909. He applied for execution on 4th January 1910. It is said that this application also was dismissed for want of prosecution and that therefore on the date of the sale to the plaintiff, defendant 25's application for rateable distribution was not pending. That question again has not been considered by the Courts below. They seem to have taken it for granted that he would be entitled to rateable distribution. It may become necessary to call for a definite finding on this question as well.

As regards the attachment in Original Suit No. 8 of 1910, it is enough to point out that that was issued by the District Court of Tanjore, and as neither defendant 25 nor the other decree-holders had their decrees transferred to the District Court, the attachment under that decree is of no value to them. Now I proceed to consider the question of law argued by the learned Advocate-General. The contention of the learned vakil for the respondents was that as the decree in Original Suit No. 22 of 1909 was satisfied in September 1911, the sale to his client was not obnoxious to S. 64 of the Code. Broadly put, Mr. Rangachariar's reasoning is that in order that a private alienation during the pendency of an attachment may be caught by S. 64, the particular attachment under which defendant 25 and the other decree-holders claim should have resulted in the realization of the assets. If the matter were res integra, and if I were not hampered by precedents, I would have found great difficulty in accepting this contention. In my opinion, the legislature by S. 73 has enabled decree-holders other than the one who attaches the property to reap the benefit of his labours, provided they comply with certain requirements. The attaching decree-holder is dominus litis. He alone can apply to bring the property to sale, and he is entitled in the first instance to get his expenses paid out of the sale-proceeds. Subject to this reservation, he holds no higher position than the other decree-holders who have applied for rateable distribution prior to the realization of the assets. The object is on the one hand not to harass the judgment-debtor by too many applications for attachment by decree-holders, and, on the other, to relieve the various decree-holders from the necessity of applying for separate attachments when their object can be gained by taking shelter under a pre-existing attachment. Such an attachment, although it does not prevent the decree-holders from separately attaching the property, secures to them a benefit without themselves attaching the properties. Consequently the attaching creditor is in a sense the

representative of all the other decree-holders.

The language of the section as well as of the explanation suggests that if at the time of the private alienation there was a subsisting attachment, all persons who could have enforced their claim for rateable distribution should have the benefit of such an attachment. In the explanation, the language is "claims enforceable under an attachment" and not "enforced under an attachment." The other construction would enable attaching on decree holder to enter into a fraudulent compromise with the judgment-debtor and the private alienee and thus defeat all the claims for rateable distribution. I do not think the legislature contemplated such a state of affairs ; but the course of decisions under S. 276 of the old Civil P. C., and under S. 64 of the new Code are all one way. Under the old Code, there were two classes of decisions. In the one, it was held that it is the attaching decree-holder alone that can avoid a private alienation. *Manohar Das* v. *Ram Autar Pande* (1) has taken this view. The other view was that all persons who would be entitled to rateable distribution have the right to impeach a private alienation if the attachment under which they claim was subsisting. The able and exhaustive judgment of Telang, J., in *Sorabji Edulji Warden* v. *Govind Ramji* (2) enunciates this proposition. In that judgment the learned Judge discussed *Durga Churn Rai Chowdhry* v. *Manmohini Dasi* (3) and *Ganga Din* v. *Khushali* (4), where it was held that if the attachment ceased to have force by the decree being satisfied, other decree holders could derive no benefit under it.

Telang, J., apparently accepted this view as correct. The same view was held in Madras under the old Code : *Kunhi Moossa* v. *Makki* (5), *Vitudhapriya Tirthaswami* v. *Yusuf Sahib* (6) *Venkatarama Iyer* v. *Esumsa Rowthen* (7). In this state of the authorities the Act of 1908 was passed and it introduced the explanation to S. 64 which did not exist under the old Code. It is clear that the legislature intended to uphold the view of Telang, J., as against the view of the Allahabad Judges in *Manohar Das* v. *Ram Autar Pande* (1). If the legislature intended to go further, the language could certainly have been clearer. It must be noticed that until the new Act was passed, there was no decision which went to the length of holding that even though the decree of the attching creditor had been satisfied, still the other decree-holders would be entitled to impeach the private alienation, provided at the time of the private alienation, they had applied for rateable distribution. The natural inference to be drawn from the action of the legislature is that the explanation to S. 64 was intended to give legislative sanction to the view enunciated by Telang, J., in *Sorabji Edulji Warden* v. *Govind Ramji* (2) and no more. Since the explanation, there have been some decisions in Bombay. The other High Courts have not dealt with the question.

In *Khushalchand* v. *Nandram Sahebram* (8), *Jetha Bhima & Co.* v. *Lady Janbai* (9) and in *Jetha Bhima & Co.* v. *Lady Janbai* (10), the learned Judges of the Bombay High Court have held that if the decree under which an attachment was made was satisfied, other decree-holders who had applied for rateable distribution will not be entitled to impeach the alienation. In *Bibi Miyakhan* v. *Gulabchand* (11) apparently a different view was taken. But it is pointed out in *Jetha Bhima & Co* v. *Lady Janbai* (9) by Beaman, J., that the learned Judges who decided *Bibi Miyakhan* v. *Gulabchand* (11) disclaimed any intention of enunciating the proposition imputed to them. Moreover, one of the learned Judges who took part in *Bibi Miyakhan* v. *Gulabchand* (11) was a party to the decision in *Khushalchand* v. *Nandram Sahebram* (8) and in *Jetha Bhima & Co.* v. *Lady Janbai* (10). Under these circumstances, I would have held that as the decree in Original Suit No. 22 of 1909 was satisfied defendant 25 and persons like him are not entitled to question the private alienation made in favour of the plaintiff. But my learned brother is inclined to take a

1. (1903) 25 All 431.
2. (1892) 16 Bom 91.
3. (1888) 15 Cal 771.
4. (1885) 7 All 702.
5. (1900) 23 Mad 478.
6. (1905) 28 Mad 380.
7. (1910) 33 Mad 429=5 I C 92.
8. (1911) 35 Bom 516=12 I C 572.
9. (1912) 15 I C 950.
10. (1912) 37 Bom 138=17 I C 625.
11. (1911) 12 I C 923.

different view and as I have said before the language of the section and reason and justice are in favour of the broader proposition contended for by the learned Advocate General.

Since writing the above, I came across the decision of the Judicial Committee in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (12). Although the decision was under the old Code, in the argument counsel referred to the new Code as well. The Board seem to doubt the correctness of *Sorabji Edulji Warden* v. *Govind Ramji* (2). Further they lay down that an attachment which does not finally fructify is of no avail. I drew the attention of my learned colleague to this judgment. He thinks that as the decision was under the old Code, it is not binding on us, having regard to the explanation added to the new Code. I would therefore refer for the decision of the Full Bench the following question:

"Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise are entitled to question a private alienation made during the continuance of such attachment?"

Bakewell, J.—In order that a judgment-creditor may obtain a rateable distribution of assets of his debtor, he must have applied for execution of his decree to the Court by which the assets are held before the receipt thereof. This claim may therefore be made either before or after the property of the debtor has been attached and must be made before the proceeds of that property have been received by the Court, but it subsists independently of the attachment. Where assets result from the sale of immovable property, any person entitled to share in a rateable distribution thereof may apply to the Court to set aside the sale (O. 21, R. 90); and since an order setting aside a sale destroys the fund in which he claims a share, I think that such a person's interests are affected within the meaning of R. 92 and that he should be given notice of an application for such an order. For the purposes therefore of challenging and upholding a sale of his debtor's property a person entitled to rateable distribution may become a party to proceedings instituted by a riva. judgment-creditor.

The Code does not declare the proceedure to be observed upon the distribution of assets but since it is a general principle that all persons interested in a fund are entitled to appear and to be heard when it is dealt with and since a person cannot complain that his interests have been neglected if he has failed to bring them to the notice of the Court and the other claimants, I think that each claimant should present an application in the execution proceedings instituted for the realisation of assets and should give notice thereof to the decree-holder who is prosecuting them. He will then be entitled to notice of any application relating to the assets and to this extent at least is in the position of a party to the execution proceedings. As my learned brother has pointed out this procedure avoids multiplicity of proceedings in execution of decrees against the same debtor and the resulting complications. An attachment of immovable property is effected by an order prohibiting the debtor from dealing with the property and all persons from taking any benefit from such dealing by a proclamation and publication of this order intended to give notice thereof to all persons interested. Prima facie a public injunction of this kind should only be dissolved by an express order of the Court upon notice to the parties interested. The explanation to S. 64 of the Code declares that the words used therein "claims enforceable under the attachment" include "claims for the rateable distribution of assets," and accordingly I think that the section should be read as providing that where an attachment has been made, any private transfer of the property attached shall be void as against all claims enforceable under the attachment or for the rateable distribution of assets to be realized thereunder.

Having regard to the above provisions, I think that it was the intention of the legislature to place claimants for rateable distribution of assets as far as possible in the same position as the decree-holder who is actively prosecuting the proceedings from which all expect to benefit and no order should be passed by the Court which may affect their interests without notice to them, such, for instance as an order raising an attachment or directing satisfication to be entered of the decree which is in course of execution. The Bombay cases and the decision in *Mina*

12. A I R 1916 P C 238=40 I C 242=44 Cal 662=44 I A 72 (P C).

Kumari Bibi v. *Bijoy Singh Dudhuria* (12), which have been cited were with reference to the Code of 1882, from which the present Code differs largely both in form and matter, and with all respect I deprecate the use of decisions under the former law for the purpose of construing a comprehensive enactment such as the Code of Civil Procedure when the provisions construed are not identical. I agree with the reference proposed by my learned brother.

Opinion

Wallis, C. J.—The question is as to the effect of the explanation added to S. 64 (formerly S. 276,) Civil P. C., of 1908, that for the purposes of the section "claims enforceable under an attachment include claims for the rateable distribution of assets."

It had been held by the Courts in India that decree-holders other than the attaching decree-holder acquired no right to rateable distribution under S. 295 (now 73) of the Code until assets had been realized in execution, and Sir Lawrence Jenkins delivering the judgment of the Judicial Committee has observed in the recent case in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (12):

"To bring S. 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court."

Applying this principle the Indian Courts held under S. 276 that if the judgment-debtor has satisfied the claim of the attaching decree-holder even by alienating the attached property, that does not give the other decree holders who have applied for execution any right to question the alienation; and in the case referred, which was decided with reference to the old Code, the Judicial Committee seem to have gone, if anything, further and have held that the attaching decree-holder himself cannot object to a private alienation by the judgment-debtor subsequent to the attachment, unless the attached property has been brought to sale in execution of the decree in respect of which the property was attached. In that case a decree holder who had attached and brought to sale and purchased the suit property subsequently to a private alienation by the judgment-debtor, was held not to be entitled to defend his title as against the alienee from the judgment-debtor under S. 276 by relying on the fact that before the date of the alienation he had attached the suit property in execution of another decree without bringing the property to sale in execution of that decree. In these circumstanees, it was held that S. 276 did not protect him.

Section 64 of the present Code affords no greater protection to the attaching decree holder than S. 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the attached property is brought to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in any better position. It may even be said that, as regards other decree-holders, the language used in the body of S. 64 is, if anything, less favourable than the language of S. 276, because it only renders void as against the claimants specified alienations which are "contrary to such attachment" and an alienation by means of which the decree in execution of which the attachment was made is satisfied can scarcely be regarded as an alienation contrary to the attachment. As pointed out by Seshagiri Aiyar, J., full effect is given to the explanation to S. 64 by regarding it as intended to settle the difference between *Sorabji Edulji Warden* v. *Gobind Ramji* (2) and *Manohar Das* v. *Ram Autar Pande* (1) in favour of the Bombay decision. Further, if it had been intended to prevent all alienations of the attached property after attachment, unless made in execution of the decree and for the benefit of the decree-holders entitled to rateable distribution under S. 73 (formerly S. 295), the legislature would have said so plainly. On the contrary, not only is the language of the body of S. 64, if anything, more restrictive than the language of S. 276, but the legislature has strengthened the provisions of the former S. 275 by providing in O. 21, R. 59, that on satisfaction of the decree, whether made through the Court or certified to the Court, the attachment shall be deemed to be withdrawn, whereas S. 275 only provided for its being withdrawn in such event on the application of any person interested. There are other alterations pointing the same way which are fully dealt with in the opinion of Kumaraswami Sastri, J. The fact that, when the attached property has been sold in execution, the other decree-holders are now expressly empowered to apply to set aside the sale under O. 21, R. 90, a

point on which there was a conflict of opinion under the former S. 311, does not appear to me to affect the present question. A decree-holder who is entitled to share in the sale-proceeds should obviously be regarded as interested in the sale. For the reasons given I would answer the question in the negative.

Ayling, J.—I agree.

Kumaraswami Sastri, J.—The question referred to us for decision is:

"whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment, which has since been raised by the satisfaction of the decree or otherwise, are entitled to question a private alienation made during the continuance of such attachment,"

and the answer turns on the scope and effect of the explanation added to S. 64, Civil P. C, 1908, which runs as follows:

"For the purpose of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

The section otherwise reproduces S. 276, Civil P. C. 1882, which rendered private alienations of property after attachment void against all claims enforceable under it. Under Civil P. C. 1859, S. 240, which is practically the same as S. 276 of the Acts of 1877 and 1882, rendered private alienation subsequent to the attachment void. This section was construed by their Lordships of the Privy Council in *Anund Loll Doss* v. *Julladhur Shaw* (13) to mean that the private alienation was only void in so far as it was necessary to secure the execution of the decree to the creditor who obtained the attachment and that the protection cannot be extended to all persons who at any future time might possibly obtain execution of their decrees. S. 276, Act 10 of 1877, which introduced the words "as against all claims enforceable under the attachment," was in recognition of the limitation imposed by Courts in India and the Privy Council on the general language used in S. 240, Act of 1859. Ss. 270 and 271 Act of 1859 gave priority to the first attaching creditor and provided for rateable distribution between other decree-holders who had taken out execution and not obtained satisfaction, in so far as any surplus remained out of the sale-proceeds.

The Acts of 1877 and 1882 took away the priority of the first attaching creditor and in place of Ss. 270 and 271 of the old Code enacted S. 295, which provided for rateable distribution between all decree holders who prior to the realization of assets had applied to the Court for execution and had not obtained satisfaction. Though the position of decree-holders who were entitled to rateable distribution in case the attachment culminated in a sale was fairly clear, questions arose as to what was to happen if there was a private alienation during the existence of an attachment which was put an end to either by satisfaction of the decree or was raised owing to other reasons. In *Ganga Din* v. *Khushali* (4) the judgment-debtor sold attached property and paid off the decree-holder who attached it. Decree-holders who would have been entitled to rateable distribution, if the attachment had not been put an end to, objected to the removal of the attachment, but their objection was overruled on the ground that their claims were not protected by S. 276, they having no right to anything till there was an actual sale and realization of assets, and applications for execution though entitling the decree-holder to rateable distribution under S. 295 were not equivalent to an attachment under S. 276. The same view was taken in *Manohar Das* v. *Ram Autar Pande* (1). In *Umesh Chunder Roy* v. *Raj Bullubh Sen* (14), where an alienation was made pending an attachment, it was held that the attachment ceased on the decree being paid off and that the assignment was good against a subsequent attachment by the same party in execution of another decree. In *Durga Churn Rai Chowdhry* v. *Monmohini Dasi* (3) it was held, following *Ganga Din* v. *Khushali* (4), that a claim under S. 295 is not enforceable as an attachment against which an assignment is rendered void by the provisions of S. 276. Pigot and Rampini, JJ., after pointing out that the legislature had not provided that a petition under S. 295 shall have the same effect as an attachment, observed as follows:

"To hold that claims under S. 295 are claims enforceable by attachment against which assignments made under S. 276 are void, would perhaps be carrying out the intention of the legislature when S. 295 was introduced. Unfortunately, the sections of the Code relating to execution were not re-cast so as to be fully adapted to the new state of things. S 276 has not been successfully framed with the object of protecting rateable distribution amongst claimants under S. 295."

13. (1870-72) 14 M I A 543 (P C).

14 (1882) 8 Cal 279.

In *Kunhi Moossa* v. *Makki* (5) a kanom was executed pending an attachment and the decree in execution of which the property demised under the kanom was attached was paid off. It was held that the kanom was valid as against decree-holders who had applied for execution and who would in the ordinary course have been entitled to rateable distribution if the property had been sold. Subramania Iyer, J., was of opinion that the attachment ceased to be operative, in so far as the attaching creditor was concerned, on the decree amount due to him being paid off and that

"on principle it follows that with reference to the other judgment-creditors also who had the attachment resulted in the realization of assets, would have been entitled to a rateable distribution, the attachment became inoperative."

In *Vibudhapriya Tirthaswami* v. *Yusuf Sahib* (6) a similar view was taken. It was held by Sir Arnold White, C. J., and Davies, J., that the rights of decree-holders who had applied for execution of their decrees depended upon S. 295 and that unless the events upon the happening of which S. 295 would have come into operation, namely, the realization of assets by the Court, happened, they had no claims enforceable under the attachment so as to attract the provisions of S. 276 to the alienations questioned. The further question as to whether the words "claims enforceable under the attachment" would include claims of judgment-creditors other than the attaching creditor, as was held in *Sorabjj Edulji Warden* v. *Govind Ramji* (2), or only the claims of the attaching creditor as was held in *Manohar Das* v. *Ram Autar Pande* (1) was left undecided. The decisions in Bombay have placed a more liberal interpretation on S. 276. In *Sorabji Edulji Warden* v. *Govind Ramji* (2) a more liberal interpretation was placed on the words "claims enforceable under the attachment" than was placed by the Allahabad and Calcutta High Courts. It was held that when a sum of money due to the judgment-debtor was attached and he assigned his rights after attachment and other decree-holders subsequently attached the same sum, they were entitled to rateable distribution of the sum paid into Court by the garnishee as against the transferee from the judgment-creditor prior to their attachment on the ground that their claims were claims enforceable under the attachment. Telang, J., in an elaborate judgment after a review of all the authorities on the point held that while realization of assets under S. 295, would protect decree-holders who had applied for execution even subsequent to the alienation, their rights were dependent on realization and consequently would not prevail over the purchaser after attachment, if the attachment ceased to have effect owing to the satisfaction of the decree or other causes—the purchaser being perfectly safe in the latter case.

It was in this state of the authorities that the legislature enacted S. 64 of the present Code (Act 5 of 1908). An explanation was added to S. 64 to the effect that for the purposes of that section claims enforceable under the attachment included claims for rateable distribution. As pointed out in *Jetha Bhima & Co* v. *Lady Jambai* (10) the effect of the explanation is to give legislative approval to the extended meaning given to the words "claims enforceable under the attachment" in *Sorabaji Edulji Warden* v. *Govind Ramji* (2). In this view a reference to the authorities as they stood prior to the passing of the new Act would be relevant. It will be useful to consider in this connection the other relevant provisions of the Code. In S. 73, which corresponds to S. 295 of the Act of 1882, the words used are:

"Where assets are held by a Court and more persons than one have before the receipt of assets, made application, instead of whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court,"

in S. 295 of the old Code. In O. 21, R. 55, which corresponds to S. 275, a clause is added providing that the attachment shall be deemed to be withdrawn and for notification of such withdrawal by proclamation at the place where the property is situate. The only amount to be paid in order to get the attachment withdrawn is the amount decreed with costs and all charges and expenses resulting from the attachment, and Cls. (b) and (c) only refer to satisfaction and reversal of the decree in execution of which the property is attached. R. 57 which is new provides for the determination of the attachment if the execution application is dismissed owing to the decree-holder's default. O. 21, R. 69, which corresponds to S. 291 of the Act of 1882, provides that the sale shall be stopped if before the lot is knocked down, the debt and

costs including the costs of sale are tendered to the officer conducting the sale or proof given that the amount has been paid into Court. O. 21, R. 89, corresponding to S. 310-A, requires that only the amount specified in the proclamation of sale less any payment subsequently made should be paid into Court with 5 per cent of the purchase-money. Form 8 of Appx. E to the Code specifies the sum due and authorises attachment and directs the officer to hold the same until further order of the Court unless the amount specified is paid, and similarly the prohibitory order specifies the amount for which the decree had been passed. Form 24, which relates to attachment of immovable property under O. 21, R. 54, also gives the amount of the decree in execution of which the attachment is made. It is clear from the rules and forms above referred to that the attachment ceases to have any force as soon as the decree in execution of which the property has been attached is satisfied or the execution application is dismissed owing to the decree-holder's default.

It is significant that the last clause of O. 21, R. 55, and the whole of R. 57 are new and that no reference is made to the claims of persons who would be entitled to rateable distribution. In contrast with this R. 90, which relates to the setting aside of sales for irregularity which corresponds to S. 311 of the old Code, contains the words "entitled to share in a rateable distribution of assets" not found in S. 311. Reference was made in the course of argument to *Lakshmi* v. *Kuttunni* (15), *Athappa Chetty* v. *Ramakrisnna Nayakha* (16), *Chakrapani Chettiar* v. *Dhanji Settu* (17), *Ajudhia Prasad* v. *Nand Lal Singh* (18), which decided that the term decree-holder included a person entitled to rateable distribution for the purposes of S. 311 and R. 90 has incorporated the result of the decisions. If the legislature intended the attachment to enure for the benefit of all persons entitled to rateable distribution, it would similarly have declared that the attachment should cease only on all their claims being satisfied or that the cesser of the attachment should be without prejudice to their rights. That the difficulty created by Rr. 55 and 57, O. 21 is real will be clear from the fact that the existence of a valid attachment is necessary in order to bring the property to sale and if the attachment ceases when the decree-holder who attaches is paid off, a re-attachment will be necessary which will be of no avail if it is subsequent to the alienation: see *Gobind Singh* v. *Zalim Singh* (19), *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (12). In order to get over this difficulty we shall have to read into all the rules in O. 21 relating to the raising of the attachment and in R. 89 the words:

"the amount due to decree-holders who would be entitled to rateable distribution prior to the private alienation,"

It is difficult to see under what rules of construction such a wholesale addition to the rules can be made. It is contended for the appellant with some force that S. 64 enacts that the alienation pending attachment shall be void as against all claims for rateable distribution of assets, that claims for rateable distribution are not dependent on the attachment but on S. 73, that the claim for rateable distribution would have been enforceable if the properties had been allowed to be sold, that the legislature in enacting the explanation to S. 64 intended to make an attachment by one decree-holder to enure for the benefit of all persons entitled to rateable distribution (the policy of the law being to prevent multiplicity of attachments), that the decree-holder who actually attaches and who under the law would have no priority in case the assets were realized by sale ought not to be allowed to defeat the rights of the other decree-holders and that by sanctioning the alienations of the property behind their back and paying off the attaching creditor will virtually get priority. It is also contended that though under Rr. 55 & 57 the attachment ceases on payment of the decree-debt of the attaching creditor, yet a fresh attachment by those entitled to rateable distribution should be treated as a continuation of the original attachment and that in any event S. 64 should be read as making the alienation void as against subsequent attachment by those who would, if the execution had been allowed to proceed, have been entitled to rateable distribution.

15. (1887) 10 Mad 57.
16. (1898) 21 Mad 51.
17. (1901) 24 Mad 314.
18. (1893) 15 All 318,
19. (1884) 6 All 33.

It has been argued for the respondent that the explanation added to S. 64 only protects "claims for rateable distribution," that such claims can only arise when assets are held by a Court under S. 73, that the explanation was merely the legislative recognition of the principle enunciated by the Bombay High Court in *Sorabji Edulji Warden* v. *Gobind Ramji* (z) and that the decision of their Lordships of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (12) is conclusive on the matter. The decision of the question, which is not free from difficulty, is in my opinion really concluded by the observation of their Lordships of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (12). Though S. 276 of the old Code did not contain any provision corresponding to the explanation, the effect of the ruling in *Sorabji Edulji Warden* v. *Govind Ramji* (2) was to read the section in the same way as it would have read if the explanation were there, and it is difficult to explain away the clear remark of their Lordships [who assume for the purposes of the argument that the decision in *Sorabji Edulji Warden* v. *Govind Ramji* (2) is correct] as having reference only to the wording of the old Code. In that case a decree-holder held two decrees against the same person and attached certain properties in execution of one of his decrees and would have been entitled to rateable distribution if the attachment had resulted in a sale. Pending attachment the judgment-debtor sold the property. The attachment subsequently ceased to be operative and the decree-holder subsequently attached the property and brought it to sale. The purchaser sought to recover the property from the alienees from the judgment-debtor. A decree was passed in his favour by the High Court but it was reversed on appeal by the Privy Council on the ground that the sale in execution, being under an attachment subsequent to the private alienation, was not protected by S. 276. Dealing with the argument that S. 276 rendered the alienation void as against the subsequent attachment their Lordships observe :

"That section provides that when an attachment has been made as there described, any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. Ex hypethesi, the alienation to the plaintiff was not during the continuance of the attachment in Execution Case No. 16 of 1907 or, in other words, the attachment under which the execution sale to the decree-holders was made. Therefore it cannot be avoided by the attachment."

It was also urged before their Lordships that having regard to the decision of the Bombay High Court, *Sorabji Edulji Warden* v. *Govind Ramji* (2), the decree-holder was a person who would have been entitled to rateable distribution and was consequently protected against the private alienation. Their Lordships dispose of the argument with the following observations :

"He relies on S. 295, Civil P. C., as entitling him to the benefit of S. 276, and for this purpose he calls in aid the application for attachment in Execution Case No. 8 of 1902. To bring S. 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court. It has not been shown that there were such assets and the indications in the record point the other way. But apart from this, S. 295 cannot help the decree-holder. Though the word "attachment" occurs three times in S. 276 the reference is to one and only one attachment ; that one in this case is the attachment in Execution Case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in the suit at present rests. So that even if it be assumed, for the sake of argument that the view which prevailed in *Sorabji Edulji Warden* v. *Govind Ramji* (2) is correct and that the conditions of S. 295 have been satisfied, it cannot advance the decree-holder's case."

There can be little doubt that S. 64, as it stands at present, can protect decree-holders entitled to rateable distribution against private alienation only where assets have been realised, in which case they will be entitled to share the proceeds in preference to the alienee. This can happen only in a very limited class of cases, e. g., where the garnishee pays the attached amount into Court. In the numerous and important class of cases relating to attachment of immovable property the amendment would be of no use to decree-holders entitled to rateable distribution. Assuming that the legislature intended the attachment under S. 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation, it has not gone far enough when it introduced the explanation to S. 64 worded as it is and made no provision for the continuance of the attachment in O. 21 in cases where the attaching creditor was paid off. The

result is not very happy, but the remedy is in the hands of the legislature. I agree with the view expressed by Seshagiri Ayyar, J., and would answer this reference in the negative.

S.N./R.K. *Reference answered.*

A. I. R. 1918 Madras 136 (1)

SADASIVA AIYAR AND BAKEWELL, JJ.

A. M. V. Avanashi Chetti—Purchaser—Appellant.

v.

Muthukaruppan Chetti and *others*—Petitioners—Respondents.

Appeals Nos. 107 and 108 of 1917, Decided on 10th October 1917, against order of Dist. Judge, Trichinopoly, in Civil Misc. Petns. Nos. 742 and 743 of 1916.

(a) Provincial Insolvency Act (1907). S. 22—Sale by receiver can only be anuulled under S. 22 and not under Civil P. C (1908), O 21, R. 90.

A District Court has no jurisdiction to entertain an application under O. 21, R. 90, Civil P. C., to annual a contract of sale completed by a receiver. Its powers are limited to applications preferred within 21 days of the contract under S. 22, Provincial Insolvency Act. [P 136 C 1]

(b) Provincial Insolvency Act (1907), S. 22—District Court has revisional jurisdiction over acts of receiver and can order sale not to be completed.

The District Court has however powers of supervision over the official receiver and can give him directions not to complete a contract of sale in exercise of such powers. [P 136 C 1]

S. T. Srinivasagopalachariar — for Appellant.

K. Bhashyam Aiyangar—for Respondents.

Judgment.—The only power of the District Judge to interfere judicially with the contract of sale entered into by the receiver is under S. 22, Provincial Insolvency Act. No application was made under that section to the District Court within 21 days of the contract of sale and hence the District Judge had no power to set aside the contract of sale in a judicial proceeding. The respondent, in filing a petition under O. 21, R. 90, Civil P. C., wholly misconceived his remedy. The District Judge might have the powers of supervision over the receiver and give directions to the receiver not to complete a contract of sale in exercise of such powers of supervision, but that is not what he has done in this case. He has held that an application under O. 21, R. 90, Civil P. C., could be entertained by him in respect of a contract of sale concluded by the receiver and has passed an order purporting to be passed under that provision of the Civil Procedure Code. The order was therefore passed without jurisdiction and is set aside. As this objection seems not to have been taken before the District Judge, there will be no order as to costs throughout.

S.N./R.K. *Appeal allowed.*

** A. I. R. 1918 Madras 136(2)

Full Bench

WALLIS, C. J., AYLING AND KUMARASWAMI SASTRI, JJ.

S. Vullappa and *others*— Accused.

v.

S. Bheema Row—Complainant.

Criminal Revn. Case No. 194 of 1917, and Case Referred No. 28 of 1917, Decided on 9th November 1917, referred by the Sess. J., Bellary, D/- 20th March 1917.

*** * (a) Penal Code (1860), S. 448—Criminal trespass—Entry effected without intention to annoy, but with knowledge that annoyance would be caused—Accused is not guitly under S. 448.**

Per *Wallis, C. J.*, and *Kumaraswami Sastri, J.*—A person who enters into property in possession of another with an intent other than to intimidate insult or annoy him or to commit any offence, but with the knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, is not guilty of an offence under S. 448: 19 *Mad* 240, *Foll.* 26 *Bom* 558 and 9 *I C* 152, *not Foll.* [P 140 C 1]

*** (b) Penal Code (1860), S. 441—Proof of intention to annoy is necessary for conviction—Person forcing into house against his will commits only civil trespass.**

Per *Wallis, C. J.*—The word "intent" in S. 441, is distinct from a "knowledge of likelihood" and the legislature intended that a trespass with a specified intent alone should be made punishable and not with a knowledge of its consequences. A man who forces his way into another's house against his will commits a civil trespass for which he may be made answerable in substantial damages, and the owner of the house in obstructing the entry may use reasonable force to remove the trespasser without committing the offence of wrongful restraint. It must be a question of fact in each case whether the intention was to annoy or not. [P 140 C 1]

*** (c) Penal Code (1860),—Mere knowledge that trespass is likely to cause insult or annoyance does not amount to intent to insult or annoy—Court can draw inferences as to intent to insult or annoy from facts and circumstances.**

Per *Ayling, J.*—A mere knowledge that the trespass is likely to cause insult or annoyance to the owner of the property does not amount to an intent to insult or annoy within the meaning of S. 441, I. P. C., but where the trepasser knows that his trespass is practically certain, in the natural course of events, to cause insult or annoyance to the owner of the property it is

open to the Court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass. [P 141 C 1

Per *Kumaraswami Sastri, J.*—The rule of law that a man must be taken to intend the natural consequences of his act is really a rule of evidence. The Penal Code takes notice of actual and not presumed intention in determining criminality, though, in determining what a man's actual intention was, Courts can raise all fair inferences that can be drawn from his acts, and in order to arrive at a 'conclusion, may hold that when a man uses means which at the time he used them he knew or had reason to believe to be likely to cause a result, his intention was to cause that result.

[P 141 C 2]

K. Koti Reddi—for Accused.
S. Swaminathan—for Complainant.
Public Prosecutor—for the Crown.

Order of Reference.

Abdur Rahim, J.—The second accused's son, a young boy, having stolen some jewels belonging to his father told him that he had given them to the Head Master of his school, the complainant, who kept them in a box in his house. Thereupon the second accused with his friends, the other four accused in the case, went into the complainant's house, and in spite of the latter's protest and remonstrances insisted on searching, and did in fact search, the house. But nothing was found. The complainant naturally felt insulted and annoyed at the highhanded conduct of the accused and lodged a complaint before the Magistrate. The trial Magistrate found that the accused knew that the consequences of their action would be to annoy or insult the complainant. The appellate Magistrate being of opinion that that finding was not sufficient to bring the case within S. 448, I. P. C., as the primary intention of the accused was not to insult or annoy the complainant, set aside the conviction and sentence. The Sessions Judge wants us to revise the case, for he says:

"the accused pushed their way into the complainant's house notwithstanding his remonstrances and must have known that they were annoying the complainant by so doing and consebuently must be deemed to have intended the ordinary consequences of their act."

The finding to my mind amounts to this: the accused went into the complainant's house with the intent to search for the jewels and they must be taken to have known that the search would annoy the complainant. Is that sufficient to make out a case under S. 441, I. P. C. I think not. The accused, when insisting on searching the house, had a known intent and that was to recover the jewels. It may be that at the same time they did not mind or care that their act would annoy the complainant; but they certainly did not enter into the complainant's house or remain there with the object of annoying the complainant. If it was found or could fairly be inferred that the accused had in addition to their intention to recover the jewels a further intent, namely, to insult or annoy the complainant, S. 441, I. P. C., would apply: see criticism of 6 Madras High Court Ruling 25 in Ss. 577 and 578 of Mayne's Criminal Law. But that is not the case here. The framers of the I. P. C. have throughout borne in mind the distinction between the "intention" or "intent" of a person and his knowledge that a certain result is likely to follow from his act: see for instance, Ss. 295, 299 and 304. There is a conflict of authority on the question, but the preponderance of authority seems to be in support of the view I have suggested: vide *Queen* v. *Varthappa Nayakan* (1) *Durgaiya, In re* (2), *In the matter of Jotharam Davay* (3), *Queen-Empress* v. *Rayapadayachi* (4) and *Manikka Veera Raghava Chariar* v. *Emperor* (5), opinion of Sankaran Nair, J., in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppen* (6), a decision of myself sitting alone in *Amavasaya Chinna Krishna Reddy* v. *Marri Poliah* (7), *Chunder Narain* v. *J. G. Farquharson* (8). *Chandi Pershad* v. *Evans* (9), *In the matter of Gobind Prasad* (10) and *Gaya Bhar* v. *Emperor* (11); while a different view has been expressed by Benson, J., in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppen* (6) followed by Sadasiva Aiyar, J., in *Somadurai Mudaliar* v. *Emperor* (12) and also *Emperor* v. *Lakshman Raghunath* (13). I would therefore refer the following question to the Full Bench:

1. (1882) 5 Mad 382.
2. (1882) 1 Weir 524.
3. (1878-80) 2 Mad. 30.
4. (1896) 19 Mad 240.
5. (1910) 8 I C 318.
6. (1911) 35 Mad 186=9 I C 152.
7. (1912) 15 I C 317.
8. (1879) 4 Cal 837.
9. (1895) 22 Cal 123.
10. (1878-80) 2 All 465.
11. (1916) 38 All 517=35 I C 979.
12. 9 Cr L Rev 196.
13. (1902) 26 Bom 558.

"If a person enters into property in possession of another or remains there with an intent other than to intimidate, insult or annoy him or to commit any offence, but with the knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, is he guilty of an offence under S. 448, I. P. C.?"

Oldfield, J.—I take the facts as stated by my learned brother that accused entered and remained on complainant's premises with the primary intention to recover their property which they wrongly thought was there, and with knowledge of the probability so strong that according to ordinary standards it amounted to certainty, that their conduct would cause annoyance. The First Class Deputy Magistrate has held and it is argued here that no offence was committed because their primary intention was to recover their property.

This conclusion was based on *Queen-Empress* v. *Rayapadayachi* (4). But it involves the further assumption which we have been asked explicitly to make that S. 441, I. P. C., is not worded so as to include an act done with knowledge of the probability of any particular consequence and that such knowledge whatever the degree of probability in question, is not to be taken into account in deciding whether an offence has been committed. My learned brother has referred to authorities as justifying this assumption. But of the cases from the authorized reports with which alone I feel bound to deal, some do not, with all respect, do so. In *Jotharam Davay, In the matter of* (3) and *Chandi Pershad* v. *Evans* (9), the accused were doing what was and what they believed in good faith to be a lawful thing in a lawful way, and in the absence of any finding of an intent to annoy or any probability that the complainants, presumably law-abiding persons, would suffer legitimate annoyance, no presumption that they would be annoyed could arise. Similarly in *Gobind Prasad's* case (10), except that there was no finding on the immaterial point, whether the act of the accused was in fact lawful. And, to contrast these two cases with that before us, in both of them accused acted in good faith, whilst here they must have known that their conduct was against the law. In *Queen-Empress* v. *Rayapadayachi* (4) and *Gaya Bhar* v. *Emperor* (11) the existence of an intent to annoy was directly negatived in the first case at least by accused's precautions against discovery; and in both the ground of decision was the distinction "between entertaining a certain intention and having the knowledge that one's act may possibly," not may probably or, as my learned brother apparently would hold, "will certainly lead to a certain result." *Chunder Narain's* case (8) is of little weight since the point is not discussed at length. Lastly the judgment of Sankaran Nair, J., in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppen* (6) no doubt supports the contention under discussion. But it is in conflict with the view taken by Benson, J., in the same case and with *Emperor* v. *Lakshman Raghunath* (13) and *Premanundo Shah* v. *Brindabun Chung* (14).

The opinion of Benson, J., is, it may be respectfully suggested, in accordance with general principles. It is true that the Penal Code distinguishes, when it is necessary to do so between intention and knowledge and does not treat the one as an invariable accompaniment of the other. But it is only necessary to compare Ss. 299 and 304 (3) and (4) in order to see that knowledge of a probability is treated as equivalent to intention when the probability is of more than a particular strength; that is, when the consequence on which the character of the act in question depends is known to be that which will follow in the natural course. This seems to me consistent with the decision in *Queen-Empress* v. *Rayapadayachi* (4) and other similar cases, in which the annoyance alleged to be the consequence of the accused's act was owing to precautions taken by him, or for other reasons regarded as no more than possible. Here however the accused must, as persons of ordinary sense, have known that their conduct would in the natural course, cause legitimate annoyance inevitably; and I would therefore hold that annoyance was their intention. I add that the contrary view would make any immediate intention, which the accused might allege as entertained, whether or no in good faith, the measure of their responsibility and authorize an unlimited extension of the right of self-help which would be disastrous to security.

With these observations I concur in the reference proposed by my learned brother and with the form, in which he has framed the question to be referred, on the

14. (1895) 22 Cal, 994.

understanding that the intent referred to in it is the primary or immediate one, which the accused may entertain.

Opinion.

Wallis, C. J.—The question in this case is, what is the meaning of "with intent to annoy" in S. 411, I. P. C. In his History of the Criminal Law, Vol. 11, p. 100, Sir James Stephen gives the following definition of intention:

"The direction of conduct towards the object chosen is called the intention or aim (the metaphor involved in the word is obviously taken from the aiming with a bow and arrow;)"

and he distinguishes the aim or intention of an act from the motive or reason which actuated the person doing it. At the same time he admits (p. 110) that intention is frequently used and understood as being synonymous with motive, and speaks of

"two common fallacies, namely, the confusion between motive and intention, and the tendency to deny an immediate intention because of the existence, real or supposed, of some ulterior intention. For instance, it will often be argued that a person ought to be acquitted of wounding a policeman with intent to do him grievous bodily harm, because his intention was not to hurt the policeman but only to escape from his pursuit. This particular argument was so common that to inflict grievous bodily harm with intent to resist lawful apprehension is now a specific statutory offence."

That is to say, the legislature in England has now solved the difficulty by making the intent to resist lawful apprehension the gist of the offence. If we are to apply these tests to the present case, there can be no doubt that the accused must be taken to have intended to annoy the complainant when he trespassed on his house in spite of his protest, even though his ulterior intention was to search for his own jewels which he believed to be hidden there. On the other hand, it is clear that this was not the view of the meaning of "intent" taken by Macaulay and the other Indian Law Commissioners in the draft Penal Code. They regarded the maxim that every one must be taken to intend the natural consequences of his acts as a fiction which should not be recognized in the Penal Code. Their treatment of this question elicited many criticisms which were met in para. 100 of the first report on the Penal Code by the Indian Law Commissioners:

"The Commissioners saw clearly the difference between "intent" and "knowledge of likelihood' and meant to express it distinctly in order to avoid the necessity of fiction in laying a charge as for example by imputing "intent" constructively when the circumstances imply only "a knowledge of likelihood', 'advisedly intending as they did that there should be no distinction in general, in respect of penal consequences between cases in which a man causes an effect which is an offence designedly, and cases in which he causes it by doing what "he knows is likely to cause it." Advisedly intending this in general they worded the enactment so that the charge may be always expressed according to the truth:" The Indian Penal Code as originally framed: Madras Higginbotham & Co., p. 215."

Their view was, in the language of the Commissioners, that there should in general be no distinction in respect of penal consequences between cases in which a man causes an effect which is an offence designedly and cases in which he causes it by doing what he knows is likely to cause it, but that it should expressly be made punishable to do the act with knowledge of the likelihood as they call it. An examination of the Penal Code as finally passed into law shows that it was framed on these lines. The maxim that every one must be taken to intend the natural consequences of his acts is incorporated in the definition of "voluntarily" in S. 30, and thus made applicable in every section where that word is used. More generally doing the act with a criminal knowledge or a criminal intent is expressly made punishable. S. 39 speaks of

"an act which is criminal only by reason of its being done with a criminal knowledge or intention,"

and the distinction is observed in Ss. 87 to 89, 166 and 167, 194, 295, 297, 299, 350, 366, 367, 425, 499, 504 and 505, in all of which doing the act with intent and doing the act with a knowledge of the consequences are both made punishable. The same result is effected by the addition of the explanation to S. 188. In S. 350 in particular it is made punishable to use force

"intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause, injury, fear or annoyance to the person to whom the force is used"

The contrast with the language of S. 441 is very suggestive. In these circumstances, when in the isolated S. 441 doing the act with the specified intent is alone made punishable, the inference appears to be that the Legislature did not intend that in this section doing the act with a knowledge of its consequences should be punishable. The only other section resembling this which I have noted on a cursory examination of the Code is S. 201, and the omission as re-

gards S. 441 may be explained by the fact that trespassing with intent to annoy was a new offence unknown in English law. This is the view on which *Queen-Empress* v. *Rayapadayachi* (4) was decided, and I think it should be followed in preference to *Emperor* v. *Lakshman Raghunath* (13) and the judgment of Benson, J., in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppen* (6). I will only add that the decision in my opinion does not involve any risk to the public security. A man who forces his way into another's house against his will commits a civil trespass, for which he may be made answerable in substantial damages. Further, the owner of the house may obstruct his entry, and even I think, use reasonable force to remove him, without committing the offence of wrongful restraint punishable under S. 341, and any active resistance to such obstruction would amount to the use of criminal force punishable under S. 350, as under that section it is sufficient if the accused knows that the use of such force is likely to cause annoyance to the person to whom it is used and any preparation for the use of such force will constitute an assault punishable under S. 351. I would answer the question in the negative. It must of course be a question of fact in each case whether the intent was to annoy or not.

Ayling, J.—With all respect, I find it impossible to answer the question referred to us with a simple affirmative or negative. That a mere knowledge that the entry is likely to cause insult or annoyance cannot be taken to be equivalent to an intent to insult or annoy must, I think, be conceded: A comparison of S. 441, I. P. C., with the other sections of the Code referred to by the learned Chief Justice makes this clear. Where the Legislature has, in so many instances, specifically placed a knowledge that a certain result is likely to follow from the act on the same footing as an intent to cause that result, it can hardly be contended that the two are synonymous. On the other hand, it seems to me necessary to bear in mind that a person's object (to use a non-contentious word) in entering on another person's property may be twofold; and that, while intent must in most cases be a matter of inference, there are degrees of probability ranging up to practical certainty, from the stronger of which an inference of intent may not improperly be drawn: vide the distinction emphasised in *Emperor* v. *Lakshman Raghunath* (13). The reference deals with certainty as well as likelihood of causing annoyance. The practical difficulty, however, seems to me to lie less in the degrees that intervene between likelihood and certainty than in the question of the extent to which one motive displaces another or should be treated to the exclusion of another as influencing a man's act.

Suppose *A* enters the dining room of *B*, a total stranger, during a dinner party. Annoyance to *B* is so certain that in the absence of special circumstances or any evidence tending to suggest an independent motive for the intrusion, a Court might, I think fairly infer that *A's* intent was to annoy *B* and nothing else. Now suppose it is shown that *A*, on entering, meant, 1. to convey warning to one of *B's* guests in a matter of life and death, 2. to gratify his curiosity by looking at a picture in *B's* dining room. Is *A's* action to be treated as equally criminal or non-criminal in each of these cases? I think not: and it seems to me that in every such case, where a specific intent other than one to insult or annoy is set up the Court must determine whether the motive involved in it is sufficiently strong to displace the intent of annoyance which would otherwise be inferred. The existence of an independent motive for the entry does not in all cases preclude the consideration of an intent to annoy inferable from the practical certainty that annoyance would be caused. In case 1, I should hold that the intruder's intent (in the sense contemplated by S. 441, I. P. C.,) is not to annoy and that he has committed no offence. The principle of S. 81, I. P. C., might be applied and it might be held that the danger to be averted by the warning far outweighed the annoyance caused to the owner of the house, or it might be held that the urgency of the matter precluded the intruder from realising, as he must be presumed to do in ordinary circumstances, the certainty of annoyance. In case 2, the motive put forward by the intruder is so trivial, that neither line of reasoning can be adopted. In effect it is as if he said to the owner of the house:

"I know my entry will annoy you, but I want to see your picture, and I mean to do so even at the cost of annoying you, I do not wish to annoy

you but I propose to gratify my curiosity whether I annoy you or not."

In this case, I do not think the intent inferable from the known certainty of annoyance is displaced by the trivial intent set up by the intruder; and I should be inclined to hold that the offence of criminal trespass had been committed. If it be held otherwise it would follow that against such an entry there would be no right of private defence. For the trespass would not be criminal and S. 97, I. P. C. only gives a right of private defence of property against a criminal trespass. It is true that this difficulty is to some extent modified, as pointed out in the concluding portions of the judgment of the learned Chief Justice., which I have had the advantage of perusing. Obstructions of an intruder's entry would doubtless not amount to wrongful restraint under S. 341, I. P. C. and might be resorted to by the owner or occupier without infringement of the law. But I am not clear how far his rights would extend against an intruder who had already effected his entry; or whether he would be legally justified in using reasonable force to expel him. I cannot therefore altogether dismiss this aspect of the case, in endeavouring to ascertain the intention of the Legislature in regard to S. 441, I. P. C. If my reading of the latter is incorrect, it seems worthy of consideration whether S. 97, I. P. C, does not need amendment. I would therefore answer the reference as follows: A mere knowledge that the trespass is likely to cause insult or annoyance to the owner of the property does not amount to an intent to insult or annoy within the meaning of S. 441, I. P. C., but where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance to the owner of the property, it is open to the Court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass.

Kumaraswami Sastri, J. — The question referred to us for decision is whether knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, would if his intention was other than one to intimidate, insult or annoy render him guilty of an offence under S. 448, I. P. C. Though there is a conflict of decisions on the question, the preponderance of authority is in favour of the view taken by Abdur Rahim, J., one of the referring Judges, that it is not sufficient to prove that the person charged under S. 448, must have known or had reason to believe that his act would cause insult or annoyance to the person in possession. The question is not free from difficulty, but I am of opinion that the reference should be answered in the negative. It is clear from a perusal of the various sections of the Indian Penal Code that a difference is drawn between "intention" and "knowledge of consequences" and that the Code takes notice of actual and not presumed intention in determining criminality, though in determining what a man's actual intention was, Courts can raise all fair inferences that can be drawn from his acts. When an act is made an offence by reason of its having been committed with a specified intention, the intention has to be found as a matter of fact upon evidence which justifies the inference that the accused had the intention required to render his action criminal. When proof of intention is necessary it is clear that, unless the accused admits that his intention was such as would render him guilty of the offence charged, intention—which is a psychological fact—can only be proved by having regard to the nature of the act he commits and a criminal intent is often presumed from acts which are reasonably susceptible of but one interpretation. The rule of law that a man must be taken to intend the natural consequences of his act is really a rule of evidence. The Court is not bound to accept the statement of the accused as to his intention but may find from the facts what his inention was, and in order to arrive at a conclusion may hold that when a man uses means which at the time he used them he knew or had reason to believe to be likely to cause a result, his intention was to cause the result.

When, however, the Court on the materials before it comes to the conclusion that a person had a specified intention when he did an act which is not the intention required to make his act an offence udner S. 441, the mere fact that he would have known that certain consequences would happen if he had paused to consider would, in my opinion, be insufficient. The view taken by the

framers of the Act has been pointed out by the Chief Justice in his judgment, and I think that in construing S. 441. it must not be forgotten that wherever the Penal Code wants to make a man liable for knowledge of consequences, it expressly says so. As pointed out by Sir William Markby (Elements of Law, para 222), expectation that a consequence would follow or a knowledge that it is likely to follow, without any desire that it should follow is an attitude of mind which is distinct from intention, and the framers of the Act clearly kept the two distinct and treat knowledge as a state of mind differing from intention. In some sections, e. g., 118 to 120, 153 154, 217, 293, etc., the words used are: "Intending or knowing it to be likely." In others only intention is referred to, e. g., 124, 140, 174 to 176, 193, 211, 509 etc. In some sections the word used is "knows," e. g., 127, 130, 188, 196, 260, etc. In some sections the words are "knowing or having reason to believe" or "believing", e. g., 136, 181 to 183, 201 to 203, 499, etc. In certain sections the words are "reason to believe," e. g., 155, 156, and in others "for the purpose of," e. g., 189, 190. In S. 298, the words used are "deliberate intention."

I think the correct view has been taken in *Queen Empress* v. *Rayapadayachi* (4). Though the facts show that the accused wanted to conceal his presence in the house, the judgment proceeds on the broad ground that

"S. 441 is so worded as to show that the act must be done with intent and does not as other sections do (e. g., S. 425) embrace the case of an act done with knowledge of the likelihood of a given consequence."

To introduce the rule that knowledge of consequences is equivalent to an intention when the probability of consequences following is of more than a particular strength would, in my opinion, introduce, into the section, which, as pointed out by Straight, J., in *Gobind Prasad, In the matter of* (10) is complicated enough, further difficulties.

S.N./R.K. *Reference answered.*

A. I. R. 1918 Madras 142

WALLIS, C. J. AND SADASIVA AIYAR, J.

Champyil Koppan and *others*—Plaintiffs—Appellants.

v.

Kolasseri Kelappan Nambiyar and *another*—Defendants—Respondents.

Second Appeal No. 1742 of 1916, Decided on 13th December 1917, against decree of Temporary Sub-Judge, Palghat, in Appeal Suit No. 126 of 1916.

Civil P. C. (1908), S. 47 and O. 21, R. 63—Objection to attachment allowed—Judgment-debtor obtaining decree for possession against objector—Property re-attached by decree-holder—Objection by judgment-debtor's assignee disallowed—Old attachment was not revived and suit was not barred.

A claim perferred to property attached in execution of the respondent's decree having been allowed, the judgment-debtor sued the claimant to set aside the settlement which was the basis of the claim and obtained a decree for possession. He then sold the property to the appellant. The respondent having re-attached the property, appellant put in a claim and having failed in it he filed a separate suit for possession:

Held: (1) that the first attachment was not revived as the result of the judgment-debtor's suit: (2) that the appellant's suit was not barred by S. 47. [P 142 C 2]

C. Madhavan Nair—for Appellants.

K. P. M. Menon—for Respondents.

Judgment.—The respondent attached the suit property as the property of his judgment-debtor. A third party put in a claim that the property was his and succeeded. The judgment-debtor sued to set aside the settlement by virtue of which the claimant had succeeded in his claim and for possession and obtained a decree. This was not a suit under O. 21, R. 63, Civil P. C. which confers a right of suit only on the party against whom an order has been made rejecting his claim or his objection to another's claim. The person who objects to a claim is the attaching decree-holder. He (the judgment-debtor) then sold the suit property to the appellant. The respondent then again attached the property and the appellant put in a claim petition and having failed in it brought the present suit. It is practically admitted that the Subordinate Judge was wrong in holding that the suit was barred by S. 47, Civil P. C.: see *Arasayee Ammal* v. *Sokkalinga Mudali* (1). Nor can we agree with Mr. Menon's contention that the first attachment was revived by the result of the judgment-debtor's suit above referred to.

1. (1916) 33 I C 84.

We must allow the appeal, reverse the decrees of the lower Courts and give the plaintiff a decree as prayed, with costs throughout.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 143 (1)

SESHAGIRI AIYAR AND KUMARASWAMI SASTRI, JJ.

Subbaraya Chetty—Plaintiff— Appellant.

v.

Nachiar Ammal—Defendant—Respondent.

Second Appeal No. 171 of 1917, Decided on 20th December 1917, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 874 of 1915.

Practice — Relief — Subsequent events — Court can pass decree in some cases even though cause of action arose subsequent to suit.

Courts have power, in certain circumstances, to grant a decree in a case, where the cause of action arose subsequently to the filing of the plaint. In a suit for money where the money becomes payable to the plaintiff only after the filing of the suit, the Court should pass a decree in favour of the plaintiff and not compel him to institute another suit for the purpose.

[P 143 C 1]

M. D. Devadoss—for Appellant.

M. O. Parthasarathy Aiyangar—for Respondent.

Judgment.— On the finding of the District Judge it is clear that the defendant did receive the money. The learned Judge has however found that the suit was premature because of the terms of the unregistered mortgage bond. Granting that the terms of the bond are binding on the parties, having regard to the fact that immediately after the suit the money became payable, we think that it is undesirable that the plaintiff should be compelled to institute another suit for the money. The principle of *Chinta Haran Das* v. *Radha Charan Poddar* (1) and of the decision of this Court in *Sarucherla Rama Chandra* v. *Maharajah of Jeypore* (2), in which it was held that Courts have power to grant a decree where a cause of action arose subsequent to the suit, is applicable to this case. Following these decisions and having regard to the special circumstances of this case, we reverse the decree of the District Judge and restore that of the District Munsif, except as to costs. Each party will bear his own costs throughout.

S.N./R.K. *Appeal allowed.*

1. (1917) 37 I C 962.
2. (1916) 34 I C 411.

** A. I. R. 1918 Madras 143 (2)
Full Bench

WALLIS, C. J., SADASIVA AIYAR AND KUMARASWAMI SASTRI, JJ.

Prativadi Bhayankaram Pichamma—Plaintiff—Petitioner.

v.

Kamisetti Sreeramulu and *others*—Defendants—Opposite Parties,

Civil Revn. Petn. No. 1248 of 1916, Decided on 21st November 1917, from decree of Sub-Judge, Kistna, in Misc. appeal No. 233 of 1916.

****(a) Civil P. C. (1908), O. 17, Rr. 2 and 3 — Scope of Rule enunciated— Difference between the Rules pointed out.**

There is no conflict between Rr. 2 and 3, O. 17. They are independent and mutually exclusive. Where the requisites of R. 2 are satisfied, that rule and not rule 3 should be applied although, in addition to the absence of the party, circumstances exist which would satisfy the requirements of R. 3. [P 146 C 2]

Rule 2, O. 17, deals with cases of absence of parties and R. 3 with failure to do what was ordered. If the party fails to appear, R. 2 applies and the Court should not assume that he is guilty of default and apply the stringent provisions of R. 3. R. 3 applies only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do: 33 *Mad.* 241, *Foll.* 34 *Mad.* 97, **Overruled.**

dant absent on adjourned hearing—Decree passed is ex parte and can be set aside under Civil P. C., O. 9, R. 13.

Per *Wallis, C. J.*—When a case is called on and the defendant is absent and the Court resolves to proceed against him ex parte, there is nothing to prevent the Court from applying the provisions of O, 17, R. 3 and disposing of the suit notwithstanding the defendant's failure to do what he had been granted time to do, but that disposal will be none the less in law and in fact ex parte, and the decree will be liable to be set aside by the defendant under O. 9, R. 13.

[P 144 C 2]

K. V. L. Narasimham and *B. Narasima Rao*—for Petitioner.

P. Somasundaram—for Opposite Parties.

Order of Reference.

Abdur Rahim, J. — The question in this appeal relates to the interpretation of Rr. 2 and 3, O. 17, Civil P. C. What happened in this case is shortly stated in the judgment of the Subordinate Judge. The suit was instituted first in the Court of the District Munsif of Kovvur and afterwards transferred to that of the Additional District Munsif. In the latter

Court, the plaintiff examined most of his witnesses and on the application of the defendants, the suit was adjourned to 7th February 1916. On that date neither the defendants' guardian nor the vakils were present. The District Munsif closed the case and delivered judgment in favour of the plaintiff on 8th February 1916. There is, in my opinion, a conflict of rulings in this Court as to whether R. 2 or R. 3, O. 17, applies to facts like these. In *Naganada Iyer* v. *Krishnamurti Aiyer* (1), which was a judgment of Munro, J., and myself, it was held that S. 158 of the old Code empowers the Court in circumstances such as those in this case to decide the suit on the merits, whether the party at whose instance the adjournment was granted was present or not at the date fixed for hearing.

If the parties or any of them fail to appear on the fixed date it is open to the Court to proceed either under S. 157 or S. 158. If there are no materials before the Court on which to come to a proper decision on the merits, it would ordinarily deal with the case under R. 2, otherwise under R. 3. In the case of *Naganada Iyer* v. *Krishnamurti Aiyar* (1) an earlier decision of this Court reported as *Chandramathi Ammal* v. *Narayanasami Iyer* (2), to which the present learned Chief Justice and Krishnaswami Aiyar, J., were parties, was not noticed. There it was held that S. 158 old Civil P. C. which corresponds to R. 3, O. 17, of the new Code, would only apply if the parties are in attendance and there is failure to do what a party is given time to do. If the parties are not in attendance, then according to that ruling, S. 157 old Code, corresponding to R. 2, O. 17, of the present Code, would alone apply and that these two rules are mutually exclusive. This view seems to have been approved in *Gundan* v. *Kamakha Rama Chetti* (3), while the view propounded in *Naganada Iyar* v. *Krishnamurti Aiyar* (1) appears to be the same as that taken in *Enatulla* v. *Jiban Mohan Roy* (4).

The question is one of importance and frequently arises and I think that it ought to be settled by a Full Bench. The question therefore referred to the Full Bench is whether the view taken in *Chandramathi Ammal* v. *Narayanaswami Iyar* (2) or in *Naganada Iyar* v. *Krishnamurti Aiyar* (1) as to the proper scope and meaning of O. 17, R. 2 and 3, is correct.

Oldfield, J.—I agree to the reference proposed by my learned brother.

Opinion

Wallis, C. J.—I am of opinion that *Chandramathi Ammal* v. *Narayanasami Iyer* (2), to which I was a party, was rightly decided. As the question is very fully dealt with in the opinion of my learned brother, I shall merely state the conclusions at which I have arrived on further consideration. Under the Code, where the plaintiff appears and the defendant does not appear either on the day fixed for the first hearing [O. 9, R. 6 (1)] or on any day to which the hearing of the suit is adjourned [O. 17, R. 2, read with O. 9, R. 6 (1)], the Court, if it is proved that the summons was duly served, may proceed ex parte. In either case, where the Court has disposed of the case ex parte and passed a decree against the absent defendant, he may, under O. 9, R. 13, move to set aside the decree on the ground that he was prevented by any sufficient cause from appearing when the suit was called on. When a case is called on and the defendant is absent, and the Court resolves to proceed against him ex parte there is nothing, I am now of opinion, to prevent the Court from applying the provisions of O. 17, R. 3, and disposing of the suit notwithstanding the defendant's failure to do what he had been granted time to do, but that disposal will be, nonetheless both in fact and in law, ex parte, and the decree will be liable to be set aside by the defendant under O. 9, R. 13. If the ex parte decree is set aside and the case restored and the defendant appears, it will still be open to the Court to apply the provisions of O. 17, R. 3, after hearing what the defendant has to say in explanation of his failure to do what he had been given time to do. There is, I think, no conflict at all between the two rules, and each may be fully applied on this construction at the proper stage of the case. In so far as we laid down in *Chandramati Anmal* v. *Narayanasami Iyer* (2) that the two rules must be read as mutually exclusive, I think we went too far.

1. (1910) 34 Mad 97=6 I C 233.
2. (1910) 33 Mad 241=5 I C 23.
3. (1916) 33 I C 660.
4. A I R 1914 Cal 360=23 I C 769=41 Cal 956.

With great respect I am unable to agree with any of the rulings or observations in the cases cited that take a different view.

Sadasiva Aiyar, J.—I have nothing to add to the judgment which my learned brother Kumaraswami Sastri, J., is about to pronounce and I entirely concur in it.

Kumaraswami Sastri, J.—The question raised by this reference relates to the scope of Rr. 2 and 3, O. 17, Civil P. C. R. 1 empowers the Court on proper cause being shown to grant time to the parties at their instance and to adjourn the suit on such terms as to costs as it thinks fit. R. 2. provides that if the parties or any of them failed to appear on the adjourned date the Court may dispose of the suit in one of the modes directed in that behalf in O. 9, or make such other order as it thinks fit. O. 9, relates to the procedure to be followed on the date fixed in the summons for the parties to appear and provides for the consequence of non-appearance. R. 3 provides that the Court may dismiss the suit if both parties fail to appear. Where the plaintiff appears and not the defendant, R. 6 empowers the Court to decide the suit ex parte if the smmons has been duly served on the defendant in time to enable him to appear. Where the defendant appears and not the plaintiff, R. 8 directs that the Court should dismiss the suit wholly or partially if the claim or any part is not admitted. R. 9 entitles the plaintiff to have the dismissal set aside if he satisfies the Court that he had sufficient cause for non-appearance. Rr. 7 and 13 enable the defendant who failed to appear to set aside the ex parte order or decree against him on showing proper cause for his non-appearance. R. 3, O. 17, empowers the Court to decide the suit forthwith notwithstanding the failure of either party to whom time is granted to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary for the progress of the suit.

It will thus be seen that R. 2, O. 17 empowers the Court to apply to adjourned hearings the same procedure to be followed in case of failure of the parties to attend at the first hearing. It however expressly empowers the Court instead of proceeding under O. 9, to pass such other order as it thinks fit. There is therefore nothing to prevent the Court from adjourning the case to another day if the parties fail to appear and the Court thinks that in the interests of justice it should not dismiss the suit or decree it ex parte. This should be borne in mind as it has been strenuously argued before us on the strength of some of the observations in some of the decisions referred to in the course of argument that the view taken in *Chandramathi Ammal* v. *Narayanasami Iyer* (2) is likely to entail great hardship on the defaulting party. Where the Judge thinks that a defaulting party has proved his case he is not bound to apply the provisions of O. 9, but can adjourn the case to another day in case he fails to appear and I am sure no Judge with any sense of justice would dismiss a just claim which he considers proved simply because a party fails to appear on an adjourned date. On the other hand, it seems to me to be pretty plain that the application of R. 3, will be the harder of the two courses as R. 3 empowers the Court to proceed to decide the suit forthwith on the materials before it. So far as the plaintiff is concerned, the Court may dismiss the suit on the merits if the evidence on record does not prove plaintiff's case. It may pass a decree if the defendant is absent and there is formal proof of plaintiff's claim or the onus is on the defendant. The dismissal of the suit on the merits, the only remedy of the party aggrieved will be by appeal or review.

It is difficult to see what the use of an appeal will be if there was no application for adjournment which was refused. The case will have to be considered by the appellate Court and decided on the materials before it and the Court cannot in very many cases say that the decision of the lower Court on the materials before it is erroneous. As regards review the scope of O. 47, is more restricted than that of O. 9. If the plaintiff's evidence is sufficient then the defendant if he appears will be entitled to let in his evidence in the absence of the plaintiff, and it will often be extremely difficult to determine how far reliance ought to be placed on evidence which has not been tested by cross-examination. The provisions of R. 3 are certainly more stringent than the provisions of R. 2, and except in cases where the case has been closed on both sides and the adjournment is only for argument, it is difficult to see

how any decision on the materials before the Court can be satisfactory.

If a party is absent and the Judge proceeds to dispose of the case on the merits under R. 3. there can be no review if the Judge does not preside over the Court when the application is made, as R. 2 to O. 47 limits the power of the successor to grant a review only in cases of discovery of such new and important matter or evidence as is referred to in R. 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree. It cannot be said that a party who is given time to adduce evidence and who owing to absence is unable to do so has discovered new and important matter or evidence. If owing to absence he is unable to do any other act necessary for the further progress of the suit for which time has been allowed, it is equally a case where no review can be applied for in case the Judge who decided a suit under O. 17, R. 3, is not presiding over the Court. The appellate Court in such cases cannot reverse the decree based on the materials before it. It cannot say that the Court should have granted an adjournment where the party was absent and did not ask for one, and it seems to me that the appellate Court cannot interfere on the ground that sufficient cause was shown for absence unless it can apply the provisions of O. 9, and it cannot do this if R. 3 is held to be the only rule applicable to cases where a decree is passed in the absence of a party to whom time has been given for the doing of an act and the Court in his absence proceeds to decide the suit "forthwith" on the materials before it. Leaving out of consideration the case of a party who is absent on an adjourned date without sufficient excuse (and who deserves no consideration either under R. 2 or R. 3), the application of R. 2 which would give the party the right to set aside the order of dismissal or ex parte decree on merely showing that he was prevented from sufficient cause from not appearing and to have the whole case re-heard on its merits after adducing all the evidence available is more beneficial and wider in scope than an application for review or an appeal which would be the only course available if R. 3 is held applicable to cases of absence.

The scope of Ss. 157 and 158 of the old Code, which correspond to Rr. 2 and 3 of O. 17 of the present Code, has been the subject of conflicting decisions. The decision of Wallis and Krishnaswami Aiyar, JJ., in *Chandramathi Ammal* v. *Narayanasami Iyer* (2), which follows *Shrimant Sagajirao* v. *Smith* (5), is in accordance with the view taken in *Maharajah of Vizianagaram* v. *Lingam Krishna Bhupati* (6). It has been followed by Seshagiri Aiyar, J., in *Majeti Nagaratnam* v. *Pachigolla Ramayya* (7) and by Sadasiva Aiyar and Moore, JJ., in *Gundan* v. *Kamakh Rama Chetti* (3).

It supports the view that Rr. 2 and 3 of O. 17 are independent and mutually exclusive and that where the requisites of R. 2 are satisfied, that rule and not R. 3 should be applied, although in addition to the absence of the party circumstances exist which would satisfy the requirements of R. 3. On the other hand a different view was taken by Munro and Abdur Rahim, JJ., in *Naganada Iyer* v. *Krishnamurti Aiyar* (1), where it was held that absence of a party on the date of the adjourned hearing does not preclude the Court from dealing with the case under S. 158 (O. 17, R. 3). The earlier decision in *Chandromathi Ammal* v. *Narayanasmi Iyer* (2) has not been considered and the reasons given in that decision have not been met. In *Mariannissa* v. *Ramkalpa Gorain* (8) (Mookerjee and Holmwood, JJ.) it was held that the scope of S. 157 was distinct from that of S. 158, but that the Court can not under S. 158 even though the parties are absent if the requirements of S. 158 are otherwise satisfied, and the Judge thinks there are materials on record on which it can pronounce judgment. The learned Judges were however of opinion that there was no justification for applying S. 158 to a case to which S. 157 is more appropriately applicable. In *Enatulla* v. *Jiban Johan Roy* (4) Imam and Chapman, JJ., held that where an adjournment was granted at the instance of a party for the purposes stated in R. 3 and there are maerials enabling the Court to decide the suit, it must act under R. 3 and not R. 2. In *Ningappa Virtappa Yelloor* v. *Govdappa* (9) a similar view was taken. The learned Judges thought that S. 102 contemplates that on the record as it stands the plain-

5. (1896) 20 Bom 736.
6. (1902) 12 M L J 473.
7. (1915) 27 I C 882.
8. (1907) 34 Cal 235.
9. (1905) 7 Bom L R 261.

tiff has not made a case which if unrebutted would entitle him to any relief and that application of S. 158 would be less burdensome to the party, but with all deference I think for the reasons already given that the balance of hardship is the other way in the very great majority of cases that are likely to arise under Ss. 157 and 158. S. 102 contains no such qualification as is indicated and compels the Court to dismiss the suit, if plaintiff is absent and defendant does not admit the claim. This decision was followed by Phillips, J., in *Subramania Othuvar* v. *Munusamiya Pillai* (10), but no reference is made to the decision in *Chandramathi Ammal* v. *Narayanasami Iyer* (2) nor is there any discussion of the authorities.

I am of opinion that the decision in *Chandramathi Ammal* v. *Narayanasami Iyer* (2) which, if I may say so with respect, is a well considered judgment dealing fully with the matter, correctly sets out the principle to be applied to cases of absence of either party at the adjourned hearing. The decision of the question must depend on the express language of O. 17, Rr. 2 and 3. As pointed out in *Chandramathi Ammal* v. *Narayanasami Iyer* (2), S. 157 (R. 2) deals with cases of absence of parties and S. 158 (R. 3) with failure to do what was ordered. If the party fails to appear S. 157 (R. 2) applies, and there is no reason why the Court should assume (in the absence of any explanation) that he is guilty of default so as to apply the stringent provisions of S. 158 (R. 3). I think the correct rule is to treat R. 3 as applying only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do. I have already dealt with the matter from the point of view of hardship to the parties and my own experience is that the rule laid down in *Chandramathi Ammal* v. *Narayanasami Iyer* (2) has been a safe and uniform guide to Courts. The construction, moreover, is one that suggests itself on a consideration of the plain language of Rr. 2, and 3. I have no hesitation in coming to the conclusion that the decision in *Chandramathi Ammal* v. *Narayanasami Iyer* (2) ought to be followed.

S.N./R.K. *Reference answered.*

10. (1915) 31 I C 869.

A. I. R. 1918 Madras 147

ABDUR RAHIM AND NAPIER, JJ.

Pisupati Venkata Rangayya—Plaintiff—Appellant.

v.

Gandavarapu Narasamma and *another*—Defendants—Respondents.

Second Appeal No. 1846 of 1916, Decided on 19th December 1917, against decree of Addl. Temporary Sub-Judge, Guntur in Appeal Suit No. 3 of 1916.

Civil P. C. (1908), S. 11—Suit against vendor—On his death widow, daughter-in-law and mother brought as representatives but mother and daughter-in-law discharged—Decree against widow—Decree is binding on daughter-in-law when claiming under will of deceased—Daughter-in-law having not set up will in suit was estopped in pleading it in defence—Hindu law, Widow.

A suit was brought for specific performance of a contract to sell certain property against the vendor and on his death pending the suit, his widow, daughter-in-law and mother were impleaded as legal representatives. The daughter-in-law did not appear or contest the suit, which was decreed by ordering the widow as legal representative to execute a conveyance. The other defendants being exonerated, the suit was dismissed as against them. In a subsequent suit for mesne profits of the property which remained in the possession of the daughter-in-law after the date of the first suit, she contended that she was in possession as legatee under a will of the vendor and that as the first suit was dismissed as against her she was not liable:

Held; (1) that having been a party to the first suit she should have raised her contentions in that suit;; (2) that the decree passed in that suit against the widow as legal representative of the vendor was binding on all who claimed through him: 26 *Mad.* 230, *Appl.*; 32 *Cal.* 296; *Dist.* [P 148 C 1]

T. V. Venkatrama Iyer and *R. Rajagopala Iyer*—for Appellant.

V. Ramesam—for Respondents.

Judgment.—The plaintiff, who is the appellant in the second appeal, had brought a suit against the husband of defendant 1 for specific performance of an agreement to sell the property in dispute. The husband of defendant 1 died pending the suit, and defendants 1, 2 and 3 were brought on record by the plaintiff as the deceased's legal representatives, defendant 1 being the widow, defendant 2, the daughter-in-law, and defendant 3, the mother of the deceased. The plaintiff, in making the application, stated that he was informed that there had been a will executed by the deceased owner of the property in favour of defendants 2 and 3. Defendant 2 however did not appear and defendants 1 and 3 alleged in their written statement that

they were not liable to any decree inasmuch as the property had been bequeathed solely to defendant 2. The District Munsif who tried the suit however held that it was not proved that defendant 2 derived the property under the will of the deceased, and, as we gather, no will was in fact put into evidence. There was a decree given to the plaintiff for specific performance as against defendant 1 as representative of the deceased and defendants 2 and 3 were exonerated, the suit against them being dismissed with costs. The present suit is brought against all these persons for mesne profits.

Against defendant 2 the suit has been dismissed on the ground that the decree obtained by the plaintiff in a suit for specific performance gave no relief against defendant 2 who in fact was exonerated, and the Subordinate Judge says that, as the plaintiff adduced no evidence independently of the decree of his right to the property, he is not entitled to mesne profits. It ought to be mentioned that the mesne profits claimed are subsequent to the suit for specific performance, and defendant 2, it is admitted, has been in possession of the property. The argument on behalf of defendant 2 is that she was the proper legal representative of the deceased as she was the sole legatee under the will, and as the suit for specific performance was dismissed against her, the decree which the plaintiff obtained for specific performance did not bind her. We cannot hold this contention to be sound. She was brought on record and it was for her to claim that she represented the estate of the deceased, but she failed to do so and a decree was passed against the widow of the deceased as representing his estate in that suit. The decree for specific performance was with respect to this very property in a suit which had been instituted against the owner of the property, and we are of opinion that the decree will bind all persons claiming through the owner. The principle of law laid down in *Kadir Mohideen Marakkayar* v. *Muthu Krishna Ayyar* (1) applies to the facts of this case, and we do not think that the decision in *Khiarajmal* v. *Daim* (2) of the Privy Council has any application. In the last case the person who successfully contended that he was not bound by the decree had not in fact been properly brought on the record in the suit. We hold therefore that the second appeal must succeed, and there will be a decree as against defendant 2 also for the amount claimed in the plaint with costs throughout.

S.N./R.K. *Appeal allowed.*

1. (1903) 26 Mad 230.
2. (1905) 32 Cal 296=32 I A 23 (P C).

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WALLIS, C. J. AND OLDFIELD, J.

Rajagopalachar — Plaintiff— Appellant.

v.

Sundaram Chetty and *others*—Defendants—Respondents.

Second Appeal No. 2053 of 1915, Decided on 24th August 1917, against decree of Dist. Judge, Trichinopoly in A. S. No. 124 of 1915.

Benami—Mortgage money tainted—Suit— Per *Wallis, C. J.* — **Real owner can sue if fraud not carried out** — Per *Oldfield, J.*— **Fraud or no fraud—Suit lies if consideration is proved.**

Where a mortgage was taken benami with money having a tainted origin in the name of *N* for a fraudulent purpose for plaintiff's benefit, but the fraud was not effected:

Held: Per *Wallis, C. J.*—That the plaintiff could sue to enforce the mortgage as the fraud contemplated was not, in fact, effected. *Feret* v. *Hill*, (1845) 15 *C B* 207, *Dist.* [P 149 C 1]

Per *Oldfield, J.*—That the suit was maintainable however tainted was the origin of the money lent, and that no further proof was necessary for the claim than that the ostensible mortgagee had the funds, whatever their origin, and invested them for plaintiff's benefit in a manner which was innocent in itself. [P 149 C 2]

L. A. Govindaraghava Ayyar and *L. S. Veeraghava Ayyar*—for Appellant.

T. Rangachariar and *T. M. Krishnaswami Ayyar*—for Respondents.

Wallis, C. J.—The plaintiff first sued as heir of his natural mother Namammal, the nominal mortgagee under Ex. A, the document sued on. The Subordinate Judge, in appeal, found that he was not entitled to sue as her heir and gave leave to amend the plaint. The plaintiff in his amended plaint alleged that the document was taken in the name of his mother for his benefit by one Srirangammal, widow of Appanna Ayyangar, as there were then disputes going on as to whether the plaintiff had been lawfully adopted by Appanna Ayyanger and it was desired to benefit him in any event. Both the District Munsif and the District Judge have found that the mortgage money was advanced by Srirangammal,

Appanna Ayyangar's widow, out of the sale proceeds of properties which had formed part of his estate and had been sold by her under Ex. C as guardian of the plaintiff and on the footing that he was the adopted son of Appanna Ayyangar. They have also found that this was done to defraud Rangasami Ayyangar, who was also claiming to have been adopted, in the event of the disputes ending in his favour and the District Judge, applying apparently the maxim *allegans turpitudinem non est audiendus*, has dismissed the suit.

The plaintiff's cause of action in the amended claim is that the mortgage was takan benami in his name for this fraudulent purpose and it appears to be well settled, as laid down by A. G. Smith, L. J., in *Scott* v. *Brown* (1), that, if a plaintiff cannot maintain his cause of action without showing that as part of such cause of action he has been guilty of illegality, the Courts will not assist him in his illegality: see also *Taylor* v. *Chester* (2), *Gordon* v. *Metropolitan Police Commissoner* (3). In *Feret* v. *Hill* (4), a plaintiff who had taken premises for the purposes of using them for prostitution and had been ejected by the landlord for so using them was allowed to recover possession from the landlord, but this has been explained in *Gorden* v. *Metropolitan Police Commissioner*(3), on the ground that the plaintiff was entitled to possession under his lease and that the purpose for which he acquired the premises was not a matter which he had to prove to establish his cause of action, In the present case the plaintiff as part of his cause of action has to prove that the mortgage taken in the name of Namammal was benami for him, and the finding is that it was so taken with a fraudulent intention. It is however well settled that this is not a bar to a suit unless a fraud has been in fact effected: *Petherpermal Chetty* v. *Muniandi Servai* (5). The mortgage money, in the present case, was the proceeds of certain properties sold by the widow of Appanna Ayyangar under Ex. C and Rangasami Ayyangar having by Ex. D renounced his claim to be the adopted son and to the properties comprised in Ex. C, it follows, in my opinion, that no fraud has been effected in this case and the plaintiff is entitled to succeed. I would reverse the decision of the lower appellate Court and restore that of the District Munsif with costs throughout.

Oldfield, J.—With all respect I am not at present clear that the present case is one of those, in which the plaintiff cannot maintain his cause of action without showing as part of it that he or a person, under whom he claims, has been guilty of illegality. No doubt in the plaint, as amended, he said that the amount of the suit land was given from the estate of his adoptive father by his adoptive mother for his benefit and the document was obtained in the name of his natural mother benami, having in view the litigation that was going on then regarding his adoption; and this was an admission of a wrongful conversion which no attempt has been made to defend. But it has not so far been shown that this averment or proof of it was necessary for the establishment of plaintiff's case; or that more was required than proof that his natural mother, the estensible mortgagee, had the funds and invested them, whatever their orgin, for plaintiff's benefit. in a manner which was innocent in itself, in the suit mortgage. If such proof could be given without reference to that orgin, it and plaintiff's admission regarding it would be immaterial. The distinction involved is justified by reference to *Tassell* v. *Cooper* (6), *Farmer* v. *Russell* (7) and *Gorden* v. *Metropolitan Police Commissioner* (3), the plaintiff in the two last montioned cases having actually alleged and given evidence of a tained origin for the money claimed. This aspect of the case was not present to the minds of the lower Courts, and, if these were the only facts, I should think that a remand, in order to its consideration, would be necessary.

There is however Ex. B which, I agree with my Lord, covers the land from the sale of which the money lent under the suit mortgage was derived, and the money itself, and whether the result of that document is to negative the carrying out of any fraud on its executant or, as I should, with all due deference, prefer to hold, to vest in plaintiff the ownership of the land or the money which now represents it,

1. (1892) 2 Q B 724.
2. (1869) 4 Q B 309.
3. (1910) 2 K B 1080.
4. (1845) 15 C B 207.
5. (1908) 35 Cal 551=35 I A 98 (P C).
6. (1850) 9 C B 509.
7. (1798) 1 Bos & P. 296.

the result is the same, that plaintiff is entitled to sue. I concur in the decision proposed.

S.N./R.K. *Appeal allowed.*

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OLDFIELD, J.

On difference between

SADASIVA AIYAR AND PHILLIPS, JJ.

G. S. Ramasami Iyer—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 311 of 1917, Decided on 9th November 1917, against order of Sess. Judge, Tanjore, in Case No. 27 of 1917.

(a) **Penal Code (1860), S. 467—Incomplete document unsigned by some of executants is 'valuable security.'—Per *Oldfield* and *Phillips, JJ.*, (*Sadasiva Aiyar, J.*, dissenting)

A document conferring or creating rights is a valuable security, even though all the signatures which it is intended to obtain or is necessary to obtain have not been affixed: *R. Turpin* 2 *Car. & K.* 820, *not Appr.* [P 154 C 1,2]

(b) **Penal Code (1860), S. 464—'Making' of false document is complete even when only some executants have signed.**

A document is 'made' within the meaning of S. 464 even when some only of the intended executants sign it, as the execution of it by them is complete and the document would be binding on them when it is completed by the other intending executants affixing their signatures. [P 155 C 1]

(c) **Penal Code (1860), S. 464 — Making false document — Document need not be legally effective and valid.**

There is nothing in S. 464, I. P. C. which requires that a document which is altered shall be legally effective and valid in order that the alteration should constitute the offence of making a false document. [P 155 C 2]

(d) **Penal Code (1860), Ss. 464 and 467—Alteration in good faith to support bona fide claim, is not dishonest or fraudulent to constitute offence of forgery — Facts must be scrutinised properly.

Per *Oldfield* and *Sadasiva Aiyar, JJ.*—Where alterations in a document are made by a person who believes in good faith that he might use them to support a bona fide claim, such alterations cannot be said to have been made fraudulently or dishonestly so as to constitute the offence of forgery. [P 154 C 1]

Per *Oldfield, J.*—Where the result of the making of alterations in a document is to exempt the maker from liability in respect of extremely reprehensible conduct, the facts must be closely scrutinized and the legitimacy of his good faith or his claim must rest on a proper basis and must be established clearly. [P 156 C 1,2]

Per *Phillips, J.*—Where the effect of an alteration in a document is to constitute an admission by one of the executants and the alteration is made without the latter's knowledge, the act comes within the definition of 'defraud' in S. 25, I. P. C., even though the alteration is made to support a bona fide claim. [P 155 C 2]

Per *Sadasiva Aiyar, J.*—A man cannot be convicted of forgery where his intention in making a false document is to secure something to which he is legally entitled or thinks bona fide that he is legally entitled. [P 153 C 2]

A document incomplete on its face neither is nor purports to be, a document conferring or creating rights, and cannot therefore be a valuable security, and alterations or interpolations therein will not constitute the offence of forgery. [P 154 C 2]

(e) **Penal Code (1860), S. 467—Forgery—Document must be 'valuable security'—Validity or otherwise does not matter.**

Under S. 467, I. P. C., the document must purport to be a 'valuable security,' and its validity or otherwise in law is not relevant. [P 155 C 2]

(f) **Penal Code (1860), Ss. 464 and 467—Document held valuable security—Alteration therein held constituted offence.**

The accused, who was in financial difficulties and whose properties were sold and purchased in auction by his father-in law *V.*, entered into an agreement with the latter, whereby on payment of a certain amount within a certain time, *V.* was to re-convey them to the accused. It was arranged that the document was to be signed by *V.*, the accused and the accused's father and two brothers. After *V.* and accused had affixed their signatures and before the others had signed, accused made, among others, two alterations in the document without *V.'s* consent, (1) that accused would give up possession of the lands which were in his possession if he did not pay the amount, and (2) that *V.* should return certain jewels and vessels belonging to the accused:

Held, per *Oldfield* and *Phillips, JJ.* (*Sadasiva Aiyar, J.*, dissenting), (1) that the alterations, being untrue in fact and liable to be used by the accused in future legal proceedings, were made fraudulently and constituted the offence of forgery; (2) that the document as altered was a valuable security. [P 160 C 1]

Per *Sadasiva Aiyar, J.*—(1) that no offence was committed, as the contents of the altered document were mainly true and the object of the accused in making the alterations being to persuade his father to sign the document, they were not made with any dishonest or fraudulent purpose; (2) that as the alterations were made when the document was incomplete and it was not afterwards completed, the document as altered was not a valuable security. [P 153 C 2; P 154 C 2]

T. R. Ramachandra Aiyar for *G. S. Venkatrama Aiyar* and *S. Rangachariar*—for Appellant.

Public Prosecutor—for the Crown.

Sadasiva Aiyar, J.—The appellant has been convicted of the offence of forgery of a valuable security under S. 467, I. P. C., or in the alternative of being in possession of a valuable security knowing it to be forged and intending to use it as genuine under S. 474, I. P. C. The facts are complicated and they may be shortly stated thus: (a) The appellant, G. S. Ramasami Iyer, is the son-in-law of P. W. 2, Vengappa Aiyar. P. W. 2's

daughter, accused's first wife, died in 1910, leaving a minor male child Narayanasami. During her lifetime, the accused's family consisting of the accused, his father and his two brothers became involved in debts and all their lands in the Ganapathi Agraharam and Manalur villages were brought to sale in Court auction by their creditors. They were purchased in the name of one Aiyyasami Aiyar, the benamidar of the accused's father-in-law, Vengappa Aiyar (P. W. 2), and the said benami purchaser afterwards gave a release in favour of P. W. 2. It cannot be said on the facts that the accused's father-in-law made the purchase as benamidar of the members of the accused's family in 1908, but there can be no doubt that there was some understanding between the accused and his father-in-law that the properties should come back to the accused or his family on P. W. 2 being recouped all the expenses he incurred in making the purchase in Court auction and which he might incur in discharging the mortgage and other debts due by the accused's family. (b) As I said, all this took place about the year 1908. The accused's marriage with his first wife took place about the year 1897. P. W. 2's son, P. W. 3 says.

"accused did not live in our family after his marriage, but sometimes with us and sometimes with his own family. There was no ill-feeling between accused and his father about his living with us. Accused managed the auctioned lands while he lived in our family. In 1912, Ramaswami Aiyar, Sub-Inspector of Police, came to hold an inquiry. Then some of the lands were under cultivation, we and accused were cultivating them."

P. W. 5 himself says that the accused lived in P. W. 2's family till his wife died and that when accused was in his (P. W. 2's) family, he was managing the lands mentioned in Ex. B (Ex. B being the document alleged to have been altered by forgery). Mr. G. S. Ramachandra Aiyar, a Vakil of this High Court of 14 years' standing, is accused's sister's husband. He says as D. W. 4:

"Till 1905, accused was living in his own family house. After that he lived both in P. W 2's family and in his own family house. There was a quarrel between accused and his father as accused wanted to have all the family properties for himself. During the negotiations of Ex. 3, P. W. 2 said he originally bought the lands at the auction for the benefit of accused's family. He gave me to understand that the enjoyment was with the accused. While accused's wife lived, P. W. 2 and he were on good terms. P. W. 2 in 1912, appeared to be a trustee, the beneficiary being accused's family and P. W. 2 had to be reimbursed in a sum of about Rs. 12,000. I understood the accused had the benefit of the produce of the lands."

It is admitted that in the negotiations which led to the writing of Ex. B in 1912, P. W. 2 agreed to convey the lands for Rs. 12,000 to the accused's family though the lands, etc., were worth Rs. 30,000. He has in February 1917 given up the lands, etc., agreeing to receive Rs. 19,000 (see Ex. 4). (c) The accused's minor son has always been living with his maternal grandfather. After accused's first wife's death in 1910 the feelings between the father-in-law and the son-in-law became estranged and in respect of the properties which had been purchased in the Court auction by P. W. 2 but which were allowed to be enjoyed by the accused, criminal and possession cases were instituted between the parties beginning in November 1910 (see Ex. 5). Both sides being respectably connected, relations intervened in 1912. On 25th July 1912 an agreement was drawn up as between accused and his father-in-law, Vengappa Aiyar. That agreement fell through and then the parties went before Mr. G. S. Ramachandra Aiyar, High Court Vakil already referred to (D. W. 4), in August 1912. He made a settlement which was signed in his presence by P. W. 2, by the accused, by the accused's two brothers. (I might add here that the accused's first wife left a daughter who was married to P. W. 2 's son's son). Ex. 3 is to the effect that on payment of Rs. 12,000 to the father-in-law (Vengappa Aiyar) Vengappa Aiyar should convey half the lands to his deceased daughter's son, that is, accused's son, Narayanaswami, and the other half to the other members of the accused's family after 400 gulies were given away to accused's mother. (*d*) Even this agreement seems to have fallen through and then we come to the disputed document Ex. B, dated 11th December 1912, in which the accused's mother's name which appears in Ex. 3, is left out and the Rs. 12,000 mentioned in Ex. 3 is increased to Rs. 12,250 by the addition of Rs. 250 for interest between the dates of Exs. 3 and B. (*e*) This document, Ex. B, begins by calling itself an agreement between the accused's father-in-law, Vengappa Aiyar, on the one hand and four persons, namely, accused's

father, accused and accused's two brothers, on the other hand. It is wholly in accused's handwriting. P. W. 1 himself says: "the document is not complete unless accused's father and brothers sign" (the signatures of accused's father-in-law and accused alone now appear in the document). P. W. 3 says:

"It was arranged that every one of the five parties should sign the agreement, Ex. B, before it was complete."

Thus the prosecution witnesses themselves admit that the document was to have no legal effect till the five signed. The accused was entrusted with the duty of persuading his father and two brothers to sign and until their signatures were put in, it was to have no legal effect (see also Exhibit 4 where in para. 11 Ex. B is admitted by everybody iuterested to be an incomplete document, void and of no effect). (*f*) P. W. 1 says "on the night of the 12th December" (the day after the writing of Ex. B)

"I was sitting with accused's father, leaving the document on a table. The accused took me out of the house and told me that some jewels, etc., of his family were with Vengappa Aiyar, P. W. 2, that they should be given to him and that the document should undertake to deliver these to him, failing which his father and brothers could not sign."

P. W. 2 the father-in-law says:

"I can't say if accused's name was cut on his vessels. I do not know if accused's family had such vessels. I gave my daughter to the accused as I thought he was rich. None of his jewels, vessels, etc., came to my house when he fell into financial trouble. Accused's wife died in my house. She was wearing jewels then. I did not take possession of them. I don't know if the document was read out to accused's father and brothers or if they approved. When Ex. B was being written accused was making suggestions, I don't know what."

P. W. 3 the son of P. W. 2 is more frank than his father and says:

My elder sister," that is accused's wife, "had jewels worth Rs. 1,600. She died in my house. We brought her there because the accused's family were in financial straits."

But he went on to say that when his sister died, she wore jewels worth only Rs. 100 and that the other jewels had been sold without her mentioning the fact to them. P. W. 5 says:

"Objections were raised about vessels and jewels during the negotiations. Tirukkalavur Subbier, D. W. 5 was present then. I forget if P. W. 2 denied possession of the jewels and vessels. I have seen her (accused's wife) wear jewels as a rich man's daughter does."

Then Tirukkalavur Subbier, a respectable independent gentleman, says:

"Accused and P. W. 2 spoke about vessels and jewels of the family. P. W. 2 consented to return them. P. W. 1 was then present. P. W. 2 touched accused on the head and said he would not deceive him. There was talk that accused's brothers and father should sign to complete the document. After it was written, accused read it. It is Ex. B. All disputed matters were dealt with in it. There was a provision regarding the return of vessels, etc. P. W. 1 and accused had each brought a draft. I heard both read."

D. W. 6 says:

"Accused was arrested for a decree debt. His wife wore jewels of over Rs. 2,000. When he become straitened in circumstances he removed his moveables to Kallur,"

that is, P. W. 2's village, accused's village being Ganapathy Agraharam. "His wife died there and her jewels were there." It seems to me clear that the accused and his father wanted that a provision should be made in Ex. B for the return of the wife's jewels and of the accused's vessels which had been saved (from attachment by the creditors of accused 1's family) through their removal to P. W. 2's house.

In the paper Ex. B, as it now stands, it is admitted on both sides that after the body of the document was written by the accused, there have been short sentences or clauses added in four or five places in accused's writing. One added sentence at the end of para. 2 provides that the accused's family should lose their present enjoyment of the lands to be sold to them by P. W. 2 if they failed to pay Rs. 12,250 within 13th April 1913. This addition, if assented to by the accused's father in-law, P. W. 2, who is one of the executants of the agreement, will imply an admission by him that the lands are in accused's possession. At the end of para. 3, an addition was made that vessels, jewels and articles remaining with P. W. 2 should be returned. In another portion, (a few lines before the list of the property to be given over to accused's mother) the accused inserted words, again indicating that the lands were then being enjoyed by accused's father, accused, etc. One word "pairil" in para. 1 alleged to be an addition by the prosecution after the body was written was denied by the accused to be an addition and I am satisfied on looking at the document that it could not be an addition, for without that word, there would be an inexplicable interval between the words written before and after it.

As regards the other admitted additions, they relate to the enjoyment of the lands by the accused's family notwith-

standing their absolute ownership in P. W. 2 (which is fully admitted in the document) and to the return of jewels, vessels etc., (value not mentioned) by P.W. 2. The prosecution alleged that these additions were made after the accused and his father-in law and the two attesting witnesses had signed the document, while the accused says that, though he added them after he first wrote the body, he entered them before he and his father-in-law and the attesting witnesses signed it. The material questions for decision therefore are, (1) whether the alterations about the enjoyment of the lands, and the return of the vessels and jewels were in the document Ex. B before P. W. 2 signed it; (2) whether such alterations were made dishonestly and fraudulently by the accused, if they were put in by him after his father-in-law signed it and without his knowledge or consent; (3) assuming again that the alterations were subsequently made without P.W. 2's knowledge or consent, whether Ex. B thereby became a forged document. I attach very little weight to the omission in the draft A of these additional provisions found in Ex. B, because several other sentences which are not in A are included in the body of B in its admittedly unaltered state, that is, in the body of B, even excluding the clauses in dispute.

There can be no question that the principal prosecution witnesses are not wholly reliable. P. W. 1, nephew of P. W. 2, though living in Kallur, pretends not to have discussed with his uncle, P. W. 2, about the genuineness of the alterations in Ex. B or about the possession of the property and not to "remember" that Rs. 250 were fixed for interest on the Rs. 12,000. He was very angry with the accused for having taken the document from the table where it had been left by him and he brought a theft case against the accused which was thrown out. The accused's father-in-law, P. W. 2, is also an enemy of the accused and he had civil and criminal litigation (about the possession of the lands) with the accused. He admits:

"My objection to the interlineations is not that they injure me, but because I had not agreed to them. I cannot say how I am injured by them."

P. W. 3 who is able to say that some portions of Ex. B are subsequent additions said:

"There was no mention of payment of 50 kalams to P. W. 2 on account of accused. I forget if there is such a provision in Ex. B. Accused made suggestions when Ex. B was being written. I cannot give details of them."

Though thus the evidence of P. Ws. 1 to 3 is of little value, I think the Sessions Judge's view that the principal alterations about the possession of lands and return of jewels and vessels were made after P. W. 2 and the attestors signed it can be supported on the evidence of P. Ws. 4 and 5 who are the two attestors notwithstanding that the evidence of D. W. 5, Tirukalavur Subbier tends to the contrary conclusion. Except therefore as regards the alleged addition of the word "pairil" I would concur with the finding of the learned Sessions Judge that the other additions were made by the accused subsequent to the signing of the document by P. W. 2, by the accused and by the attestors.

Coming to the second point, I am of opinion on the evidence that the additions have not been shown to have been made with any dishonest or fraudulent purpose. The accused seems to have been in possession of the lands to be sold by P. W. 2. P.W. 2 seems also to have been in possession of some jewels and vessels belonging to the accused's family. Accused honestly thought that the signatures of his father and his brothers could not be obtained without mention being made in the document of these matters, and he might have further honestly believed that he could persuade his father-in-law, though he had already signed the document to agree to these subsequent alterations. Even if this further assumption is untenable, dishonest or fraudulent intent does not follow. The making of a false receipt in order to support a true state of facts was held not to be forgery in *Ram Prosad Maity* v. *Emperor* (1). In *Emperor* v. *Surendra Nath Ghosh* (2) the addition of a name to the list of attesting witnesses of a kabuliyat was held not to be a forgery if there is no fraudulent or dishonest intention. In *Manika Asari* v. *Emperor* (3), decided by Sir William Ayling, J., the conclusiou is thus stated in the head note:

"Where the accused altered a document without the authority of the executants after its execution and it was proved that the alteration was made to prevent other people from setting up a

1. (1908) 12 C W N 1113.
2. (1911) 38 Cal 75=7 I C 629.
3. (1915) 28 I C 102.

claim to property which was admittedly in the possession of the accused the object cannot be said to be dishonest and the man is not guilty of forgery under S. 464, I. P. C. An intent to defraud implies something more than mere deceit. The advantage intended to be secured must be something to which the party perpetrating the deceit is not entitled either legally or equitably. There can be no intention to defraud where no wrongful result was intended or could have arisen from the act of the accused. A man cannot be convicted of forgery where his intention has been merely to secure something to which he was legally entitled."

(I would add "or to which he thought bona fide he was legally entitled.") In *Queen* v. *Kishan Pershad* (4) it was held that the prosecution in order to establish that a title has been asserted with a fraudulent or dishonest intent, must show that the accused had no reasonable ground for asserting the title. The conviction for forgery of the accused was set aside in that case on the ground that the prosecution had not proved such intent. In *Guddappa, In re* (5) it was held that the making of a document untrue in certain particulars is not forgery if it is not shown that it was made fraudulently or dishonestly and that mere intention to deceive is not sufficient. A similar view was held in *Queen-Empress* v. *Sheo Dayal* (6) with reference to receipts manufactured to support actual payments. I shall now deal with the third contention. It is clear that no legal right or liability can at all be based upon Ex. B, (a) *either in its unaltered state before the additions in dispute were made*; *or* (*b*) *in its altered state after the additions in dispute*. In *R.* v. *Turpin* (7) Baron Platt says:

"I think that this prosecution must fail. Until the signatures of a majority of the Parish Officers were attached to this cheque, it was an incomplete instrument and the altering it"

(as regards the amount) "when incomplete, is therefore no forgery. The prisoner must be acquitted." The cases in *Sivasami Chetti* v. *Sevugan Chetti* (8), *Amirtham Pillai* v. *Nanjah Gounden* (9) and *Nethiri Menon* v. *Gopalan Nair* (10), and the evidence on the side of the prosecution itself which I have already set out to show that neither n its altered state nor in its unaltered state could any legal right or liability be created or be purported to be created under this document because it is not signed by three of the five intended executants, nor does it purport to be signed by them. And as Halsbury, Vol. 9, para. 1417, puts it:

"if an instrument had it been genuine, would have been effectual in the ordinary course of business between the parties. . . , no defect being . . . on the face of it, such instrument may be the subject-matter of a forgery, although the instrument itself if genuine would have been void in law for want of compliance with some statutory direction. . .An instrument which after making or alteration still remains incomplete cannot be an order. An ineffectual addition to a document which already constitutes a complete order is not forgery, but where the document is so far incomplete that a signature is required as a condition of payment. . . the false making of such signature is forgery."

An incomplete document cannot be a valuable security or a document which is or purports to be a documeut by which any legal right is created or affected: see illustration to S. 30, I. P. C. A document incomplete on its face neither is, nor purports to be a document creating or affecting rights. If the accused had obtained or forged the additional signatures required to convert the document into a complete agreement on its face, he might be convicted of forgery if my view on the second point is erroneous. Even if he intended to obtain the signatures of his father and brothers to the altered document without obtaining P. W. 2's authorization or ratification of the alterations, the matter would not have passed beyond the stage of preparation for committing an offence. In the result, I would agreeing with the two assessors in the lower Court, find the accused "not guilty" reverse the conviction and order him to be set at liberty. [As regards the question of sentence mentioned by the appellant's vakil at the end of his arguments, I think that even if the accused's conviction is sustainable, having regard to the whole circumstances of this case arising out of a family dispute and to the fact that this criminal case has been hanging over the head of the accused from February 1913 (see Ex. E printed separately) that is for nearly $4\frac{3}{4}$ years, I should think that a sentence of four years is excessive and that one year's rigorous imprisonment would be an adequate punishment].

Phillips, J.—On the evidence, I agree with the learned Sessions Judge that the additions and interpolations in Ex. B were made by accused after the document

4. 2 N W P H C R 202.
5. 1 Weir 542.
6. (1885) 7 All 459.
7. 2 Car & K 820.
8. (1902) 25 Mad 389.
9. A I R 1914 Mad 369=23 I C 464.
10. (1915) 39 Mad 597=30 I C 713.

had been signed by him and P. W. 2. There seems to be no ground for rejecting the evidence of P. W. 1, as he appears to be a disinterested witness. He is supported by P. W's. 2 and 3, who no doubt, are now on bad terms with accused, but at the time of the agreement Ex. B, P. W. 2 was clearly not ill disposed towards accused, or he would not have agreed to re-convey the lands for a low price. P. W's. 4 and 5 who attested the document support the prosecution and P. W. 5's contradiction of the evidence of P. W's. 1 and 2 as to whether there was a discussion about jewels and vessels when the parties were negotiating is not really material. D. W. 5 was admittedly present when Ex. B was written and he supports accused, but he does not appear to be a reliable witness. Accused says he showed Ex. B to a vakil (vide Ex. G), but this vakil has not been examined, although his evidence would be invaluable.

It is next contended that the alteration of the document does not amount to making a false document within the meaning of S. 464: (1) because it was not made dishonestly or fraudulently. and (2) because the document Ex. B being incomplete for want of the signatures of accused's father and brothers, it cannot be said to be a false document. In support of the 2nd proposition we have been referred to *R.* v. *Turpin* (7), but I can see no advantage to be gained from consulting this old English case (which is very briefly reported) when we have to interpret an Indian Statute of a much later date. Similarly the many civil cases cited to show that Ex. B is not a valid document, are quite useless in determining whether it is forged. The contention, that the word "make" in S. 464 is used in the first sentence in its ordinary sense, but must subsequently be read in the technical meaning denoted in "making" a promissory note, must be rejected. It has nothing to support it and even in the expression "maker of a promissory note" there is no technical meaning; for the technical term for the maker is the "drawer."

Under Cl. 2, S. 464, I. P. C., a person is said to make a false document who without lawful authority dishonestly or fraudulently by cancellation or otherwise alters a document in any material part thereof after it has been made or executed either by himself or by .any other person. There is nothing in the section which requires that the document so altered shall be legally effective and valid in order that an alteration should, in the circumstances set out, constitute the offence of making a false document. In the present case not only had the document been made, but it had also been executed by P. W. 2 and accused. So far as the former is concerned the document would be binding upon him when completed, and consequently his execution of it was complete. As regards the first contention it is argued that the alterations in the document are not dishonest or fraudulent. The alterations relate to two points:

(1) The question of right to possession of the lands agreed to be sold, and (2) the possession by P. W. 2 of certain jewels and vessels alleged to belong to accused and his father.

Inasmuch as the lands in question were bought with funds belonging to P. W. 2 and as in the prior agreement, Ex. 3, there is no reference to accused's right to possession of the lands, I think it is obvious that accused's claim is not bona fide for there is other evidence to show that his claim is untrue. Similarly P. W. 2 denies possession of the jewels and vessels, and there is no evidence to prove his possession. The interpolation of a provision for their return by P. W. 2 is clearly dishonest. Even if accused had a bona fide claim to the lands and the moveables, I think the interpolations in the document would be fraudulent for he intended by unfair means to obtain a document containing an admission in his favour by P. W. 2 and this would come within the definition of "defraud" in S. 25, I. P. C.

It is then contended that Ex. B is not a valuable security, because it is invalid until the execution by accused's father and brothere is complete. Under S. 467, I. P. C., the document must purport to be a valuable security and its validity or otherwise in law is not relevant. Ex. B certainly purports to be a valuable security within the meaning of the section, and therefore the offerce is complete, and I would confirm the conviction. As my learned brother is of opinion that the accused should be acquitted it is useless for me to express any opinion as to what the sentence should be, although I may say that four years' rigorous im-

prisonment seems to me, in the circumstances, to be somewhat severe. (On difference between his Lordship, Oldfield, J. delivered the following):

Judgment.—The accused has been convicted of an offence punishable under Ss. 467 and 464, I. P. C., in the alternative, the forgery being alleged as consisting iu certain alterations in Ex. B made after its execution by P. W. 2 and accused, the result being the making of a false document, purporting to be a valuable security. Both learned Judges, before whom the appeal originally came, held that the alterations were so made by accused; and nothing now advanced leads me to dissent from this conclusion.

The questions, to which the argument has been mainly directed before me, are (1) whether the alterations were made dishonestly or fraudlently; (2) whether they could amount to forgery either of a document or a valuable security, if, as is alleged, they were made before the completion of the document; (3) whether the sentence is excessive. One contention on the first of these questions, that accused made the alterations, intending to get P. W. 2 consent to them before obtaining the other signatures, which, it is said would make the document effective, can be dealt with shortly. For it was not put forward at the trial, or so far as I can judge, at the original hearing of the appeal. And the reason is clear. Accused then put forward the case, to which he adhered before me, that the alterations were made before P. W. 2 signed; and he adduced evidence in support of it, which, if believed, negatives the contention under consideration. So also, so far as it goes, does the evidence for the prosecution. In these circumstances I pass at once to the argument that the alterations were not made fraudulently or dishonestly, because they represented what accused in good faith believed to be the truth and intended to use to support what is good faith he claimed or might claim. That this defence is open to him is entailed by the decisions in *Queen-Empress* v. *Syed Husain* (11), *Queen-Empress* v. *Sheo Dayal* (6), *Queen* v. *Kishen Persad* (4) and *Manika Asari* v. *Emperor* (3). But, when, as is pointed out in the two last cited cases, the result is to exempt the accused from liability in respect of extremely reprehensible conduct, the facts must be scrutinised closely and the legitimacy of his claim or his good faith in its assertion must be established clearly. The question is one of fact and reference to the evidence is therefore necessary. In 1908 accused was in difficulties and sent his wife to the house of P. W. 2, his father-in-law, with his jewels and vessels and allowed his land to be sold in Court auction and to be purchased, it is not disputed, by a benamidar for P. W. 2. Both learned Judges agree (and I see no reason for differing from them) that this purchase was not benami for accused or his family. Accused's difficulties continued and his wife remained with P. W. 2 until her death in 1910 and the land continued in the latter's ownership, although he and accused quarrelled and there were criminal and possession proceedings (Ex. J) in 1910, 1911 and in 1912, very shortly before the incidents to be considered (D. W's. 1 and 3).

In the last mentioned year however negotiations began for the restoration of the land to accused's family in consideration of a payment of the expenses incurred by P. W. 2 with interest; and this project materialised, firstly, in Ex. 3, and next, Ex. 3 failing, in Ex. B, which as originally executed by P. W. 2 and accused, was an agreement for the sale of the land by the former for Rs. 12,250 to accused, his father and brothers, the two documents differing only in the omission of provision for accused's mother from the latter and the addition in it to the consideration of the interest, which would accrue in the interval between them. The alterations in Ex. B, with which we are concerned, consist in additions: (1) implying that present enjoyment of the land was with accused, (2) providing for a new and distinct matter, the return of the jewels and vessels, which were with P. W. 2. What then is the evidence as to each of these points and accused's good faith in respect of it? As regards the land there is no doubt the evidence of one credible witness, who intervened in the dispute, that, as he understood from P. W. 2, enjoyment was with and profits were received by accused. But it is merely indirect and may easily rest on misunderstanding; and it cannot fill the place of what accused requires, proof of the fact or of the fact or of reasonable

11. (1885) 7 All 403.

ground for belief in it, on which he was entitled to act.

On the other hand the finding against P. W. 2's holding benami for accused or his family negatives the latter's possession and the good faith of accused's belief in it at its origin; and for the prosecution there is evidence consistent with probability that accused was merely managing the property, whilst he lived in P. W. 2's house. As regards the moveables there is some evidence that they came to P. W. 2's house with accused's wife in 1907. But it justifies no presumption that they remained there until 1912, either as regards the jewels, which accused might naturally have demanded after his wife's death in 1910, or the vessels, which very likely would be worn out. The only evidence that P. W. 2 admitted possession of this moveables is given by D. W. 5 and is worthless, since he also supported the existence of a reference to them in Ex. B as originally drafted. There is further the absence of reference to them in Ex. 3. In these circumstances accused has not shown that the interpolated recital as to possession of the immovables or the provision regarding the moveables rested or was in good faith believed by him to rest on any legitimate basis. This conclusion goes some way towards justifying a finding that accused's intention was dishonest or fraudulent; and in fact argument against one has been based mainly on P. W. 2's atatement that he could not say how the insertion of these additions in Ex. B injured him and that his only objection to them was that he had not agreed to them. But this seems to me merely an expression of his unwillingness to specify what was essentially contingent and uncertain. For he was clear in asserting his possession of the land and in denying his liability for the moveables. The case as to intention is however different as regards each class of property.

The evidence of P. Ws. 5 and 10 indicates that the alterations relating to moveables were made, primarily at least, because accused's father insisted on their insertion; and they were fraudulent, because the intention was to obtain his signature on the pretence that P. W. 2 had agreed to them, quite apart from any ulterior dishonest intention to use them in support of a claim against the latter. As regards the addition relating to possession of the land there is no evidence that accused's family were interested in it. But the conclusion reached that it was not and was not believed by accused to be in accordance with fact, the explanation, to which the defence has suggested no alternative, must be adopted that he was creating an admission, purporting to be by P. W. 2, for use in possible future legal proceedings. This explanation is not excluded by the fact that accused was at the time promoting the arrangement embodied in Ex. B. For that arrangement might fail owing to failure to find the necessary money or accused, whom his father treated as untrustworthy, might abandon it and revive the claim, to which he adhered at the trial, that P. W. 2's holding of the land was merely benami. It is only consistent with accused's previous and recent resort to possession proceedings that he should create evidence in order to deprive P. W. 2 of possession in the future. In these circumstances I find that the additions to Ex. B were made fraudulently and dishonestly.

The next question is whether accused's making of them amounted to forgery under S. 463, I. P. C., notwithstanding that they were made when Ex. B was not completed and it is alleged, was not to be legally effectual, until all the persons specified in it had signed it. The result already reached is that Ex. B was altered by accused dishonestly and fraudulently in a material part after its execution by himself and P. W. 2; and therefore its character as a "document" is the only further matter to be established. Certainly it fulfils the requirements of the definition of a 'document' in S. 29, since the matter expressed on the paper comprising it might be used, even apart from the additions under discussion, as evidence of the rights in the property, which P. W. 2 claimed or did not claim and which he had or had not agreed to transfer; and it cannot matter for the present purpose whether it does or does not purport to be more. It will be a question how far completion is necessary, when the character of Ex. B as a valuable security and the application of S. 467 are under discussion. But, if by completion is meant the taking of the steps necessary to make the document legally enforceable, as it is contended the signatures of accused's father and brothers

would have made Ex. B, it is clear from illustrations (j) and (k) to S. 464 that completion is not essential.

In my opinion the evidence establishes all that S. 462 read with S. 29 requires. Accused, therefore, is guilty at least of the offence punishable under S. 465. Before entering on discussion of the further question whether he is guilty also of forgery of a valuable security, punishable under S. 467, the reason why no reference has so far been made to the English authorities, which have been relied on, may be stated. It is that they relate to charges of forgery, amounting to felony, of various instruments specified in the Statute, 24, 25 Vict. Ch. 98, corresponding with the more serious charge next to be considered, not with that already dealt with. It is no doubt true that the English definition of forgery, as

"the false making of any written instrument for the purpose of fraud and deceit"

[*R.* v. *Parkes* (12)] is the same for both forgery at common law and under the statute. But English procedure recognizes no principle similar to that provided in S. 238, Criminal P. C., vide: *Queen* v. *Thomas* (13); and therefore it does not follow, and it does not appear, that the absence of completion in the cases otherwise in point, to which reference will be made, would have entailed an acquittal, if the indictment had been for a misdemeanour punishable at common law, an opinion to the contrary being in fact implied in the judgment of Stephen, J., in one of them, *R.* v. *Harper* (14), and accordingly it is only in connexion with the question remaining for decision that it is necessary to refer to those cases or to the extract from Halsbury's laws of England, which Sadasiva Aiyar, J., has adopted as expressing the law and which, it may be added, occurs in the sub-section of that work dealing with forgery by statute.

The question is whether Ex. B purported to be a valuable security, when the alterations were made and when, it was assumed for the defence, it had not been made effectual by the signatures of all the parties referred to in it; and with regard to the arguments from authority, which have been addressed to me, two observations may be offered. Firstly, my learned brother's application of the extract from the Laws of England above referred to (Vol. 9, p. 721) is open to the objections that some words have (with all due deference) been misconstrued and others, which are material have been omitted. For it begins with a statement relating to instruments, which, had they been genuine, would have been effectual, but are not so far want of compliance with some statutory direction and not on account of any patent defect; this is clearly beside the present point and the cases cited in connexion with it show that the defect contemplated is not one, which the accused could have made good: vide, *R.* v. *Donnelly* (15) and *R.* v. *Moffatt* (16). Then follows the portion directly in point:

"an instrument, which after making or alteration still remains incomplete, cannot be an order"

to pay, such as the statute contemplates. But this omits the words in the original, which show the nature of the incompleteness in question. They are after the word "incomplete" the words "and has no resemblance to a genuine instrument" and, as *R.* v. *Rushworth* (17), the case referred to in the foot note, *R.* v. *Pateman* (18) and *R.* v. *Burke* (19) show, they are meant to cover instruments which have not and never could acquire the form of any specified in the statute. Secondly, as regards *R.* v. *Turpin* (7) I fully appreciate the reluctance of Phillips, J., to interpret our Code with reference to the brief report of a single remote English authority; but I deal with it, since it has been made the foundation of a general argument.

It was no doubt held in it that in the absence of proof that all the necessary signatures had been attached to a cheque before it was altered fraudulently, it must be treated as incomplete at the time of such alteration and could not be the subject-matter of forgery. But reasons for doubting the correctness of this decision are given by the learned Editor of Russell on Crimes (Edn. 7, Vol. 2, 1634). And *R.* v. *Kirkwood* (20) and *R.* v. *Dade* (21) show that forgery can be committed by a person who makes a part

12. 2 Leach C C 775.
13. 2 M C C 141.
14. (1881) 7 Q B D 78.
15. 1 M C C 438.
16. 1 Leach 431.
17. R & R 317.
18. R & R 455.
19. R & R 496.
20. 1 M C C 304.
21. 1 M C C 307.

only of a forged instrument, if he intends that others shall complete it. In those cases there was no charge of conspiracy and it therefore does not seem material that the completion was intended to be effected by further forgery, and not, as here, by persons acting honestly. These decisions followed the decision in *R.* v. *Bingley* (22), in which the trial Judge submitted the case as being that,

> "unless in such case all are principals, the law seems to reach only the party who performs the last operation, and thereby makes the forged instrument complete (viz., in this case the party who added the signature, and in the case of a forged deed, who adds the seal), who may be one of the least active and the least guilty of those concerned,"

and this appears to have been accepted by the Court. Again in *R.* v. *Lee* (23), a case resembling *R.* v. *Turpin* (7), except that forged signatures, not alterations, were in question, the fact that the instrument, a cheque, was not effective, until the genuine signature of a clerk had been attached, was held immaterial; and, although the argument for the Crown was according to the report that this signature was necessary, not to complete the instrument, but as a guarantee for the genuineness of the other signatures, the defence contention disallowed in the short ruling of the Judge was in accordance with the statement of facts that the clerk's signature was under the rules of the complainant society, by which its relations with its Bank were governed, essential to the validity, and therefore the completness of its cheques. It is not necessary to refer in detail to other more recent cases, in which the completion of a document by signatures essential to its validity has been considered with reference to its liability to stamp duty and other matters unconnected with criminal responsibility. It is sufficient that no analogy with English law constrains me to hold generally that the stage, at which a document purports to be a valuable security, is that, at which all signatures, which it is intended to obtain or which are necessary, have been affixed. In the present case it is not necessary to insist on the broad view. which was taken in the cases of *R.* v. *Bingley* (22), *R.* v. *Kirkwood* (20) and *R.* v. *Dada* (21) and it is sufficient to adopt what may, it would appear, have been the principle underlying *R.* v. *Lee* (23) and *R.* v. *Harper* (14) that the documents in question therein, nogotiable instruments, were complete when they bore any signature in virtue of which they would appear to the persons, to whom they might be offered, to be valuable securities, that is, when they purported to do so, without reference to the knowledge of the ostensible parties to them that they were not so in fact.

To apply these observations to the present case, Ex. B, as it stood after signature by P. W. 2 and delivery by him, purported to be an agreement by him in an ordinary form to sell in case the price stipulated for was paid within the date fixed and an agreement for the benefit of accused's minor son was executed simultaneously by the vendees; and there are also provisions regarding the subsequent management of the property for the minor's benefit, which also are to be included in that agreement. The result is that P. W. 2 promised to convey on receiving the payment and on the vendee's executing the agreement. Ex. B therefore imposed an obligation on P. W. 2 but none at all on accused or his family by way of adherence to the arrangement or otherwise. For them accordingly it created only an option (that is, in the words of S. 30 a legal right) without reference to any condition or any obligation to which their consent was necessary. Accused however contends that it did not create such a right, because there was a condition precedent, not appearing explicitly on its face, that his family should sign it. Such a condition is not, in my opinion, expressed or implied in its terms; and the obligation imposed being only on P. W. 2 no reason for implying any such condition would suggest itself to any person, to whom it might be shown, to the possible purchasers for instance referred to by P. W. 2 in evidence or any Court, in which a suit might be instituted to compel registration or for specific performance; in fact to any one, except accused and his family. And that is sufficient to justify a finding that Ex. B purported to be a valuable security.

In fact however it is not, as I understand the case, necessary to have recourse to this ground of decision, because I hold that Ex. B not only purported to have, but had that character. It has been

22. R & R 446.

23. 3 Cox C C 80.

pointed out that its terms did not expressly or by necessary implication require the signatures of accused's family to make it operative against P. W. 2; and I do not find any separate agreement proved to that effect. It is said that one was necessary in his interest, as immunity from any possible attacks on his title by accused's father and brothers was the consideration for his promise to sell. But nothing to that effect was expressed or put to him in cross-examination. There is no evidence that these persons ever made or contemplated such an attack. The evidence of D. W. 4 that P. W. 2 "appeared to be a trustee" is supported by nothing definite and is not consistent with the conclusion of my learned brothers and myself as to the origin of his title. There was in view of the relationship between P. W. 2 and accused nothing improbable in Ex. B being voluntary: and the fact that the former not only signed, but also delivered it without previous negotiation with the latter's family indicates that it was so. The direct evidenc erelied on is the statements of P. Ws. 1 and 3 that the document would not be complete until it had the signatures of all five persons mentioned in it. But those statements did not necessarily mean that without them it would not be gally enforceable against P. W. 2 or more than that it was in fact accused's intention to obtain them. In fact P, W. 2 deposed:

"I heard no talk that Ex. B should have effect only after all the parties signed,"

and P. Ws. 1 and 3 were present at the execution by P. W. 2, the latter being his son, do not refer to any insistence by him on the necessity for further signature or to any conversation regarding it. In these circumstances I cannot find that the condition precedent relied on by accused was either expressed or implied in Ex. B or established by independent evidence; and I therefore hold that Ex. B was a valuable security when accused altered it. The result is that accused's conviction of the offence punishable under S. 467 or S. 474, I. P. C. in the alternative is confirmed. As regards sentence both learned Judges considered that the period of four years imposed by the lower Court was excessive and I agree with them. Having regard to the circumstances and in particular to the fact that the forgery was discovered before the accused could profit by it he will suffer one year's rigorous imprisonment, the sentence being reduced and the appeal allowed to that extent.

S.N./R.K. *Order accordingly.*

A. I. R. 1918 Madras 160

BAKEWELL AND KUMARASWAMI SASTRI, JJ.

Adiraja Arsu—Petitioner—Appellant.

v.

Budan Sahib and *others* — Respondents.

Letters Patent Appeal No. 95 of 1917, Decided on 6th December 1917, against order of Coutts-Trotter, J., D/- 20th July 1917, in Civil Revn. Petn. No. 1015 of 1916.

(a) Hindu Law — Religious endowment — Property endowed is generally not transferable.

As a general rule of Hindu law, property given for the maintenance of religious worship and of the charities connected with it is inalienable. [P 161 C 1]

(b) Hindu Law — Alienation — Religious endowment—Manager—Alienation by manager will be only justified to protect temple or to maintain service—He must ordinarily carry on within income.

The manager of a temple has no authority to pledge the credit of the temple excpt for necessity, which necessity must relate to the preservation of the temple or the maintenance of the religious service. He should ordinarily only apply the income in the administration of the charity. [P 161 C 2]

(c) Hindu Law — Temple — Alienation — Religious endowment—Manager—Power — Purchaser of fire works for festivals is not necessity justifying debts.

The purchase of fireworks for use at festivals cannot be charged on the assets of the temple, as it is not necessary for the preservation of the temple or the maintenance of religious service. [P 161 C 2; P 162 C 1]

(d) Hindu Law — Religious endowment — Temple trustee — Power— Manager though competent to collect and expend income cannot borrow without consent of trustees. (*Obiter*)

Per *Bakewell, J.*, (*obiter*)—Even if under the scheme of management of a temple one of several managers has authority to collect and disburse its income, it does not follow that he can exercise the abnormal power of alienating or charging the temple property or otherwise dealing with its capital without the concurrence of his co-trustees. [P 161 C 2]

B. Sitaram Row—for Appellant.

K. Ramnath Shenai — for Respondents.

Bakewell, J.—The question in this case is, what is the remedy of a person who has sold goods on credit to the manager of a temple to be used for the purposes of the institution? It has been

found that the plaintiff, the vendor, was aware that defendant 2, the purchaser, was the manager and that he made the purchase of fireworks for the temple, and that these goods were necessary for the temple. A temple is a permanent religious charity carried on for the benefit of the present and future worshippers, and it is obvious that its property should be preserved intact in order that the existence of the charity may be continued, and that its income alone should be applied by the manager or dharmakartha in the administration of the charity. see *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (1). It follows that the manager has ordinarily no authority to dispose of the capital of the institution, since such a disposition would endanger its very existence, and that his authority is ordinarily limited to the receipt of the income and its proper disbursement in the upkeep of the fabric and the performance of the customary ceremonies. It has been held by their Lordships of the Privy Council that

" as a general rule of Hindu law, property given for the maintenance of religious worship and of the charities connected with it is inalienable: [*Prosunno Kumari Debya* v. *Golab Chand Caboo* (2)].

but that, under certain circumstances, the manager of that property is

"empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir: *Ibid p.* 152:"

That decision and other cases were fully considered by their Lordships in a recent case reported as *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (1), where it was contended that the manager had the power to grant a permanent lease of land belonging to the temple at a fixed rent and in consideration of a premium in case of necessity and for the benefit of the institution. Their Lordships observe

" that the only specific point touching the present case actually decided in those three authorities was this: that a debutter estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestation (*p.* 718 *of* 40 *Mad.*),"

and, although they point out that it is not possible to define precisely the things which may constitute a benefit to the estate and justify the exercise of this power, the illustrations which they give relate to the preservation of the institution and its endowments. They also point out that there must not only be a benefit to the estate from the exercise of the power, but there must be an unavoidable necessity for the alienation. The manager should therefore consider in each case whether the particular alienation of the temple property which is contemplated is the most provident disposition which can be made in the interests of the institution. It follows, I think, from these propositions that the manager has no authority to pledge the credit of the temple, because the result would be that strangers to the trust would be able to proceed against the general property of the temple in execution of their decrees, and the consequent alienation of its property would not be made by the trustees acting upon a due consideration of the interests of the temple. Moreover the manager would in this indirect manner obtain much larger powers of disposition than the reported decisions allow him.

The District Munsif has held that the purchase of fireworks was necessary for the temple, but that is not sufficient; the necessity must relate to the preservation of the temple or the maintenance of the religious service, and the discharge of fireworks, though customary at certain festivals, cannot possibly be included in these purposes. For these reasons I am of opinion that the purchase of these goods was not within the authority of defendant 2 as manager of the temple, and the temple funds cannot be made liable for the price in these proceedings. No question has been raised as to the powers of one manager or trustee to act without the concurrence of his co-trustees, but I may point out that even if under the scheme of management one manager has authority to collect and disburse the income, it does not follow that he can exercise the abnormal power of alienating or charging the temple property or otherwise deal with its capital without the concurrence of his co-trustees. For these reasons I would allow the appeal and set aside the decree of the District Munsif, and remit the case for re-trial upon the question of the personal liability of defendant 2, and

1. A I R 1917 P C 33=39 I C 722=40 Mad 709=44 I A 147 (P C).
2. (1874) 2 I A 145=3 Sar 449 (P C.)

direct the respondent to pay the costs of defendant 1 throughout.

Kumaraswami Sastri, J.—I agree with my learned brother that the plaintiff is not entitled to a decree against the assets of the temple, as the purchase of fireworks cannot be said to be necessary for the performance of the trusts. I concur in the order proposed.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 162

SESHAGIRI AIYAR AND NAPIER, JJ.

Subramania Aiyar—Plaintiff—Appellant.

v.

Namasivaya Asari — Defendant—Respondent.

Second Appeal No. 1811 of 1916, Decided on 11th December 1917, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 189 of 1914.

(a) Civil P. C. (1908), S. 102—Second appeal after amendment to Art. 35, Small Cause Courts Act—No second appeal lay in suit to recover value of trees cut and removed—Term cognizable in S. 102 refers to nature of suit and not its character at time of appeal.

A suit to recover the value of trees cut and carried away was filed in the Small Cause Court and was afterwards transferred to the regular file as a question of title was involved in the suit. Against the decree of the trial Court there was an appeal to the District Court, and from the decree of the latter Court a second appeal was filed in the High Court. It was objected that under S. 102, no second appeal lay. It was contended in answer that as the second appeal was filed after the amendment of Art. 35, Sch. 2, Provincial Small Cause Courts Act in 1914, the second appeal was maintainable:

Held: that as the appeal was against a decree in a suit of the nature cognizable by Small Cause Courts, no second appeal lay.

The word 'cognizable' in S. 102, Civil P. C., is restricted to the nature of the proceeding prior to decree and not to its character at the time of the second appeal. [P 162 C 1]

(b) Practice—Appeal—Right to—Principle of vested right of appeal being unaffected by subsequent legislation is subject to other parties' right of treating decision as final.

The pinciple of law that a right to prefer an appeal, being a vested right cannot be affected by legislation, is equally applicable to parties who have acquired a right to a judgment being regarded as final and conclusive: *Colonial Sugar Refining Co* v. *Irving*, (1905) *A. C.* 369 *Expl.* [P 163 C 1]

(c) Interpretation of Statutes—Retrospective effect—Enactment withdrawing certain class of suits from jurisdiction of Small Cause Court cannot be retrospective.

An enactment which deliberately withdraws certain classes of cases from the jurisdiction of Small Cause Courts, cannot be said to declare the law and does not have a restrospective effect. [P 163 C 1]

K. Rajah Aiyar—for Appellant.

V. Purushottama Aiyar for *T. R Venkatarama Sastri*—for Respondent.

Judgment.—A preliminary objection has been taken by Mr. Purushottama Aiyar to the maintainability of the second appeal, and we are of opinion that the objection should prevail.

The suit was for Rs. 50 odd for cutting and carrying away trees. It was originally instituted in the Small Cause Side of the Tanjore Subordinate Judge's Court. As a question of title was involved in the determination of the claim. the plaint was returned for presentation to the District Munsif's Court at Pattukottai. The suit was tried by that Court and an appeal was heard therefrom by the District Judge. This second appeal is against the decree of the District Judge.

The suit as originally filed was not exempted from the jurisdiction of the Small Cause Court. An amending act was passed in 1914, by which a new Cl. (11), was added to Art. 35, Sch. 2, Provincial Small Cause Courts Act. Under this new clause, if the suit were to be filed now, there can be no question that the Small Cause Court will have no jurisdiction to try it. The point for determination is whether this amendment affects the operation of S. 102, Civil P. C. Under that section no second appeal lies in any suit of the nature cognizable by Small Cause Courts, if the value of the subject-matter does not exceed Rs. 500. In the present case all the disqualifying conditions are present. Mr. Rajah Aiyar contended that the nature of the suit must be considered with reference to the date on which the second appeal is presented and not with reference to the date on which the suit was filed; and as the amending Act was passed in 1914, before the second appeal was filed, the character of the suit has changed so as to admit of a second appeal being presented. This ingenious argument ignores the consideration that the appeal is against the decree which has been passed in the suit of the natnre cognizable by small Cause Courts. The word "cognizable" must be restricted to the nature of the proceeding prior to decree and not to its character at the time of the second appeal.

The next contention of the learned vakil was that the right of preventing an appeal being filed is not a vested right. It was held in *Colonial Sugar Refining Co.* v. *Irving* (1) that the right to prefer an appeal being a vested right, it will not be affected by a new legislation. We think that the principles of that decision applies to the present case. The right claimed by one party to take up a matter to an appellate tribunal is no more sacred than the right given to the other party to prevent the right of finality attaching to the decree obtained by him not being disturbed. We think that the statement of law by the Judicial Committee is equally applicable to parties who have acquired a right to a judgment being regarded as final and conclusive. The next contention was that the matter is one of procedure. Reliance was placed upon the decision in *Attorney-General* v. *Theobald* (2). That was a case in which a declaratory enactment was construed. It was held that where the legislature declares the meaning of a particular expression, that must be deemed to have been the meaning from the outset. In the present case, the legislature has deliberately withdrawn certain cases from the jurisdiction of the Small Cause Court. This is not a case of declaring the law but of the making of a new law. To such an enactment the statement of law contained in the judgment of Lopes, L. J., in *Pulborough School Board Election, In re* (3) is peculiarly applicable:

"It is a well recognized principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. This principle of construction is especially applicable when the enactment to which a retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transaction."

Mr. Rajah Aiyar next referred to cases which have held that there is no vested right in having a case tried by a tribunal which has been deprived of jurisdiction by a subsequent enactment. Such a right has been held by Lord Mcnaughten in *Colonial Sugar Refining Co.* v. *Irving* (1) as pertaining to the province of processul law, and not to vested right, because so long as there has been no trial, no party has any right to say that the mode of trial or the procedure for trying it shall not be changed. These observations apply to *Vajechand* v. *Nandrnm* (4) as well.

For these reasons we are of opinion that no second appeal lies in this case and we reject it with costs.

S.N./R.K. *Appeal dismissed.*

1. (1905) A C 369.
2. (1890) 23 Q B D 557.
3. (1894) 1 Q B 725.
4. (1907) 31 Bom. 545.

A. I. R. 1918 Madras 163

SESHAGIRI AIYAR AND NAPIER, JJ.

Srikakolapur Venkataraju—Defendant—Appellant.

v.

Gudivada Ramanujam — Plaintiff—Respondent.

Second Appeal No. 667 of 1917, Decided on 5th December 1917, from decree of Sub-Judge, Cocanada, in Appeal Suit No. 129 of 1914.

(a) Contract Act (1872), S. 30—Wagering contract—Money deposited as security by party—Suit for its recovery lies and is not affected by S. 30—S. 30 refers to money deposited with stakeholders.

A suit lies for recovery of money deposited by a party to a wagering contract as security for the performance of his part of the contract. The direct prohibition contained in S. 30, Contract Act, does not cover such a claim.

The words "entrusted to any person to abide the result of a game etc.," in S. 30 refer only to moneys deposited with stakeholders [P 164 C 1]

(b) Contract Act (1872), Ss. 30 and 65—Principle involved stated—Person not tainted with fraud can recover.

The general principle is that a plaintiff whose hands have not been tainted by corruption and who has not committed any act which fixes him with having been a party to a fraud is entitled to get back the money which he lelt with another [P 164 C 2]

T. R. Ramchandra Aiyar—for Appellant.

B. Narasimha Row—for Respondent.

Judgment.—We accept the finding that the contract was a wagering one. The further question is whether the money deposited by the plaintiff with the defendant as the security for the performance of his part of the contract is recoverable. There is no question of limitation. The lower Courts held that S. 65, Contract Act, was applicable to the transaction. We are unable to agree with them. S. 30 makes a wagering contract void ab initio and to such a class of contracts S. 65 has no application. In *Ledu* v. *Hira Lal Bose* (1) this view was taken. Despite the inclination of the learned Judges of the Bombay High Court in the earlier cases to apply S. 65 to such con-

1. (1915) 43 Cal 115=29 I C 625.

tracts, the later view is in agreement with the Calcutta view : see *Parshottam Veribhai* v. *Chhotrasangji Madhavsanji* (2). In this Court, Oldfield and Bakewell, JJ. held in *Srinivasa Aiyar* v. *Sasha Aiyar* (3) that S. 65 does not cover moneys paid under a marriage brokerage contract. That principle is applicable to the present case. The question still remains whether the plaintiff is entitled to sue for the recovery of the money paid by him in furtherance of the contract of wager. We are clear that the direct prohibition contained in S. 30 does not prevent such a claim. This is not a suit to recover any money "won on any wager," nor is the suit to recover money

"entrusted to any person to abide the result of any game or other uncertain event on which any wager is made"

In our opinion this latter clause applies only to cases of moneys left with stakeholders. It may be, as Mr. Ramachandra Iyer suggested, that the money is sometimes left with one of the parties to the contract on account of his solevency or respectability. But the position he would occupy with reference to the money so paid will be that of a stakeholder. The entrustment referred to in the section can have no meaning when the money is left as a security for the due performance of the contract. We therefore hold that S. 30 does not prohibit the maintainability of such suit.

This takes us to the general right of parties whose moneys are in the hands of another without the latter having any right to retain them. Ordinarily the person who paid the money is entitled to claim it back. But there may be such a conduct on the part of the person paying it as to disentitle him from recovering it; one instance is that of being a party to the perpetrated fraud. Another instance is where moral turpitude is attributable to the person who paid the money: The decision in *Ledu Hira* v. *Lal Bose* (1) is an illustration of the latter class of cases. The observations of the learned Judges in that case show that if there is no moral delinquency, the plaintiff can sue to recover. *Gulabchand Paramchand* v. *Fullbai Harchand* (4) and *Haribhai Hansji* v. *Nathubhai Ratnaji* (5) lay down the same principle. These decisions derive support from a catena of English decisions which have held that even against a stakeholder a suit for money will lie if he had not parted with the stake money and the claim is founded not on the result of the wager. It is an a fortiori conclusion from these authorities that where money is not left with a stakeholder nor entrusted on condition that its disposal is to be determined by the result of the uncertain event, the money deposited as security must be returned. *Hampden* v. *Walsh* (6), *O'Sullivan* v. *Thomas* (7) and *Burge* v. *Ashley* (8) enunciates the proposition we have referred to.

In our opinion the general principle that a plaintiff whose hands have not been tainted by corruption and who has not committed any act which fixes him with having been a party to a fraud is entitled to get back the money which he left with another is applicable to the present case. We uphold the judgment of the Courts below on this ground and dismiss the second appeal with costs.

The memorandum of objections is also dismissed with costs.

S.N./R.K. *Appeal dismissed.*

2. (1917) 41 Bom 546=40 I C 1002.
3. (1917) 41 I C 783.
4. (1909) 33 Bom 411=3 I C 748.
5. A I R 1914 Bom 102=23 I C 602=38 Bom 249.
6. (1876) 1 Q B D 189.
7. (1895) 1 Q B 698.
8. (1900) 1 Q B 744.

A. I. R. 1918 Madras 164

SPENCER, J.

Ravri Manikyam and *others* —Petitioners, In re.

Criminal Revn. Case No. 530 of 1917, and Criminal Revn. Pet. No. 415 of 1917, Decided on 7th September 1917, against Proceedings of Joint Magistrate, Narasapur Divn.

Criminal P. C. (1898), Ss. 145 and 439—Proceedings under S. 145—Mere expression of opinion by Magistrate — No final order passed —High Court cannot interfere.

Where in proceedings under S. 145 a Magistrate merely expresses his opinion on the documents produced and their legal effect without passing final orders and there is no award of possession to either party the High Court cannot interfere in revision. [P 165 C 1]

C. Sambasiva Rao for *T. Prakasam*—for Petitioners.

Order.—It is clear that the Magistrate has made no final order under Ch. 12, Criminal P. C. He says in his proceedings of July 17th:

"I refrain from taking proceedings under either of the aforesaid sections (S. 145 or 107, Criminal P. C.) just at present. If the counter-petitioners persist in interfering with the petitioners

possession of the mill, I shall be constrained to institute regular proceedings under S. 107, Criminal P. C. but I hope and trust that they will refrain from doing so. I wish to make it clear that I am not actually issuing an order disobedience to which is ipso facto a criminal offence."

Also it does not appear that he issued any order as is required by Ss. 145 (6), forbidding all disturbance of the possession of the successful party until eviction in due course of law. The Magistrate in fact stopped the proceedings that he commenced under S. 145, and stated in writing what his opinion was as to the documents produced in the case and as to their legal effect but I do not find that he exercised his powers as a Magistrate and passed any order authorised by any section of the Code of Criminal Procedure. There is no award of possession to either party. Under these circumstances I must decline to interfere under Ss. 435 and 439, Criminal P. C. I dismiss the petition.

S.N./R.K. *Petition dismissed.*

A. I. R. 1918 Madras 165

SESHAGIRI AIYAR AND NAPIER, JJ.

Yamajala Sanjevudu—Plaintiff—Appellant.

v.

Nakka Venkadu and *others*—Defendants—Respondents.

Second Appeal No. 1737 of 1916, Decided on 30th November 1917, against decree of Temporary Sub-Judge, Ellore, in A. S. No. 113 of 1915.

(a) Civil P. C. (1908), O. 21, Rr. 97, 99 and 101—Order under S. 335 of old Code not challenged within year—Order not executed—Register can plead absence of title.

An order uuder S. 335, Civil P. C. 1882, is final if no suit is insitituted questioning its correctness within a year in the sense that it cannot be re-opened after a year, that is, in cases where the order upholds the auction purchaser's right to possession if there is an application for delivery within the time allowed by law the party against whom the order is passed cannot be heard to say that he will not deliver possession as he has a better title. But where the order is unexecuted and the resister remains in possession he is not estopped from pleading in defence to a suit for possession that the plaintiff has no title to recover: 7 *W. R*, 87, *Foll.* 10 *Mad.* 357 & 9 *M. L. J.* 131, *Diss.* [P 165 C 2, P 166 C 1]

(b) Civil P. C. (1908), O. 21, Rr. 99 and 101—Person not claiming through judgment-debtor—His title cannot be investigated under present Code.

The Civil Procedure Code of 1903 does not provide for the investigation of the claim of an objector who does not derive title under the judgment-debtor. The provision to that effect in S. 335, Act 14 of 1882, has not been reproduced in the new Code. [P 165 C 2]

P. Narayanmurthi—for Appellant.

B. Narasimha Row—for Respondents.

Judgment.—This is a suit by an auction purchaser to recover possession. He applied in execution for possession but was obstructed by defendants. The District Munsif passed the following order upon the application:

"the counter petitioner has no witnesses. It is not necessary to take evidence in this case. It is ordered that the property be delivered over to the petitioner at once. In case the counter petitioners raise any further obstruction they will be committed to jail."

No attempt was made to obtain possession and we accept the finding of the Courts below that possession remained all along with the defendants. As more than 3 years had elapsed from the date of the order above referred to the plaintiff brought this suit for possession basing his title on the sale certificate. The District Munsif held that the order for possession precluded the defendants from disputing plaintiff's title. On appeal the Subordinate Judge held that the order for possession was not passed on investigation and that the defendants were not therefore estopped from showing that plaintiff acquired no title to the property. On the merits he found that the judgment-debtor, as whose property the suit site was sold had no title to it at the time of the auction sale and dismissed the suit. We agree with his conclusion. Under S. 335, old Civil P. C. the law provided for the investigation of the claim of an objector who did not derive title under the judgment debtor. The present Code has abolished this provision. It was anomolous that the rights of a person who was no party to the suit should be concluded by summary proceedings in execution: and the Legislature has removed this anomaly in the present Code. But as the present case is governed by the old Code we have to see whether the order passed against the defendants has the effect of preventing them from showing that their title is superior to that of the plaintiff. S. 335 by its last clause provides that: "the party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property but subject to the result of such suit if any the order shall be final."

This can only mean that the particular order if given effect to should not be allowed to be reopened after a year, that is to say, if there was any applica-

tion for delivery of possession within the time allowed by law the defendant could not be heard to say that he would not deliver possession as he had a better title than the plaintiff. But where the order remained unexecuted and the defendant continued to be in possession, he is not estopped from pleading in defence to a suit for possession that the plaintiff has no title to recover. He is not disputing the order passed in execution which S. 335 said was conclusive on him. He is contesting the plaintiff's right by proving that he has got a superior title. The decision in *Fidaye Shikdar* v. *Ozeeooddeen* (1) is on all fours with the present case and we think that it was rightly decided. Sadasiva Aiyar, J., expresses concurrence with the view taken in that case in *Ayyakutti Mankondan* v. *Periasami Koundan* (2). It is not necessary to consider the arguments addressed to us that the learned Judge is wrong in his view that where possession of a share is given by the order of the Court that is not actual possession; we agree with him when he says that where the obstructor has not been dispossessed, the order does not conclude him in a subsequent suit from proving that the plaintiff has no title to sue.

As regards *Achuta* v. *Mammavu* (3) there was a finding that the objector had no title; consequently it was incumbent on him to sue to establish his title. In *Muhamod* v. *Ayyappan* (4) possession was given to the auction purchaser which was not contested within a year. A subsequent suit by the objector based on title was disallowed apparently on the ground that the order as to possession which was carried into effect had to be vacated if the suit is to be decreed.

We think these authorities do not affect the present question. In our opinion the defendants whose possession was not disturbed by the order are entitled to sustain their right to continue in possession by proving that plaintiff's title is defective. The decree of the lower appellate Court is right and we dismiss the second appeal with costs,

S.N./R.K. *Appeal dismissed.*

1. (1867) 7 W R 87.
2. (1915) 31 I C 615.
3. (1887) 10 Mad 357.
4. (1899) 9 M L J 131.

A. I. R. 1918 Madras 166

SESHAGIRI AIYAR AND NAPIER, JJ.

Khaji Sayyid Yusuf Sahib and *others* —Plaintiffs—Appellants.

v.

Ediga Narasimhappa and *others*—Defendants—Respondents.

Second Appeal No. 1138 of 1916, Decided on 8th November 1917, from decree of Dist. Judge, Bellary, in Appeal Suit No. 113 of 1914.

Civil P. C. (1908), Ss. 11 and 91—Private individual cannot sue for declaration of public right—He can sue for special damages—But Court having given declaration in such suit it operates as res judicata.

A private individual is not competent to obtain a declaration that a right is a public one, but he is entitled to sue for damages for injuries sustained by him in the exercise of his privileges connected with a public right. [P 167 C 1]

Where the Court gives a finding in such a suit that the right is a public right, it becomes res judicata in a subsequent litigation by virtue of Expln. 6, S. 11. [P 167 C 1]

L. A. Govindaraghava Aiyar—for Appellants.

H. Balakrishna Rao — for Respondents.

Judgment.— The matter has been fully argued before us and we have come to the conclusion that the District Judge's judgment cannot be supported. In the previous litigation the present plaintiff 1's father claimed a right of way over the path in question. The case was taken up to the High Court and it was held in *Khaji Sayyad Hussain Saheb* v. *Ediga Narasimhappa* (1), accepting the finding of the lower appellate Court in that behalf, that the path was not a public one and that the plaintiff was entitled to maintain the suit without alleging special damage. Accepting this decision the present plaintiff 1, who is the son of the plaintiff in the previous litigation, sued along with three others the same defendants for a declaration that the path is a public one. The necessary sanction under S. 91, Civil P. C., was obtained to institute the suit. The defendants now plead that it is a private right of way. The District Munsif overruled this plea and gave plaintiffs a decree. On appeal the District Judge has reversed this judgment and has dismissed the suit.

Apart from the view we take in regard to the binding nature of the previous judgment, it seems to us that it

1. (1912) 16 I C 962.

would not conduce to the proper administration of justice, if a defendant who has been defeated on a particular view of the facts put forward by him is allowed to resile from that position and to raise a defence inconsistent with his original contention. Even if there is no question of res judicata, we would have held that the defendants are estopped from questioning the judgment to which they were parties : see *Sayam Ramamoorthi Dhora* v. *Secy. of State* (2).

But we think that the present contention is res judicata and that Expln. 6 to S. 11 governs this case. The essence of a litigation, which is carried on by a private party for injuries sustained by him in the exercise of a right common to him and others, is that there is a public right and that the party suing has suffered special damage in enforcing that right. The fact that on obtaining this individual remedy, it is not open to him to get a declaration embodied in the decree that the right is a public one, will not affect the principle of res judicata. Mr. Balakrishna Rao's citations from English decisions only established that a private individual is not competent to obtain a declaration that a right is a public one. The vindication of such a right is either by indictment or by a suit by the Attorney-General. But no authority has been quoted for the proposition that an individual is not entitled in his own right to seek redress in respect of the injuries sustained by him in the exercise of his privileges connected with a public right. That is a common law right and when that right is put in Court there must necessarily be a finding whether the special injury was sustained by the plaintiff in exercising his rights as a member of the public. When that adjudication is given, the finding regarding the right becomes res judicata in a subsequent litigation by virtue of Expln. 6 to S. 11 which gives a comprehensive definition of the terms "under whom they or any of them claimed." Mr. Balakrishna Rao's argument that the enactment of S. 91 prohibits a member of the public from obtaining a finding regarding the public right would render nugatory Expln. 6 to S. 11 and would strike at the root of the common law right which every individual possesses in these matters. There is authority also for the view we have taken. *Godimella Rangamma* v. *Punchangam Narasimhacharyulu* (3) decides the converse of the present case, but the principle is there recognized as argued by Mr. K. V. Krishnaswami Ayyar that the right litigated in the first litigation need not be on behalf of the general public, provided the foundation of the claim is that the injury was suffered in exercising a right common to the plaintiff and others. *Muhammad Amir* v. *Sumitra Kuar* (4) is also to the same effect. The decision in *Rama Das* v. *Hanumantha Row* (5) under S. 92 of the Code enunciates the same principle.

For these reasons we are of opinion that the finding in the previous litigation that the suit path is public one operates as res judicata in the present suit and that it is not open to the defendants to go behind that finding. We must reverse the decree of the District Judge and restore that of the District Munsif with costs here and in the lower appellate Court.

S N./R.K. *Appeal allowed.*

2. (1913) 36 Mad 141=19 I C 656.
3. (1916) 35 I C 116.
4. A I R 1914 All 441=24 I C 97=36 All 424.
5. (1911) 36 Mad 364=12 I C 449.

A. I. R. 1918 Madras 167

ABDUR RAHIM AND OLDFIELD, JJ.

Lakshmanan Chetty—Plaintiff—Appellant.

v.

Nagappa Chetty and *another*—Defendants—Respondents.

Civil Appeal No. 30 of 1917, Decided on 23rd November 1917, against decree of Temporary Sub-Judge, Sivaganga, in Original Suit No. 26 of 1916.

Civil P. C. (5 of 1908), O. 30, R. 9—Suit between firms having common partners for moneys does not lie without asking for account—R. 9 does not lay as to when and how suit between firms lie—It only provides for certain cases.

No suit lies as between partners or between firms having common partners for recovery of moneys without asking for accounts : 32 *Mad.* 76 ; 34 *Mad.* 112 and 28 *Mad.* 314, *Dist.* 26 *Bom.* 739 and 1 *C. L. R.* 545, *Foll.* [P 169 C 1]

Order 30, R. 9, contemplates the possibility of suits between a firm and one or more of the partners therein and suits between firms having one or more partners in common, but it does not profess to lay down when and under what circumstances such suits would be entertained and it is not within the scope of the Civil Procedure Code to lay down any such proposition.

[P 168 C 2]

K. V. Krishnaswami Aiyar—for Appellant.

K. Rajah Aiyar—for Respondents.

Judgment.—This is a suit instituted to recover a sum of Rs. 8,000 odd from the defendants. The plaintiff and the father of the defendants were partners in a firm, at first called R. M. S. L. P. P. and afterwards changed into R. M. S. L. S. This firm carried on business in Soomangai and Kyato. The plaintiff had also a firm of his own at Rangoon. The case of the plaintiff is that his Rangoon firm called R. M. S. L. advanced sums of money on different occasions to the defendants' firm of which he himself is a partner, that the latter firm was dissolved long before the institution of the suit, and on taking accounts as between the plaintiff's firm and the defendants' firm it was found that a balance Rs. 25,000 odd was due to the plaintiff's firm. The contract between the plaintiff and the father of the defendants with relation to the partnership was that the plaintiff was to have $\frac{3}{4}$th share and the father of the defendants $\frac{1}{4}$th share and we may also take it, so far as we can gather from the pleadings, that the plaintiff's share of the liability was $\frac{3}{4}$ths to $\frac{1}{4}$th of the defendants' father's. The plaintiff sues to recover, not the entire sum of Rs. 25,000 odd which was found to be due from the R. M. S. L. S. firm to the plaintiff's firm, but $\frac{1}{4}$th of that sum on the basis that his liability being to the extent of the $\frac{3}{4}$ths, the defendants would only be liable for $\frac{1}{4}$th of Rs. 25,000 odd, and that nothing is due to anybody else from the R. M. S. L. S. firm. It is not proved that there are any other debts due from that firm. But we may take it to be proved that there are outstanding in respect of a decree debt due to the R. M. S. L. S. firm and otherwise. The question is whether a suit of this character is maintainable.

The plaintiff is practically suing himself and his partner, and he says that for the debt due to himself $\frac{3}{4}$th of that liability falls upon him. That is to say, he really seeks to establish a certain liability against the defendants on the basis of accounts. The defendants do not admit that upon the taking of the entire account the amount due would be that claimed by the plaintiff. It may be said on behalf of the plaintiff that if there were any other assets due to the R. M. S. L. S. firm, the only difference which it would make would be that the plaintiff will have his share of those assets as well. But that does not by any means conclude the question. We may take it that one partner can sue another in certain cases, such as the one which this Court had to deal with in *Karri Venkatareddi* v. *Kollu Narasayya* (1). There the defendant partner was sued upon a special agreement to hand over certain promissory notes and other documents to the plaintiff. In such a suit no question of accounts arose. It was therefore held that to entertain a suit of that character could in no way work injustice to the defendant partner. The cases referred to in *Thiruvengada Mudaliar* v. *Sadagopa Mudaliar* (2) and *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (3) are different cases. In these, the suits were to recover a share of a particular item of partnership assets after the dissolution of partnership and the decisions lay down the principle and the conditions under which such suits will lie. They have no bearing on the present case.

Mr. K. V. Krishnasami Ayyar, the learned vakil for the appellant, relies very strongly on the provisions of O. 30, R. 9, Civil P. C., which says this order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and enquiries may be directed to be taken and made and directions given as may be just. Now all that can be said is that this rule contemplates the possibility of suits between a firm and one or more of the partners therein and suits between firms having one or more partners in common. But it does not profess to lay down when, and under what circumstonces, such suits would be entertained, and it would not ordinarily be within the scope of the Civil Procedure Code to lay down any such proposition. The rule in question only lays down that if such suits are entertained, the procedure to be followed is that set out in the order. On the other hand, we

1. (1909) 32 Mad 76=1 I C 384.
2. (1910) 34 Mad 112=7 I C 811,
3. (1905) 28 Mad 344.

have been referred to at least two cases which seem directly to bear on the point, *Kashinath Kedari* v. *Ganesh* (4) and *Chunder Sikhur Biswas* v. *Ram Buksh Chetlungee* (5). The facts of those cases are very similar to the present case, and it was held that such suits would not lie.

We must however say that we do not understand the reasons given by the Subordinate Judge in support of his view on this question. He says that it is shown by the evidence that there are some assets belonging to the firm and therefore the suit ought to have been instituted against the assets. We do not understand what the learned Subordinate Judge means. He could have been right if he had held that a suit like this could be entertained as the plaintiff has not asked for accounts. But there is no meaning in his saying that the suit ought to have been "against the assets." He also decided against the plaintiff on other grounds, namely, that certain entries in books of accounts filed by him had not been proved; and, even if proved, they would not be sufficient in law to support his case. It is unnecessary, in view of what we have expressed as regards the maintainability of the suit, to pronounce any opinion on that question. We dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

4. (1902) 26 Bom 739.
5. (1878) 1 C L R 545.

A. I. R. 1918 Madras 169

SPENCER AND KRISHNAN, JJ.

Subramanian Chetty — Plaintiff—Appellant.

v.

Vijia Raghunatha Pillai and *others*—Defendants—Respondents.

Second Appeal No. 1803 of 1915, Decided on 4th September 1917, against decree of Sub-Judge, Sivaganga, in Appeal Suit No. 27 of 1913.

Fishery—Suit for injunction by lessee of village restraining obstruction of prescriptive right—Defendant must prove 12 years adverse possession—Ownership of tank does not necessarily carry with it fishery right—It must be proved specially when defendant pleads adverse title — On proof of adverse possession lost grant may be presumed—Acquisition of fishery right by prescription is neither unlimited nor unreasonable—On evidence being let in by both sides absence of issue does not justify remand—Civil P. C. O. 41, R. 23.

Plaintiff, the lessee of a zamindari village, claimed the exclusive right of fishing in a tank situated therein and sued defendants, the raiyats, for an injunction restraining them from obstructing him in the enjoyment of such right. Defendants pleaded that they had acquired a prescriptive right to fish in the tank on payment of 'pasivari' cess to the zamindar. The plea was upheld by the Court, though no specific issue was framed on the point :

Held : (1) that the plaintiff must prove both his title and possession within 12 years before suit ; (2) that proof of plaintiff's ownership of the tank did not relieve plaintiff from establishing that the ownership of the tank carried with it the exclusive right of fishing therein, especially after evidence had been let in by defendants to prove the prescriptive right which they claimed ; (3) that on proof of a prescriptive title by defendants, it was competent to the Court to presume a legal origin for it on the principle of a lost grant ; (4) that defendants' right by prescription could not be negatived on the ground of its being unlimited, unreasonable or without stint : (5) that as evidence was let in by the lower Courts on the question of prescription, it was not necessary to remit the case back for raising an issue and recording a fresh finding.

[P 170 C 1,2]

A. Krishnaswami Ayyar — for Appellant.

K. V. Krishnaswami Ayyar and *K. V. Sesha Ayyangar*—for Respondents.

Spencer, J. — In substance the case set up by the plaintiff in this suit was that, instead of exercising his admitted right to collect rent at a fixed rate from the raiyats of Manjoori village for fishing in the village tank, he had a right to catch the fish himself to the exclusion of those raiyats who had hither to been enjoying this privilege, or to lease out the fishery to strangers. In the plaint, after setting out his title, which is based on a seventy years' lease of the village of Manjoori from the Rajah of Ramnad (vide Exs. A and B), he proceeded to allege that the defendants had obstructed him in the enjoyment of his alleged fishery rights, and to ask for a declaration of his title and for an injunction restraining defendants from interfering with his enjoyment, and for damages. The District Munsif dismissed the plaintiff's suit, finding on issue 1 that the plaintiff was not the exclusive owner of the fishery in the plaint tank. This finding would have been enough for the dismissal of the suit. There were also other issues. Issue 6 raised the question whether the plaintiff or his predecessor-in-title had exclusive possession of the fishery within

12 years before suit. The District Munsif found this issue also against the plaintiff and added that the raiyats had, by long enjoyment, acquired a prescriptive right to the fishery, which was a finding that did not arise out of the issue as framed. On appeal the Subordinate Judge found that the plaintiff had failed to establish either title or enjoyment within the statutory period and he dismissed the appeal on both grounds.

It is now argued that the lower Courts were in error in requiring the plaintiff to prove possession within 12 years of suit under Art. 142, Lim. Act, and that the article of limitation applicable to this suit being Art. 144, the burden of proving adverse possession for over 12 years should have been cast on the defendants. It is true that the District Munsif has found a prescriptive title to exist in the defendants without an issue being raised on the question and that the Subordinate Judge has not found it at all. I am of opinion that Art. 142 was not appropriate to this suit for a declaration of title and an injunction, and that, if the Courts found that present possession was not with the plaintiff, the proper procedure was to refuse to give a declaration of title under the proviso to S. 42, Specific Relief Act, for the reason that the plaintiff was neither in possession nor had asked for possession to be given him. But on the allegations of fact in the plaint, no question of limitation arose, and the defendants' claim in their statement to have acquired a title by prescription was not put in issue at the trial.

The finding of both Courts on the first point, that of title, was enough to justify the dismissal of the suit, and that being a finding of fact, we cannot interfere with it in second appeal. I do not think that the mere fact that the plaintiff had taken a lease of the village including the tank and had spent money in repairing the tank, relieved him from the necessity of proving his further assertion that the ownership of the tank carried with it the exclusive right of fishing in the tank, especially after evidence had been let in on the other side to prove that actual enjoyment of the fishery for a long series of years was with the raiyats. I agree with the Subordinate Judge's observation that, even if the plaintiff be the owner of the tank, that position is fully consistent with the raiyats having the right of fishery over the same. The Subordinate Judge, having found

> "beyond any shadow of doubt that from the earliest period the fishery right in the suit tank is being enjoyed by the raiyats subject to the payment of a fixed rent",

might very well have found a title to exist in the defendants on the principle of a lost grant ; as was done by the Privy Council In *Bhola Nath Nundu* v. *Midnapore Zamindary Co.* (1) in respect of a right of pasturage enjoyed by a corporate body of villagers from time immemorial. But I do not consider it necessary to call for a finding on the point, nor do I consider in the circumstances of this case that any question of "reasonableness" arises. The second appeal fails and must be dismissed with costs.

Krishnan, J.—The point at issue between the parties in this second appeal is whether plaintiff is entitled to take the fish from the Manjoori tank and channel in the zamindari of Ramnad, excluding the defendants from exercising any right of fishery in them. Plaintiff claimed the exclusive right as the lessee of the zamindar and brought this suit on the footing that he was in possession and enjoyment of this right and that the defendants, who are the raiyats of the Manjoori village, were trying to obstruct him. The main plea of the defendants was that they and their ancestors had been exclusively enjoying this fish "in pursuance of a long established custom" on payment of a settled "pasivari" or fishery cess to the zamindar, which was included in their pattas. They also pleaded limitation. The lower appellate Court held that plaintiff had failed to prove his title to the fishery and enjoyment of it within the statutory period of 12 years, applying Art. 142, Sch. 1, Lim. Act, to the case, and dismissed the suit on the merits as well as on the bar of limitation. Plaintiff has appealed to us and has contended that, on the question of title, defendants should have been called upon to prove the right they asserted as the tank in question being within the ambit of the zamindari, its ownership and possession should have been taken to be prima facie in the zamindar or his assignee, the plaintiff, and the right to fishery which is only an incident of the right of ownership should also be simi-

1. (1904) 31 Cal 503=31 I A 75 (P C).

larly taken to be prima facie in them. This argument, so far as it goes, is, in my opinion, well founded. But the Subordinate Judge has found that defendants have established on evidence the continued exclusive enjoyment they pleaded. That Judge says in para. 2 of his judgment that

"ancient documents produced on the defendants' side show beyond any shadow of doubt that, from the earliest period, the fishery right in the suit tank is being enjoyed by the raiyats subject to the payment of the fixed rent."

In fact it is clear on the evidence that the zamindar never tried to interfere with the raiyats in the matter of fishing and it is only after the plaintiff lessee came on the scene that attempts were made to so interfere ; but all such attempts were frustrated by the opposition of the raiyats. On these facts it seems to me there is a clear presumption in defendants' favour of a legal origin of their title. Lord Loreburn, Lord Chancellor, has stated in the case of *Harris* v. *Chesterfield* (*Earl*) (2), cited for the appellants on another point, the law on the question thus :

"When long and continuous enjoyment is established, a lawful origin will be presumed if it is reasonably possible. This doctrine has been repeatedly affirmed and in no case better illustrated than in that of *Goodman* v. *Saltash Corporation* (3)."

The doctrine was applied by the Privy Council in a case of pasturage rights over waste lands claimed by the tenants of a village against their zamindar: see *Bhola Nath Nundi* v. *Midnapore Zamindary Co.* (1). Although the lower Court has not expressly referred to this doctrine, it has considered the evidence of long enjoyment and thrown the burden on the plaintiff to establish his title in defeasance of the defendants' claim arising from it and I think it is right in the circumstances in doing so, as there is a clear presumption in favour of the legal origin of the defendants' claim. It may well have been the result of a lost grant by a zamindar or a lost agreement by him with raiyats allowing them to take the fish permanently on payment of 'pasivari'. It was pressed upon us that as the question of presumption of a legal origin was not pointedly raised in the lower Courts, we should send the case back for trial on the point and finding thereon. I do not think it necessary to do so, as the facts required for it were stated by the defendants and evidence all taken and the Courts have given their opinion on that evidence. Issue 1 was wide enough to cover the question. It is not stated that there are any new facts to be considered with reference to this point. In similar circumstances their Lordships of the Privy Council disapproved of the course of sending the case for a finding : see the case in *Bhola Nath Nundi* v. *Midnapore Zamindary Co.* (1) already cited. It was next urged that from the very nature of the right claimed here it should be held to be one unknown to law and for which no legal origin could be presumed, and reliance was placed on the case in *Harris* v. *Chesterfield* (*Earl*) (2) above cited. That was a case where "a right by prescription in a *que estate for a profit a prendre in alieno solo*", viz., the right to take fish in the river Wye at a place where the bed of the river was in the possession of Lord Chesterfield and his co-plaintiff, the river being non-tidal there, was claimed by certain villagers as appurtenant to their tenements and the right claimed was expressly stated to be without stint and for commercial purposes, namely, to sell the fish in the market. Their Lordships by a majority of one held that such a right was unknown to law and should not be recognized, as the exercise of such an unlimited right tended to the entire destruction of the subject-matter of the right. The reasoning is clearly put in the judgment of Cozens Hardy, M. R.; see the report of the case of *Chesterfield* (*Earl*) v. *Harris* (4) in the appeal Court, particularly the observations on p. 410. That reasoning was adopted by the majority of their Lordships.

Now such a question as this has not been raised in the present case ; and consequently the facts necessary for it have not been investigated. In the first place, it is not clear whether the right claimed here is not a right in gross vested in the raiyats of Manjoori village as a body, in which case it may well be that no question of unreasonableness will arise : see the observations of Buckley, L. J., in the same case on appeal in the middle of the p. 421. In the next place, assuming the right claimed is one appurtenant to the holdings of the raiyats in the village, it does not seem to be an unlimited one,

2. (1911) A C 623.
3. (1882) 7 A C 633.
4. (1908) 2 Ch 397.

and without stint as in the English case. What the raiyats claim is the right to take fish in the manner they have been taking for all these years. Such an exercise of the right has not hitherto led to the destruction of the fish in the tank nor apparently even to its diminution in numbers. There is no reason to assume a different result in the future. If there is excessive fishing the zamindar may have a right to restrain it, but that is not the question here. I hold that the claim of the raiyats cannot be rejected in second appeal on the ground of unreasonableness, as argued. I may observe that, though the rights of fishery in other people's waters are very common in India, particularly in the northern parts, no case has been cited to us from any of the Indian Reports where such a right has been negatived on the ground put forward above. I am therefore of opinion that on the finding of the lower Courts that plaintiff has failed to prove his title, which is a finding of fact on the evidence in the case and which we must accept in second appeal, his claim to disturb the long established practice in the village regarding the fishing in the tank was rightly rejected and his suit was rightly dismissed. It is not necessary to express any opinion on the question of limitation or on any other question raised in the case. I agree that the second appeal fails and should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 172

ABDUR RAHIM, OFFG. C. J., SESHAGIRI AIYAR AND PHILLIPS, JJ.

K. N. Rama Aiyar—Defendant—Appellant.

v.

G. Parthasarathy Chetty and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 102 of 1915, Decided on 7th August 1916, against the judgment of Sadasiva Aiyar, J. in O. S. A. No. 88 of 1913.

(a) Assignment—Equitable assignments—Authority to collect decree and pay decree holder out of proceeds amounts to equitable assignment.

Defendant authorised plaintiff to collect certain decrees and to pay a certain sum out of the proceeds to himself:

Held: that this amounted to an equitable assignment of the decrees in plaintiff's favour.

[P 177 C 2]

(b) Assignment—Equitable assignment—Agreement that debt shall be paid out of specific fund or from money received from particular source, amounts to equitable assignment.

An agreement between an assignor and an assignee that a debt shall be paid out of a specific found, or an undertaking to pay over to another, moneys to be received from a particular source amounts to an equitable assignment. [P 177 C 2]

L. A. Govindaraghava Aiyar—for Appellant.

T. Narasimha Aiyangar and *C. Narasimhachariar*—for Respondents.

Sadasiva Aiyar, J.—The question for decision in this appeal is whether the facts appearing from the oral and documentary evidence in this case have created either of the two following rights in the plaintiff: (1) the right of a legal or an equitable assignee of the decree in Original Suit No. 90 of 1901 on the file of the Subordinate Judge's Court of Trichinopoly; (2) the right to a charge on the amount of that decree debt to the extent of the sums entered in Sch. A of the plaint. (The phrase "equitable assignment by way of charge" is used in many English and Indian cases, but I do not like it as it seems to me to be an ambiguous phrase likely to cause mental confusion. It may mean an assignment of that portion only of the right assigned which portion is sufficient to satisfy the amount due to the assignee; or it may mean the mere creation of a charge in the assignee's favour, the assignor retaining the ownership of the moneys due to him and the right to take legal or other proceedings to recover the moneys. I think that Courts in India ought not to perpetuate distinctions between legal rights and equitable rights and should not hold that there might be an equitable assignment which is a thing distinct from a legal assignment. I am aware that in *Shair Mull* v. *Singaravelu Mudali* (1), the phrase "equitable assignment" is used by two eminent Judges. In that case, solicitors got a power-of-attorney from their client authorising them to receive all moneys due to their client under a decree and they also got a separate letter from their client authorising them to satisfy their (the solicitors') claim out of the moneys so received by the solicitors. It seems to me that instead of calling their right as due to an "equitable assignment" with or without the addition of the words "by way of charge" the created right might have been more appropriately and

1. (1883) 6 Mad 294.

simply called "a charge" on the moneys recoverable by the client under his decree.

Such a charge on moneys to be recovered, while not affecting bona fide assignees of the decree without notice and for valuable consideration, cannot be ignored by the attaching creditors of the creator of the charge or by the assignees of the decree with notice of the charge so created. I notice that in a subsequent case reported as *Palaniappa* v. *Lakshmana* (2) to which also Muthusami Aiyar, J. [who took part in *Shair Mull* v. *Singaravelu Mudali* (1)] was a party, the learned Judge called the plaintiff's right created under a similar state of facts as a charge, though he quoted English cases which make distinctions between legal assignments and equitable assignments which have to be completed into legal assignments. As far as I could understand, a legal assignment of moneys or funds seems to be a transfer of the rights in funds already realised and earmarked, while an equitable assignment seems to be the transfer of the right to moneys which have hearafter to be recovered and realized, the equitable assignment being, I take it, converted into a legal assignment as soon as the moneys are realized. An 'equitable assignment by way of charge" seems to mean no more than a charge created on moneys to be realized thereafter. As I said before, I am unwilling that in India the assignment of a right to receive moneys, or a chose in action, should be called an 'equitable assignment' instead of using unambiguous expressions showing the exact right assigned.

In the present case, I am inclined to hold that the agreement Ex. B, dated 14th July 1909, when read with the power of attorney Ex. C, executed on the next day, did create, according to the case in *Shair Mull* v. *Singaravelu Mudali* (1), a charge in the plaintiff's favour on the amount of the decree passed in the suit of 1901, though there was no assignment of the decree itself. I am further of opinion that this charge was not given up in December 1909, when the plaintiff accepted the new arrangement proposed by defendant 1 to him in the letter Ex D. What was given up was only the plaintiff's right to exercise his powers under the power of attorney, Ex. C, to himself take steps to execute the decree as agent of defendant 1 and to get into his own hands directly the moneys realized in such execution. In Halsbury's Laws of England, Vol. 4, p. 376 and 377 (Para 800), twelve different kinds of transactions are said to be "good, equitable assignments." The headings under which the present case could fall are the 4th, 8th and 9th:

"An agreement between an assignor and an assignee that the debt shall be paid out of a specific fund coming to the debtor. A declaration in writing by the assignor that he holds at the disposal of the assignee a sum due to him from a third party." "An undertaking to pay over to another moneys to be received from a particular source"

In the case in *William Brandt's Sons and Co.* v. *Dunlop Rubber Company* (3) there was not only such an agreement between the creditor and the debtor, but the creditor wrote to the debtor's debtor mentioning the agreement and requiring him to sign an undertaking to pay the money to the creditor. Notice to the debtor's debtor is however not treated as of importance except as showing the intention of the parties. Lord Halsbury's Book quotes however several other English cases in the foot-notes (h), (l) and (m) at p. 377 in support of the broad propositions enunciated in the 4th, 8th and 9th headings. In *Gur Prasad* v. *Gorakhpur Bank Ltd.* (4) the debtor's debtor assented to the charge notified by the creditor and the learned Judges say:

"It is unnecessary to consider whether the assignment would have been valid if the debtor's debtor (who was a bank) had refused to recognise the assignment, as it expressly recognised the assignment"

by way of a charge. There are however observations in that case which are on the same lines as those made in the English cases cited in Halsbury. I do not feel myself strong enough to ignore the cases in *Shair Mull* v. *Singaravelu Mudali* (1) and *Palaniappa* v. *Lakshmanan* (2), already referred to. Those cases seem to decide that a charge could be created in favour of *B* by *A* on unrealised funds due to *A*, if a written promise is given by *A* to pay the sums due to *B* out of these funds when realised and also if *A* gives a power of attorney to *B* to realise those sums and authorizes *B* to pay himself out of those sums when realized The plaintiff is therefore entitled to a charge as against defendant 2 who

2. (1893) 16 Mad 429.

3. (1905) A C 454.

4. A I R 1914 All 279=24 I C 385=36 All 507.

knew all the facts, and I would dismiss the appeal. But to borrow the language of Brett, J. in the case in *Field* v. *Megaw* (5), though in that case it was held on the facts that no charge was intended to be or was created:

"I must confess I have entertained some doubts. The law upon this subject is brought to such an exquisite degree of refinement that it is by no means easy to understand it."

I would therefore pass no orders as to the costs of this appeal.

Napier, J.—This is an appeal from Civil Suit No. 142 of 1912 on the Original Side of this Court in which the Chief Justice (then Wallis, J.) has held the plaintiff entitled to a charge on a certain sum of money in deposit in Civil Suit No. 20 of 1912 in priority to the admitted interest of defendant 2 in the same amount. The appellant contends that, whatever be the rights of the plaintiff as between himself and defendants 1 and 3 his interest does not amount to a charge. The learned trial Judge, on the authority of *William Brandt's Son & Co.* v. *Dunlop Rubber Company* (3), has held that no special form of words is necessary to effect an assignment of an interest, whether that assignment be absolute or by way of charge and that all that has to be gathered is the intention of the parties. I entirely agree with this view. The learned Judge who had the witnesses before him further came to the conclusion that what happened should be gathered from the documents which have been exhibited in the case as being more reliable than the oral evidence. This expression of opinion by the learned Judge is of importance, because I should be slow to differ from him on a matter of appreciation of oral evidence; but I have come to a conclusion different to that taken by him on the result of the documents. The history of this transaction is to be found in Exs. A, 9, E, B, C, D, F, 3, 12, K and G. The property, the subject of the alleged charge consisted of two decrees obtained by the father of defendant 4 against strangers to this suit. These decrees were assigned by defendant 3, the agent and partner of the said defendant 4, to defendant 1 by Ex. A on 15th December 1908. Exs. 9 is an agreement executed by defendant 1 on the same date with defendant 3 in which he agrees to pay defendant 3, out of the moneys collected, Rs. 6,000 due to him from defendant 4; to take Rs. 4,000 which was due to himself, and to pay over the balance either to defendant 3 or to persons named by him. It appears that nothing was done by defendant 1 towards the execution of these decrees; and an arrangement was come to by defendants 1 and 3 with the plaintiff for the plaintiff to provide money to carry on the legal proceedings.

This appears by Ex. E, dated 10th June 1909, Ex. B of 14th June 1909. and Ex. C of 15th June 1909. By Ex. E those 2 defendants write to the plaintiff that in the matter of his paying sums for the suit of defendant 4 (that is, the decrees) they give this guarantee letter to the effect that they shall be guarantees to take steps and collect, for his filing suits to collect, for his taking steps to collect the amount and for his collecting the amount. This somewhat obscurely worded letter indicates nothing more than that the plaintiff should supply the money and collect the amount, the defendants undertaking to assist him. The next document Ex. B is the document relied upon as an assignment. It is dated 14th July 1909 and purports to be an agreement entered into between defendant 1 and the plaintiff. It is signed by defendant 1 and recites the assignment to him (Ex. A). It contains the following sentences:

"I have given you authority to collect these sums of money. You yourself should lay out the moneys to be incurred for the expenses of collecting the aforesaid decree amounts and keep accounts. As soon as the aforesaid moneys are recovered, you should take Rs 3,500 due to you by defendant 4 and give me Rs. 2,500 and give Rs. 2,300 to defendant 3 and Rs. 1,000 to a person who is a stranger to this suit. You should obtain receipts for having paid the aforesaid persons and give them to me. You should take commission at 5 per cent for the amount recovered. The money that may remain after allowing for the moneys payable to the aforesaid individuals, the expenses and the commission should be handed over to me. The general power of attorney granted to you shall not be annulled until the aforesaid conditions are fulfilled after the debt due on the decree is fully recovered."

The power of attorney, Ex. C, is of the next day. It recites the assignment to defendant 1 and appoints the plaintiff attorney to engage vakil and give vakalat for executing the decrees, for conducting execution proceedings and all other legal steps for recovering the money and binds defendant 1 to accept the proceedings conducted by the plaintiff as if they were done by himself. Contrasting the pro-

5 (1869) 4 C P 650.

ceedings evidenced by the document with those contained in Ex. A, it is to be noted that Ex-A taken by defendant 1 purports to be a deed of transfer of decree written and given to defendant 1 and it states that "I have this day assigned to you all rights for collecting the two decrees," that defendant 4 on whose behalf it is made shall have no connection whatever in future with the decrees, that the assignor is bound to inform the Court of defendant 1 having acquired the right under the decrees by means of this document as assignee and that defendant 1 should take away the name of defendant 4 from the execution proceedings. Ex-9 also speaks of this document as an assignment. The reference to the notification to the Court by the assignor is clearly with reference to O. 21, R. 16, Civil P. C., which requires that when an assignee of a decree applies for execution, notice shall be given to the alleged assignor. It is clear therefore that defendant 1 was wery well aware of the legal process by which a decree should be assigned. Coming to the transaction in dispute we find an entirely different procedure adopted. Ex. E, the letter, says nothing about an assignment. Ex. B differs from Ex-A in form entirely. Nowhere in the whole document is the word "assignment" used. It purports to be an agreement under which the plaintiff shall lay out the moneys to be incurred for the expenses of collecting the amount; it gives him a commission on the amount collected, and it is coupled with a power of attorney from defendant 1. There was no power of attorney given in connection with Ex. A and a power of attorney is not only unnecessary, but in my opinion inconsistent with an assignment. An assignment of a decree is a transfer of property within the smeaning of S. 5, T. P. Act., being an act by which a living person conveys property to another.

The fact that proceedings have to be taken to reduce that property into possession does not necessitate a power of attorney from the transferor, as the right to take all legal steps vests by the assignment. I regard the existence of this power of attorney as very strong evidence against Ex-B, being intended as an assignment, and when that is strengthened by the difference in the language used the conclusion seems to me irresistible. I now turn to the subsequent history to see if there is anything inconsistent with this view. The next document is Ex. D of 9th December 1909. Mr. Govindaraghava Iyer, who appeared for the appellant, argued that this was a forgery. I do not think that this is so; but in my view it does not help the plaintiff. The learned trial Judge considers this as a recognition of an existing charge in favour of the plaintiff. I cannot take that view. In this letter defendant 1 writes to the plaintiff that in consequence of the death of the judgment-debtor there will be further delay, and therefore he and defendant 3 think that the plaintiff had better put off filing the general power and allow defendant 1 to conduct execution proceedings in his own name. He promises that after the money is realised the amount due to the plaintiff will be paid to him. He promises also to repay the money already advanced for the execution expenses. With all respect to the learned Judge, I regard this as a strong indication that there had been no assignment. If there had been an assignment, the non-filing of the general power would not have put an end to the right of the plaintiff to execute the decree. This is to my mind a clear indication that defendant 1 at all events regarded the plaintiff as his agent for collection, that is, a person empowered under O. 3, R. 2, Civil P. C., to act for a party in a suit. It is to be noted that the plaintiff raised no objection to this proposal. He wrote a letter, Ex. F, on 7th March 1910, that is about three months later, in which he called upon defendant 1 to pay the money advanced to vakils and other moneys and stated that he could not patiently wait until defendant 1's assignment matters came round. This has reference to proceedings which were being taken by defendant 4 to set aside the assignment under which defendant 1 was claiming.

The next letter is from defendant 1 to the plaintiff, Ex. 3. The learned Judge in dealing with this letter speaks of it as a disingenuous document in that defendant 1 ignores Exs. B and D altogether and refuses to do what he had promised to do. This is true, but it does not follow that defendant 1 knew that what he was ignoring was an assignment. He certainly ignores his promise to pay the amounts already expended and says nothing about his promise to pay the plaintiff the amount due under the agreement.

But it does not indicate that he was endeavouring to resile from the arrangement made by Ex. D for the payment to the plaintiff of the amount due under the agreement. I have no doubt that the plaintiff accepted the new proposal made by Ex. D, which amounted in effect to a suspension of the planintiff's right to act under the power-of-attorney and a variation of his rights under the agreement Ex. B. His right to recover the money under the power-of-attorney and retain the amount due to him was cancelled and in its place there was a substituted promise to pay the expenses already incurred and to pay the amount which he had under Ex. B been entitled to retain. Up to this stage it seems to me that the plaintiff did not think that he had an assignment, and it seems to me also that for some reason or other he was not willing any longer to advance money, but preferred to be repaid what he had already expended and looked to defendant 1 to pay him the amount promised under Ex. B.

The next document is Ex. 12. It is true that the plaintiff was not a party to it; but undoubtedly he subsequently became aware of it. It is dated 26th November 1910, eleven months after the date of Ex. D, under which the plaintiff stopped financing the execution proeeedings, and is made with defendant 2. It recites the receipt by defendant 1 of money for the expenses of execution proceeding in the decree in Original Suit No. 90 of 1901 and charges that decree and his other properties as security for the advances. Ex. K is the last document between the plaintiff and defendant 1. It has not been referred to by the learned Judge, but in my opinion it throws considerable light on the intention of the parties as to the prior arrangements. It is executed by defendant 1 in favour of the plaintiff and is stated to be an assignment deed. It recites the original assignment Ex. A in favour of defendant 1 and some clerical error therein. It recites that the decree in Original Suit No. 90 of 1901 has been satisfied; that is, the decree which was assigned to defendant 2, and it purports to assign absolutely to the plaintiff the other decree, the subject of Ex. A. The language is:

"I have assigned to you through this the said decree. You may petition the District Munsif's Court to recognise this assignment. Hereafter I have no claim on the said decree. I have executed this assignment deed thus consenting".

It is suggested on behalf of the plaintiff that the difference in language between this document and Ex. B is due to the fact that Ex. B was only a charge, whereas this is an absolute assignment. I am not prepared to accept this as being a sufficient explanation. Ex. 12 just above referred to was by way of charge also and it contains clear language under which the decree is made security for the amount advanced. Nor can I believe that, if the plaintiff thought he held a valid assignment by way of charge of both decrees, he would have acquiesced in the subsequent assignment of one of them by way of charge to defendant 2 and taken an assignment only of the other. The last document is Ex. G, a letter of 11th March 1912, a month or so after the execution of Ex. K. It is addressed by the plaintiff to defendants 1 and 3 and calls upon them to pay the amount of Rs. 3,000 and interest due to him by Arunachalam Chetty, i. e., defendant 4 and also Rs. 786 for moneys advanced to defendant 1 for the execution proceedings. It refers to Ex. B as an agreement, and it refers to Ex. 3 and another letter not produced. It does not mention Ex. D, but the claim is one that arises out of Ex. B as modified by Ex. D. It is in my view absolutely inconsistent with any assignment.

It is not until we come to the plaint in the suit filed the next month that we find any allegation of an assignment and it is there stated in para 10 that the agreement and the power-of-attorney constituted in law an equitable assignment of the two decrees. In my view the documents point to the following arrangements as having been intended by the parties. Exs. B and C constituted the plaintiff attorney of defendant 1, with an interest in the subject matter of the agency: vide S. 202, Contract Act. Ex. D was a variation and as that promise made in Ex D was not carried out, the plaintiff has rights against defendant 1 for breach of contract. That however is not an interest within the meaning of S. 5, T. P. Act, which can take precedence to the undoubted charge of defendant 2 on the decrees. There remains the contention in the written statement referred to, that the documents constitute an equitable assignment apart from intention Mr. Narasimha Aiyangar relied strongly on two cases, *Shair Mull* v. *Singaravelu Mudali* (1) and *Palaniappa* v. *Lakshmana* (2). I can find nothing however in the judgments

to suggest that there was not an intention to assign. The case in *Irving, In re; Brett, Ex parte* (6) relied on establishes that where a person borrows money from a bank and in return contracts with the bank to hand over certain dividends received, that is a good equitable assignment of the dividends. I do not suppose that this would be disputed for a moment. In *Gorringe* v. *Iruell India Rubber Works* (7) Cotton, L. J., states the law as follows:

"Where there is a contract for value between the owner of a chose in action and another person which shows that such person is to have the benefit of the chose in action that constitutes a good charge. The form of words is immaterial so long as they show an intention that he is to have such benefit"

and Fry, L J, speaking of the letter on which the charge was founded says:

"It made the writer of the instrument a trustee of the debt for the appellants and therefore it is equivalent to an equitable assignment."

The basis of an equitable assignment is stated by Lord Macnaghten in *Tailby* v. *Official Receiver* (8) at p. 546:

"an assignment of property (future in that case) operates in equity by way of agreement binding the conscience of the assignor . . , in accordance with the maxim . . . that whenever persons agree concerning any particular subject, that in a Court of Equity as against the party himself and any claiming under him . . . with notice raises a trust,"

and again on p. 547:

"The truth is that cases of equitable assignment . . . where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement."

This criterion seems to be the same as that quoted by the learned trial Judge from *William Brands's Sons & Co.* v. *Dunlop Rubber Company* (3).

I have come to the conclusion on the evidence that defendant 1 did not intend to contract to give any interest in the judgment-debt and that the plaintiff neither intended to acquire nor thought that he had acquired any such interest. In the absence of such intention, the authorities seem to me to be clear that no interest passes. In the view that I take of Ex. B, it is to my mind unnecessary to consider the other points raised by the appellant, namely, whether if Ex. B had been an assignment, there has been a waiver of performance on the part of the plaintiff and whether in view of our decision in Original Side Appeal No. 79 of 1913 the plaintiff could recover more than we have held defendant 4 liable for on the promissory notes. I would therefore allow the appeal but as my learned brother takes a different view the appeal will be dismissed.

6. (1878) 7 Ch D 419.
7. (1887) 34 Ch D 128.
8. (1888) 13 A C 523.

(On Letters Patent Appeal):

Abdur Rahim, Offg. C.J. —The facts of this case are fully set forth in the judgments of the trial Judge, Wallis, C. J., and of Sadasiva Aiyar and Napier, JJ, and it is unnecessary to repeat them here. The first question argued before us is whether the transactions evidenced mainly by Exs. B. C. and D constituted an equitable assignment of the two decrees in question by defendant 1 who was at that time the transferee of the decrees in favour of the plaintiff. Ex. B (dated 14th July 1909) is an agreement which provides that as soon as the amounts of the decrees are realised, the plaintiff should take Rs. 3,500 due to him by defendant 4. Defendant 4 is the person in whose favour the decree originally stood and who had executed two pro-notes of Rs. 1,500 each in favour of the plaintiff at the instance of defendant 1 who was acting as defendant 4's agent. The amount was to be collected by the plaintiff under Ex. C, a power of attorney which was executed the day after Ex. B. This arrangement was subsequently varied as shown by Ex. D to this extent, that instead of the plaintiff collecting the amounts due under the decrees, the defendant 1 himself undertook to do so promising to pay the plaintiff the amounts due to him under the agreement (Ex. B) if the money is realized, that is to say, as I read it, out of the money which might be realised under the decrees.

I entertain no doubt that these facts are sufficient to create an equitable assignment of the decrees in favour of the plaintiff giving him a charge on the fund for the amount due to him. The law is succinctly stated in Halsbury's Laws of England, Vol. 4, p. 376 and 377, where among the examples of transactions which have been held to amount to an equitable assignment, we find cases of an agreement between an assignor and an assignee that the debt shall be paid out of a specific fund and of an undertaking to pay over to another moneys to be received from a particular source. Some of the English cases from which these propositions are deduced are *Rodick* v. *Gandell* (9) *Riccord*

9. (1852) 1 De G M & G 763.

v. *Prichard* (10), *William Brnadt's Sons & Co.* v. *Dunlop Rubber Company* (3). Such assignments by way of charge are also well recognised here: see *Shair Mull* v. *Singaravelu Mudali* (1) *Palaniappa* v. *Lakshmanan* (2) and *Gur Prasad* v. *Gorakhpur Bank Ltd.* (4). As stated by Lord Macnaghten in *Tailby* v. *Official Receiver* (8) the mode or form of assignment is absolutely immaterial, provided the intention of the parties is clear. It is contended. however, by Mr. Govindaraghava Aiyar who appeared for defendant 2 who obtained a transfer of the decrees in 1912, that since it has been fonnd in a suit instituted by the plaintiff against defendant 4 on the promissory note that the latter who was a minor at the time was liable only to the extent of Rs. 160, the plaintiff could not have a charge for more than that amount under Ex. B. But the defendant 1 made himself liable for the entire amount of the two promissory notes and it is that liability that is provided for in Ex. B. The extent of the liability is expressly stated at Rs. 3,500 and the mere mention of the fact that the plaintiff mistakenly believed that the whole of the amount was payable by defendant 4 can make no difference.

It was next argued by Mr. Govindaraghava Aiyar that there has been a waiver of the charge if there was one. But both the learned trial Judge and Sadasiva Aiyar J., held that no waiver was proved and I agree in that view. Exs. F and G to which we have been referred do not show that the plaintiff ever gave up his rights under Ex. B. The appeal is dismissed.

Seshagiri Aiyar. J.—I entirely agree and have nothing to add.

Phillips, J.—I agree.

S.N./R.K. *Appeal dismissed.*

10. (1855) 1 K & J 277.

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WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

Ganesa Aiyar and *another*—Plaintiffs—Appellants.

v.

Amirthasami Odayar and *others*—Defendants—Respondents.

Civil Appeal No. 225 of 1916, Decided on 29th October 1917, against decree of Temporary Sub-Judge, Tanjore, in Original Suit No. 21 of 1915.

(a) Limitation Act (9 of 1908), Arts. 44 and 126—Hindu father alienating as guardian of minor son does not oust application of Art. 126 and bring it within Art. 44.

The fact that a Hindu father executes a sale deed as guardian of his son will not take the case out of Art. 126 and bring it under Art. 44, which applies to cases where property belonging to a minor is transferred by his guardian: 38 *All.* 126; 40 *Cal.* 966 (*P. C.*); 34 *I. C.* 794; 3 *I. C.* 505 and 32 *I. C.* 242, *Foll.* [P 179 C 1]

(b) Hindu Law — Alienation — Manager—Necessity—Starting of prospective trade is no necessity.

The starting of a prospective trade is not a justifiable ground for alienation of family properties by the manager, whether the family is a trading or non-trading one. [P 179 C 2]

(c) Hindu Law — Alienation — Manager—Necessity — Purchase of new land unless beneficial is no necessity.

The sale or mortgage of ancestral lands for the purpose of purchasing other lands can only be justified if there is clear benefit to the family. [P 180 C 1]

(d) Hindu Law — Alienation — Manager—Necessity — Presumption of validity arises when all adult members join provided alienation is for necessity—Mere joining of adult members is of no avail.

When evidence as to the necessity for a sale is not clear, the fact that all the adult members of the family joined in it would have an important bearing on its validity, but when there is no justifying necessity, the mere fact that all the adult co-parceners joined would not give any additional weight to the transaction. [P 180 C 1]

(e) Hindu Law — Alienation — Manager—Unwarranted alienation—Mesne profits from date of alienation cannot in all cases be claimed.

In cases of unwarranted alienations by the manager the other co-parceners are not as of right, entitled to mesne profits from the date of the alienation. Mesne profits being in the nature of damages, each case must be dealt with on its own merits. [P 180 C 2]

T. R. Venkatarama Sastri—for Appellants.

S. T. Srinivasa Gopalachari, G. S. Rama Chandra Iyer, T. V. Gopalsami Mudaliar and *S. Muthiah Mudaliar*—for Respondents.

Kumaraswami Sastri, J.—The plaintiffs, who are the appellants, sued for a partition of the properties specified in the plaint between themselves and their father who was defendant 1, after setting aside the alienations made by defendant 1 to the other defendants. The alienations complained of were made under four sale deeds, Exs. B, C, D and F. The Subordinate Judge held that the alienation under Ex. C was binding on the plaintiffs and dismissed the suits as regards the items comprised therein. He found that the alienations under B, D and F were not binding, but passed a decree in favour

only of plaintiff 2 for his share of the items, holding that plaintiff 1's claim was barred by limitation. The plaintiffs appeal in so far as the decree is against them.

As regards the question of limitation, the case so far as defendant 1's alienation is concerned clearly falls under Art. 126, Lim. Act, which provides for a period of 12 years for suits by a Hindu governed by the law of the Mitakshara to set aside his father's alienation in ancestral property. The fact that the father executes the document as guardian of his son will not take the case out of Art. 126 and bring it under Art. 44, which applies to cases where property belonging to a minor is transferred by his guardian. In the case of joint family property the father is co-owner with the sons. He sells property as the managing member of the family and the mere fact that he describes himself as guardian of the sons would not take the case out of the express terms of Art. 126. In *Lachmi Narain Prasad* v. *Kishan Kishore Chand* (1), which was a case where property had been conveyed by the father and grandfather, the article that was held applicable was Art. 126 and the suit was dismissed on the ground that the alienation was more than 12 years before suit. In *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (2) their Lordships of the Privy Council treated a suit by the sons to set aside a partition by the father giving to a stranger properties as a suit governed by Art. 126. I might also refer to *Soundararajan* v. *Saravana Pillai* (3) and *Kishan Lal* v. *Shib Narain* (4) and *Asaram* v. *Ratansingh* (5). The plaintiff is therefore entitled to a decree so far as his one-third share in the properties covered by Exs. B and C is concerned. As regards the alienation under Ex. C, I am unable to agree with the Subordinate Judge. Defendant 1 and his father, who died before 1909, conveyed about 46 acres 45 cents of Nanja land and 3 acres 65 cents of Punja for Rs. 5,000. The recital as to consideration runs as follows:

"Owing to the distance between the said Palli Vialkam village and Mudikondan village where we live, the cultivation and other business have been interrupted and a great deal of loss has been occasioned. Intending therefore to discharge the present small debts of our family and to purchase lands in the village where we reside and to better our prospects by carrying on money dealings you and we entered into an agreement on 29th October last, and under this we receive Rs. 500 in cash, and the amount received by us this day from you is Rs. 1,500 and the amount with which we are debited under the agreement to receive in the presence of the Sub-Registrar of Nannilam from you is Rs. 3,000."

The distance between the village where the lands sold are situate and defendant 1's village is admitted to be within 10 miles, and it is difficult to see why cultivation should be interrupted and a great deal of loss occasioned because of the distance. Families often own lands few miles away and this would not justify a Hindu father in alienating the lands. So far as the debts are concerned, all that is stated is that there were some "present small debts," and there is no evidence either as to the extent of the debts or as to any debts having been paid off. The transaction was not very old and the existence of debts could easily have been proved. The family was not a trading family or one carrying on money-lending business and the starting of prospective money-lending transactions is no ground for alienating family properties. The observations of the Privy Council in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (6) apply with equal force to sales of joint family properties by non-trading families. Though there is nothing said in the sale deed as to any difficulties having been experienced owing to the want of irrigation facilities, from evidence of the defendants' witnesses the sale does not seem to be justified. The lands sold consisted of 46 acres 45 cents of wet land and it appears from the evidence of defendant 3 that irrigation supply was improved by Government in 1904 or 1905 (prior to the sale Ex. C).

He wants to make out that because the silt was not cleared by the Public Works Department, the harvest was poor for four or five years and that when the department removed the silt, the harvests were good. D. W's 4 and 5 want to make out that the water supply was bad till shutters were fitted up to the irrigation channel and improved afterwards. It is not disputed that the Government completed the irrigation channel over two

1. (1916) 38 All 126=33 I C 913.
2. (1913) 40 Cal 966=20 I C 958=40 I A 213 (P C).
3. (1916) 34 I C 794.
4. (1909) 3 I C 505.
5. (1916) 12 N L R 12=32 I C 242.
6. A I R 1917 P C 33=40 Mad 709=39 I C 722 =44 I A 147 (P C).

years before the sale. If all that was required to make the channel a success was the removal of the silt or the putting up of shutters, I cannot say that it was a prudent act to sell the lands after irrigation facilities were completed, as it was almost certain that the Government would do the needful to give a good supply of water. The sale or mortgage of ancestral lands to purchase other lands can only be justified if there was clear benefit to the family: *Krishnasawmi Doss, In re* (7), *Subramania Nadan* v. *Ramasami Nadan* (8) and *Adikesavan Naidu* v. *Gurunatha Chetti* (9), and having regard to the case with which such recitals can be made by an improvident father in order to raise money, I think Courts ought to be slow to find necessity unless on clear proof that the transaction was one manifestly for the benefit of the family. So far as the price of the lands is concerned, I do not think Ex. 11, which is relied on by the Subordinate Judge, is a safe criterion. Thamarai Selvam Pillai, the purchaser under Ex. 11, admits that he got the lands cheap. Subramania Iyer, the vendor, D. W. 4, admits that he purchased the lands for Rs. 3,600 and that he sold the lands for Rs. 3,000 as he had debts to the extent of Rs. 3,600. The sale deed shows that Rs. 3000 went to discharge debts and the price at which a needy debtor sells is no safe criterion as to value. Having regard to the other sale-deeds filed in the case the value per acre is certainly much more than the price for which the lands have been sold under Ex. C.

I am not unmindful of the fact that defendant 1's father also joined in the sale deed. When evidence as to necessity is not clear, the fact that all the adult members of the family joined would have an important bearing, but when there is no justifying necessity the mere fact that all the adult co-parceners joined would not give any additional weight to the transaction. I am of opinion that the sale of the land under Ex. C is not binding on the plaintiffs. As however it is proved that the lands covered by Ex. 11, dated 9th April 1908, were purchased for Rupees 3,000 out of the sum of Rs. 5,000, the consideration for Ex. C, the plaintiffs, if they seek to avoid the alienation under Ex. C, cannot get any share of the lands purchased by defendant 1 under Ex. 11. Their claim to these lands items 2 to 27 specified in Sch. B to the plaint, is therefore dismissed and the property will be declared to be the separate property of defendant 1. As regards the claim for mesne profits, I do not think plaintiffs are of right entitled to mesne profits from the date of alienation. Mesne profits are in the nature of damages and each case must be dealt with on merits. I think the correct principle has been laid down in *Bhirgee Nath* v. *Narasingh Tewari* (10).

In the result the decree of the Subordinate Judge will be modified by decreeing to the plaintiffs a third share in the properties alienated under Exs. B and C in addition to a third share decreed to plaintiff 2. The decree of the Subordinate Judge dismissing the suit as regards alienation of the items covered by the sale deed Ex. C is set aside, the plaintiff getting one-third share in the said items (plaintiff 1 getting 1/6th share). As plaintiffs elect to take the lands in Sch. A1 to the plaint which represent lands exchanged for some of the family lands covered by Ex. C they will get one-third share of the lands covered by Schs. A and A1 to the plaint. The plaintiffs' suit as regards items covered by the sale deed Ex. 7 (Sch. B properties) will be dismissed. The alienees defendants 2 to 6 will have a charge on the properties covered by Ex. 7, except those alienated under Ex. F, to the extent of a third of the consideration paid by them under Ex. C. There will be a preliminary decree for partition on the above terms. Each party will bear his own costs of the appeal.

Wallis, C. J.—I agree and will only say that I concur in what my learned brother has said as to the question of mesne profits in a case like this being determined upon a consideration of all the circumstances of the case.

S.N./R.K. *Decree varied.*

7. (1912) 13 I C 648.
8. (1913) 21 I C 656.
9. (1917) 40 Mad 338=39 I C 358.
10. (1916) 39 All 61=35 I C 475.

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ABDUR RAHIM AND NAPIER, JJ.

Kathirayasami Naicker — Plaintiff—Appellant.

v.

V. Ramabadra Naidu and *others* — Defendants—Respondents.

Civil Appeal No. 155 of 1915 and Civil Misc. Petn. No. 1008 of 1917, Decided on 19th December 1917.

(a) Civil P. C. (1908), O. 21, R. 96—Mortgage decree—Property not included in sale certificate but delivered to purchaser—No separate suit for its recovery lies—Civil P.C. S. 47.

Where under a sale held in execution of a mortgage decree, lands not included in the sale certificate but which by mistake are assumed to be so included are delivered to the purchaser, the mortgagor cannot claim their re-delivery by a separate suit. The question whether the lands so delivered are correctly included in the sale certificate or not can only be determined by the executing Court on an application under S. 47, Civil P. C. [P 181 C 2; P 182 C 1]

(b) Civil P. C. (1908), O. 21, R. 96—Order under R. 96 is judicial order.

An order directing delivery of possession to a purchaser under O. 21, R. 96, is a judicial order. [P 182 C 1]

(c) Civil P. C. (1908), S. 47—Suit cannot be treated as execution application when prejudice is caused.

A suit cannot be treated as an execution application where the effect of doing so would be to prejudice the defendant in his plea of limitation. [P 182 C 2]

K. V. Krishnaswamy Aiyar—for Appellant.

S. Srinivasa Aiyangar, *K. Rajah Aiyar* and *T. Narasimha Aiyangar*—for Respondents.

Srinivasa Aiyangar, J.—The plaintiff's father Kadiriyasami on 15th September 1893 mortgaged to Sabapathi Chetty, defendant 2, what may generally be termed the Zamindari Estate of Doddappanaikanur. The mortgagee sued to enforce his security in Original Suit No. 3 of 1901 on the file of the District Court of Madura and obtained a decree for sale on 1st October 1901. He transferred the decree on 28th May 1906, to Mr. Ramabhadra Naidu, defendant 1, who executed the decree, brought what presumably were the mortgaged properties to sale and purchased them himself after obtaining the necessary sanction from Court. Kadiriyasami Naicker, the mortgagor judgment debtor however died before the final execution and sale. Defendant 1, after his purchase obtained a sale-certificate from Court and got possession of the properties which it was assumed he purchased. The Zamindari of Doddappanikanoor consists of the two villages of Doddappanaikanoor and Sempatty together with their hamlets. In the said two villages there are ayan punja garden lands of about 9462 kulis (a kuli is about 5/7th of an acre) besides waste lands, hills and forests which the mortgagor owned as Zamindar. Besides these, there were pannai (home-farm) lands in which the Zamindar was entitled to both the warams. The total extent of such pannai lands in the Zamindari is in dispute and it is difficult to ascertain it from the evidence on the record.

The question in dispute in appeal is about the extent of pannai lands purchased by defendant 1 in the Court sale. According to the plaintiff, an extent of 226 kulis, which at the time of the mortgage to Sabapathi Chetti was admittedly in the possession of one Kamalammal, the widow of the predecessor of Kadiriyasami, was not included in the mortgage or the suit or the decree or the execution sale and did not pass to defendant 1, as purchaser; while according to defendant 1, the said lands and in fact all the pannai lands within the geographical limits of the Zamindari, whether in the possession of Kadiriyasami, the Zamindar, or not, were included in the mortgage and were thereafter included in the suit and the decree and were sold. (His Lordship next discussed the evidence and concluded:) I therefore come to the conclusion that the sale did not include the 226 kulis, though it is true that defendant 1 and the mother of the plaintiff were under the mistaken impression that they were so included.

It remains now to deal with another contention of respondent 1. Though the sale certificate did not include the 226 kulis, it appears to be true that the lands on which there were encumbrances were placed in the possession of defendant 1 under S. 319, old Civil P.C., by an order of Court: see Ex. 3 (a) at p. 86, printed papers. Among the properties so delivered are 68 odd kulis out of the 226 kulis subject to encumbrances created by Bommuthayi after the date of the mortgaged decree for the purpose of raising money to pay the mortgagee decree-holder as stated above. Respondent 1's contention is, whether the sale certificate included these lands or not, inasmuch as by an order of Court defendant 1 was placed in possession (though such possession was symbolical) of a portion of these lands in the purported execution of the sale-certificate, the only Court which can determine whether the lands so delivered were included in the sale certificate or not, was the Court which was executing the previous decree; and that can be done only on an application to that Court and not by a

separate suit. I think we must give effect to this contention. It has been held in several cases in this Court that questions arising between the decree-holder purchaser and the judgment-debtor as regards the properties directed to be sold by the decree and purchased in execution sale are questions relating to the execution of the decree and must be determined under S. 47 of the Code. The latest of such cases is *Gunniah Vencata-chalapathy Aiyar* v. *Perumal Iyer* (1). Mr. K. V. Krishnasamy Aiyar for the appellant contends that there is no case in which the question as to what passed under the sale, apart from the question of the validity of that sale, was held to be a matter relating to execution under S. 47.

That may be so, but I see no reason to think that questions such as we have here are not questions relating to execution. The series of sections relating to obstruction by judgment-debtors, to possession being given to a decree-holder or to a purchaser in execution of a decree all assume that the judgment-debtor is to come in by way of an application in execution-proceedings if he was not satisfied with either the delivery of possesssion or with the order directing the sale. The order directing delivery of possession to a purchaser under S. 319, of the old Code, which corresponds to O. 21, R. 96, of the present Code, is a judicial order—see *Pran Krishna Dhar* v. *Juramoni Chowkidar* (2). The appellant asked that his present suit should be converted into an application under S. 47 of the Code.

But it is to be observed that any application on the date, when the present suit was instituted, to rectify any error in the proceedings in execution of the mortgage decree would be barred by limitation, as more than three years had elapsed since the date of the order of the delivery of possession, and the Limitation Act of 1908 does not extend the time for making the application on the ground of minority, though under the Limitation Act of 1877 such a disability would be taken into account in computing the period of limitation. In *Chidambaram Chetty* v. *Karuppan Chetty* (3) this Court decided that the new Limitation Act applied to applications of this sort and that a person, who by reason of minority would have an extended period of limitation under the old Act for making an application, cannot after the new Act came into force claim the benefit of the exemption under the old Act.

Following that decision I hold that the plaintiff is not entitled now to ask us to convert his suit into an application. A technical objection was taken to the frame of the suit by respondent 1. It was said that the plaintiff did not ask for possession of these 226 kulis of land but asked only for an injunction, and inasmuch as he was not in possession at the date of the suit, his suit should be dismissed as he has not prayed for the proper relief. No such objection was taken in the lower Court and we are not inclined to uphold his contention. If necessary, the plaintiff should be given permission to amend the prayer in the plaint and we think he is in the circumstances of the case entitled to a decree for possession of the lands not covered by the sale to defendant 1, except the 68-6-3 kulis which the plaintiff is not entitled to recover by a separate suit. The lands so excepted are those described in Sch. D of the plaint. The plaintiff will also be entitled to mesne profits on the lands now decreed to him. That will be the decree in the appeal. The plaintiff and defendant 1 will pay and receive proportionate costs both here and in the Court below. I ought to draw attention to the fact that the translation of the portion of Ex. 2 (f) which contains the description of the properties mortgaged, which is the most important portion for the purpose of this appeal, is incorrect.

Abdur Rahim, J.—I agree.

(The appeal having been posted to be spoken to on 4th April 1917 and the Miscellaneous Petition coming on for hearing on the same day before Abdur Rahim and Srinivasa Aiyangar, JJ., the Court made the following)

Order.—We think it better to have a report after inquiry by the lower Court on the point in dispute between the parties raised in Civil Miscellaneous Petition No. 1008 of 1917, namely, whether "No. 2802" in Sch. C of the plaint is a mistake for "No. 2801" and whether what is claimed in Sch. E is really "No. 2801." Time for the submission of the report will be till the re-opening of

1. (1912) 13 I. C. 133.
2. (1909) 1 I. C. 430.
3. (1910) 35 Mad 678=8 I C 543.

this Court after the ensuing summer recess.

(In compliance with the above order, the Temporary Subordinate Judge of Ramnad at Madura submitted the following)

Report.—I have been directed by the High Court to report whether No. 2802, in Sch. C of the plaint is a mistake for No. 2801 and whether what is claimed in Sch. E is really No. 2801.

On the above evidence, therefore I have no hesitation in saying that the paimash No. 2802 in plaint Sch. C is a clear mistake for paimash No. 2801.

The land claimed in Sch. E is water-spread or the tank-bed and the extent given is 20 kulis. D. W. 1, the Karnam, says that the paimash No. of the tank-bed is 2802 and its extent is 20 kulis. So, his evidence places the matter beyond all doubt, and therefore what is claimed in Sch. E is really not paimash No. 2801 but paimash No. 2802. I find the point accordingly.

(The Appeal and Civil Miscellaneous Petition coming on for hearing after the return of the report of the Temporary Subordinate Judge of Ramnad at Madura, in compliance with the order of Court dated 4th April 1917, the Court delivered the following)

Judgment.— We accept the finding and the plaint will be amended in accordance with it and the decree will follow. The appellant will bear the costs of respondent 1 in this petition.

S.N./R.K. *Decree modified.*

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SESHAGIRI AIYAR AND NAPIER, JJ.

(*Vysravanath Manakal*) *Raman Somayajipad*—Plaintiff—Appellent.

v.

(*Marampure Thalakkodi Madhathil Karnavathi*) *Kunhu Kutti Kovilamma* and *others*—Defendants—Respondents.

Second Appeals Nos. 924 to 926 of 1916, Decided on 15th November 1917, against decree of Sub-Judge, South Malabar, in Appeal Suits Nos. 875 to 877 of 1914.

(a) Malabar Law — Devaswom — Position and functions of Uralan and Samudayi stated—Latter is not always agent—He may be some times trustee and former may have powers of temple committee to supervise and control—Where founder's family which reserved rights of Uraima becomes extinct, Samudayi becomes real Uralan.

A Samudayi cannot accurately be described in all cases as the agent of the Uralan. There may be a temple in which the Uralan is the person in whom the property and the management vest and such a temple may have a Samudayi who will be the agent of the Uralan. In such a case, the Samudayi will not be entitled to sue or defend actions in his own name. There may be institutions in which an absentee Uralan performs only the functions of a supervisor or controller, leaving the management and legal ownership of the Dewaswom properties in the Samudayi. The Uralan in such a case will have very nearly the powers of a Temple Committee and the Samudayi those of a trustee. The right of suit will be in the Samudayi in these institutions. There may be a temple in regard to which the founder's family which exercised the Uraima right ceased to exist generations ago. In such a case the Samudayi will be the real Uralan. [P 186 C 2]

(b) Malabar Law—Devaswom—Hereditary samudayi—Declaration by, do not bind his successor.

In the case of hereditary Samudayis, the declarations and acts of a Samudayi will not bind his successor-in-office belonging to the same family. [P 188 C 2]

(c) Malabar Law — Devaswom — Title to Devaswom properties could be acquired by prescription by Samudayi and become trustee.

Alike under the Limitation Act of 1908 as under the earlier Acts of 1859 and 1871 it was competent for the Samudayi to acquire a title by prescription to the Devaswom properties and to be recognized as a trustee : 1 *M. H. C.* R. 258, *Diss. from.*

(d) Malabar Law — Devaswom—Samudayi can recover possession of properties against Uralan claiming by prescription without proving that he is trustee—He must prove possession and management.

A Samudayi therefore is entitled to sue for recovery of the Devaswom properties on proof of possession adverse to that of the Uralan and of repudiation of his agency. It is not necessary for him to show that he became a trustee. It is enough if he proves possession and the management of the temple affairs.

(e) Malabar Law—Devaswom—Hereditary Samudayi is not mere agent of Uralan.

Per *Napier, J.*—A hereditary Samudayi, whose office entails the doing of many acts of management, is not a mere agent of the Uralan affected by the ordinary principles of agency. [P 190 C 2]

(f) Practice—Pleadings—Courts should not discover graver matters in trivial plaints and try to adjudicate upon them.

Per *Seshagiri Aiyar, J.*—Courts should, as far as possible, refuse to allow plain plaints to be construed as containing hidden causes of action and pronounce opinion thereon. Litigants should not convert trivial and innocuous proceedings into suits for adjudication of grave issues and substantial rights. [P 184 C 1, 2]

K. Srinivasa Aiyangar—for Appellants.

T. R. Ramachandra Aiyar—for Respondents.

Second Appeal No 924 *of* 1916.

Seshagiri Aiyar, J.—The plaintiff styling himself as the Uralan and Udama of the Kottaseri Devaswom, sues to redeem a kanom of the year 1898 granted by him to the tarwad of defendants 1 to 11. Defendants 12 to 18 are now in possession of the properties. Defendant 19 obtained a surrender of the properties from defendants 1 to 11 and claimed to be the real Uralan of the Deveswom. The defendants denied that the plaintiff was the Uralan and disputed his title to recover the demised properties Both the Courts below though not for the same reasons, dismissed the plaintiff's suit. Hence this second appeal. Before dealing with the merits of the case, it is desirable to draw attention to a feature of Malabar litigation which amounts almost to an abuse of the machinary of civil administration. I do not in the least feel influenced by considerations of the quantum of court fees paid. If the legislature has framed its provisions in such a way that a right can be litigated by paying a small fee, the litigant is entitled to avail himself of that privilege to his best advantage. But where litigants are permitted to avail themselves of the indulgence of the Court to convert what on the face of it appears to be a trivial and innocuous proceeding into a suit in which grave issues involving very substantial rights and large properties are adjudicated upon, it is the duty of the Court to use all its powers to prevent such an abuse. To come to particulars. The present suit is based on a kanom, but the matter decided has practically no bearing on that question. It is the right of rival Uralans, that of the plainitiff and of defendant 19, that has been considered in judgments of enormous length which necessitated the examination of numerous documents old and new. With what result ? In second appeal we are called upon to pronounce our opinion on findings which in some instances we can treat as dealing with facts, and which in very many respects necessitate an inquiry into mixed questions of fact and law. If the respective rights of the plaintiff and defendant 19 were directly in issue, the suit would have been filed in a different tribunal from which a first appeal would have been preferred to this Court.

I cannot help feeling that the leniency with which such litigations are treated may enable a suitor to choose his own time and forum for prosecuting his rights. Fortunately the integrity of the subordinate judiciary in this country is so well established that there is not much fear of miscarriage of justice by such devices. But it is not difficult to imagine circumstances which may lend themselves to the unscrupulous handling of a clever suitor to the detriment of his opponent. I hold very strongly with Wilkinson, J that Courts should, as far as possible, refuse1 to allow a plain plaint to be construed as containing hidden causes of action and to pronounce an opinion thereon. The parties suffer more severely than the Government revenue through such an indulgence. I feel no doubt that the use of all the powers conferred on Courts relating to the addition or deletion of parties, to the returning of plaints for amendment or for presentation to the proper Court with reference to the substantial questions in issue, would tend to advance justice and not to retard it. It may discourage,—what is now pursued as a fine art—the compelling of Courts to deal with questions which ex facie have no relevancy to the reliefs stated in the plaint. Before I leave this subject, let me refer to another concrete instance taken from this second appeal, which enforces in a marked degree the necessity for the above caution. For nearly half a century the plaintiff's Illom and defendant 19's Kovilagom have been playing a game of hide and seek. They dared not face each other. In suits for rent and for relemption tenants were encouraged to set up the rights of defendant 19's Kovilagom. Documents were summoned from and produced by the rival claimant. Some of them were characterised as impudent forgeries in the earlier litigation; but time has rolled on, they have gained sanctity by age: they have now risen to the distinction of being reverentially handled lest they grumble to pieces and to the dignity of being regarded by the translator as undecipherable in places as to words, syllables and phrases.

I am referring to Ex. 7 in particular; let us look at the result. On the present occasion, the Subordinate Judge, differing from the District Munsif and differing from a previous Subordinate Judge, has held that the document is genuine. In second appeal, we are perforce compelled to accept that finding. If in the earlier

litigation, the Court had refused to raise any issue on the rival claimants' rights or to permit subpoenas to be taken out on those issues, the question would soon have been brought to a head and the parties would have directly raised the point earlier. I have made these prefatory remarks, as I feel that the laxity of the Courts helps dishonst litigation to resort to device for stifling justice and for availing themselves of the processes of law to gain an undue advantage over honest litigants. Now I shall deal with the case bearing in mind the limitations which the law imposes on a Court sitting in second appeal. Mr. K. Srinivasa Aiyangar for the appellant and Mr. T. R. Ramachandrier for the respondent have placed before us all that can be said in favour of their respective clients. The main points for decision are:

(a) Whether the Kovilagom of defendant 19 has a subsisting Uraima right in the plaint Devaswom; (b) Whether the plaintiff is only a Samudayi; if so, what are his functions and privileges. A large number of subsidiary issues have to be considered in connection with these two questions. The history of the Uraimaship of the devaswom is lost in antiquity. It is not disputed that three Nambudri Illoms were entitled originally to contribute each one Uralan to the temple. Two of them became extinct before 1841. The last Illom, which may for brevity's sake be called the Oravil Illom, had an undoubted claim to one Uralan. From Ex. 15, it is clear that the last surviving member of the Oravil Illom assigned the Uraima right to the Padinhare Kovilagom, of which defendant 19 is the present Thamburatti. From subsequent documents which it is not necessary to refer to at length, it appears that the transferor regarded himself as jointly entitled with the Padinhare Kovilagom to be the Uralan of the temple. It may be that the last member of the Oravil Illom acquired the rights of the two other Illoms by Attaladakkam right. It is unnecessary to pursue this inquiry. The Oravil Illom became extinct in 1843. To my mind, it admits of no doubt that originally the plaintiff's predecessors regarded themselves only as agents of the Uralan. It is the subsequent development of their rights and the extinction or supersession of the rjghts of defendant 19's Kovilagom that have to be considered in this case. I may at once say that the pretension of the plaintiff to style him-self as the Udaima or the owner of the Devaswom has not a shred of evidence to support it. Mr. Srinivasa Aiyangar did not argue the case on that footing. His contention was that since 1860 the plaintiff's predecessors have been setting themselves up as the sole managers of the Devaswom and have thereby acquired an indefeasible right to manage its affairs, by whatever name they may be called.

He also argued that defendant 19's Kovilagom lost the right, if they possessed it at any time, by the bar of limitation. It is common ground that the transfer referred to in Ex. 15 was incapable of conferring a legal right to the Uraimaship. M. Ramachandrier contended that by exercising the rights of a Uralan since 1841, defendant 19's Kovilagom acquired a prescriptive title to be Uralans, that the management by the plaintiff was only in his capacity as Samudayi, that the latter did not and could not acquire the uraima right, and that therefore plaintiff has no right to recover possession of the dismissed properties,

These arguments of the learned vakil necessitate an inquiry into the respective rights and duties of a Uralan and of a Samudai. It has to be borne in mind, in this connexion, that the plaintiff's Illom have been the hereditary Samudayis of the Devaswom long before 1841. Before referring to the cases which deal with the functions of the various dignitaries connected with a devaswom, it may be useful to inquire into the history of their offices. In Malabar, as on ths East Coast, temples, in most instances, owe their existence to the munificence of some ruling chief or nobleman. But it would beinaccurate to say that all of them have been so founded. In a small village the villagers might establish a temple—not a few instances of this kind are to be found on the East Coast, and I do not suppose religious evolution has been working differently on the West Coast. Whenever an influential chief or Karnavan founded a Devaswom, he would in addition to being its founder be its Uralan also. Distance from the temple and other considerations might induce him to appoint others to manage the affairs of the Devaswom. The word Samudayam denotes an assembly of persons. That is its etymological mean-

ing. The chief inhabitants of a village where the temple is founded would naturally be the persons to whom the management would be entrusted. They may among themselves select a person to be their agent, or it may be that the founder himself might ask one person among the villagers to be the manager. In course of time, the successive discharge of duties by the members of the same family would ensure to that family the privilege of giving the manager from its members.

This is the process by which the principle of heredity has been evolved all over the world; and in a country like India, where reverence for established institutions and for long continued practices is a sort of fetish, heredity gains recognition far more easily than elsewhere. In Malabar these conservative tendencies are at their highest. In my opinion, this process accounts for the existence of what are known as hereditary Samudayis. There are other hereditary offices connected with a Devaswom. I feel no doubt that at its inception the Samudayi was only the agent of the Uralan, if there was one, but the reasoning by which a hereditary Samudayi can be regarded as a perpetual agent is a conception of law which demands serious consideration. Further, it is not correct to assume that the Samudayi remained an agent, pure and simple even after the extinction of the house which founded the devaswom. The suggestion of Mr. Ramachandrier that if the Tarwad or kovilagom which founded the Devaswom became extinct, the right of the Uralan would escheat to Government requires more authority to support it than the learned vakil has given us. After the policy declared in Act 20 of 1863 it is open to argument that the Government divested themselves of their right to claim this particular kind of escheat, even if the proposition is unexceptionable that the right of trusteeship which vested in the owner of temporal properties would pass by reversion to the Crown by virtue of his private properties having escheated. It is more natural to suppose that the disappearance of the hereditary Uralan will be followed by the development of the Samudayam into the Uralan.

In Moore's Malabar law this process is hinted at as of constant occurrence. Holloway, J., seems to have set his face against this practice. Before passing away from this subject, I may say that the main conditions regarding the respective functive functions of these officers of the temple are not to be gathered from a priori notions regarding their rights as understood in ancient times, but from the usages of the particular institutions concerned. There may be a temple in which the Uralan is the person in whom the property and the management vest and such a temple may have a Samudayi who will be the agent of Uralan. In such a case, the Samudayi will not be entitled to sue or defend actions in his own name. There may be institutions in which an absentee Uralan performs only the functions of a supervisor or controller, leaving the management and legal ownership of the Dewaswom properties in the samudayi.

The Uralan in such a case will have very nearly the powers of a Temple Committee and the Samudayi those of a trustee. The right of suit will be in the Samudayi in these institutions. There may be a temple in regard to which the founder's family which exercised the Uraima right ceased to exist generations ago. In such a case, the Samudayi will be the real Uralan.

On the merits, the first point raised by Mr. Srinivasa Aiyangar was that the suit should be confined to the consideration of the question whether defenants 1 to 11 have any valid defence to surrendering property which they obtained under the demise of 1898 and that the rival claims of the plaintiff and of defendant 19 should not be gone into in this case. He argued that defendant 19 was impleaded, not because he claimed the Uraima right, but on the ground that he was the assignee of the other defendants. In view of the principles enunciated by me in the opening paragraph of this judgment, I would have been prepared to strike out all the averments on either side which do not relate to the question of surrender, had it not been for the fact that the plaintiff deliberately challenged the title of defendant 19 and invited a decision upon the respective titles of the parties. Even this may be ignored, but for the fact that the questions involved in the suit have been elaborately gone into in the two Courts and it would result in sanctioning a waste of judicial time and energy, if at this stage, the

plaint is directed to be amended by striking out the contentions relating to defendant 19 or is directed to be presented to the proper Court on the ground that the substantial relief claimed in the plaint should be properly valued. The plaintiff apparently felt emboldened by his successes against tenants behind the back of defendant 19 and was prepared to meet him in the open field. Defendant 9 thought that this was her last chance and concentrated all her strength upon establishing her case. Much as I regret that the Courts below should have allowed this suit to be treated in the way it has been done, I am not prepared to wipe out all that has been put on the record by either side and to treat the suit as one for redemption, pure and simple. In this view, I do not consider it necessary to express any opinion on the interesting question of estoppel by tenant argued by the learned Vakil for the appellant.

The next contention was that the Kovilagom defendant 19 had no right to the Uraima right. Until the Judicial Committee ruled in *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (1) that an assignment of the trusteeship was opposed to public policy, it seems to have been the practice, not only on the West Coast, but also on the East Coast to transfer such rights. But the pronouncement of the Committee must be deemed to have declared the pre existing law. Therefore the question is whether the Padinhare Kovilagom acquired a prescriptive title to be the Uralan of the Devaswom. The learned Vakil for the appellant, contended that beyond an acknowledgment by the plaintiff's Illom of their liability to render accounts, the Padinhare Kovilagom was not shown to have had any possession of the Devaswom properties either actually or constructively and that consequently no adverse possession was acquired. The documents to which the learned Vakil for the respondent drew our attention show that the defendant 19th's Kovilagom was in management of the properties through the plaintiff's Illom. Exs. 33, 13, 1, 87, 1 (a) and 12, among other documents, prove active participation in the affairs of the Devaswom.

The Subordinate Judge has found that up to 1860 the Padinhare Kovilagom "took an active part in looking after the affairs of the plaint temple": and I think there is ample evidence to support this finding. I, therefore, hold that the defendant 19th's Kovilagom would have acquired a prescriptive title to the Uraimaship by the year 1860 if the law permitted them to do so. As regards the suggestion that that acquisition must be restricted to the right of one of the Uralans alone and that the plaintiff must be deemed to have adversely enjoyed the other two Uraima rights, it is enough to say that there is no trace in any of the numerous decuments filed in the case that the plaintiff's Illom prescribed for the rights of the two Uralans of the two extinct Illoms.

The finding of the Subordinate Judge on this question is stated in these terms at the end of para 18: "From 1886 onwards plaintiff's Mana was allowed to have its own way in all matters". Mr. Srinivasa Aiyangar contended that, as under the old Limitation Acts in force up to the year 1871, there was no provision for acquisitive prescription, even granting that defendant 19's Kovilagom had possession of the Devaswom properties through their agents, they were not entitled to be regarded as Uralans. I was at first inclined to agree with this contention, but the course of decisions in the other Presidencies to which Mr. T. R. Ramachandrier drew our attention shows that even under the old Limitation Acts and Regulations, title by prescription was held to have been acquired. The decision in *Gunga Gobind Mundul* v. *Collector of* 24- *Pergunnahs* (2) certainly lends support to this proposition. At first it looks as if the suit brought by the plaintiff in that case was dismissed as being barred by limitation, but the observations on page 362 suggest that even under the old Acts a prescriptive title could have been acquired. This was the interpretation of that decision adopted in *Brindabun Chunder Roy* v. *Tara Chand Banerjee* (3). The Calcutta High Court have taken that view consistently. See *Gossain Das Chunder* v. *Issur Chunder Nath* (4) and *Ram Chunder Ghosaul* v. *Juggutmonmohiney Dabee* (5). In *Jagamba Goswamini* v. *Ram Chunder Goswami* (6) Rampini and

1. (1876-78) 1 Mad 235=4 I A 76 (P C).

2. (1866-67) 11 M I A 345 (P C).
3. (1873) 20 W R 114.
4. (1877-78) 3 Cal 224.
5. (1879) 4 Cal 283.
6. (1904) 31 Cal 314.

Pratt JJ., reviewed all the earlier decisions of their Court and said that notwithstanding the fact that there was no provision in the earlier Regulations and Acts of Limitation similar to S. 29 of the Act of 1871, title by prescription could have been acquired under the old Act, see page 317. In *Jagrani Bibi* v. *Ganeshi* (7) the same view was enunciated, following *Gossain Das Chunder* v. *Issur Chunder Nath* (4) and the decision of the Judicial Committee in *Gunga Gobind Mundul* v. *Collector of 24-Pergunnahs* (2). In *Radhabai* v. *Anantraw Bhagvant Deshpande* (8) the Full Bench of the Bombay High Court accepted this view of the law. See the judgment of West, J., at pp. 228 and 229. As against these decisions there is an old decision of this Court in *Kesava Pillai* v. *Pedu Reddi* (9), in which it was pointed out that under the Act of 1859 no prescriptive title could be acquired. I do not think that it is safe to follow this ruling in preference to the pronouncement of the Judicial Committee which has been accepted in all the other High Courts.

It is to be borne in mind that under the English law even before the Statutes contained any provision by way of prescription the English Courts held that continued long possession adversely to the owner would confer title to the property. I, therefore, am of opinion that defendant 19's Kovilagom must be deemed to have acquired a prescriptive right to the property before 1860. The next contention of the learned vakil for the appellant was that since 1860, defendant 19's Kovilagom ceased to manage the temple affairs and that the plaintiff's Illom acquirad a prescriptive title thereto as Uralan. Mr. Ramachandrier's answer was two-fold. He relied on the principle that "once a Samudayi always a Samudayi", and contended that the plaintiff's Illom was incapable of acquiring a prescriptive title so long as it did not divest itself of the functions of a Samudayi, secondly, he contended that the course of conduct pursued by the plaintiff's Illom showed that they only prescribed for a Samudayi's right and for no more.

As regards the first contention the learned vakil referred to S. 109, Evidence Act. It is true that once a relationship like that of principal and agent is established, it would require very strong evidence to show that that relationship was abandoned and that a new right was asserted to the knowledge of the principal. But the position in the present case is not that of an agent appointed by the principal. As I stated before, it is a case of hereditary agents under hereditary principals. What I understand by the term hereditary agent or Samudayi is this; that ordinarily you will have to look to the family of the Samudayi for a person to manage the affairs of the Devaswom. On the death of the previous Samudayi and by the fact of a member of the Samudayi's family entering upon the duties of Samudayi, it may be taken that he was impliedly appointed by the then Uralan to discharge the duties of an agent. It would not follow from this that the acts and declarations or omissions of the previous Samudayi who was a member of the same family would be binding upon the succeeding Samudayi. I do not say that there should be a sanad of appointment in the case of each successor, but I would require very strong authority to convince me that each succeeding agent, though he belonged to the same family, was bound by the acts or conduct of his predecessor-in-office. Therefore granting for the sake of argument that by Exs. 7 and 44 the Samudayi in office at the time recognized the right of defendant 19th's Kovilagom, it does not follow that that acknowledgment would affect his successor, The Subordinate Judge has given the dates of succession of the various Samudayis from 1843.

It is clear from that statement in para. 3 that the Samudayai who acknowledged the title of defendant 19th's Kovilagom in 1843 was succeeded by one Parameswaran Nambudri who died in 1852, that this man was succeeded by Naryanan Somayajipad in 1872-1873 and that the plaintiff succeeded to the management in 1892-93. Now if there is evidence from 1892 onwards that the plaintiff repudiated, to the knowledge of defendant 19th's Kovilagom, the title of that Kovilagom and asserted his right to be independent of that Kovilagam, I fail to see why the recognition by his ancestor in 1843 should be against his setting up a right in himself. In 1892-93; there was a very important pro-

7. (1881) 3 All 435.
8. (1885) 9 Bom 198.
9. (1862-63) 1 M H C R 258.

ceeding to which sufficient attention has not been paid by the Subordinate Judge. In that year the Government contemplated instituting proceedings in escheat regarding the properties and rights possessed by the Oravil Illom. It is conceded that to this proceeding the plaintiff's Illom as well as defendant 19th's Kovilagom were parties. Mr. Ramachandrier relied upon these proceedings on the ground that the Government dropped their intention of claiming the properties by escheat because defendant 19th's Kovilagom established its right to them. It may be that that consideration operated on the Collector to give up his idea of claiming the properties of Oravil by by escheat, but at the same time it is clear that the plaintiff's Illom set up its independent right to manage the Devaswom to the exclusion of defendant 19th's Kovilagom. As defendant 19th's Kovilagom was a party to these proceedings her predecessors-in-interest must have been aware of the adverse claim set up by the plaintiff's Illom.

Now the question is as to whether this assertion conferred a right on the plaintiff's Illom to manage the properties without the intervention of defendant 19th's Kovilagom. I am not now concerned in saying that the assertoin amounted to claiming Urarma right itself. It may be that the plaintiff did not until 1902 set up a right as Uralan, but if the plaintiff's predecessor Narayanan Somayajipad asserted that he was entitled to manage the properties of the Devaswomon the ground that there are no Uralans for the temple, will not that confer a right upon him to sue in his own name to recover property on behalf of the Devaswom? Mr. Ramachandrier strongly relied upon the decision in *Patinharipat Krishna Unni Nambiar* v. *Chekur Manakkal Nilakandan Bhattathiripad* (10) for the proposition that a Samudayi can never sue to recover trust property. I have examined this case very carefully. I do not think that the present case is covered by that judgment. At the same time, I must express my respectful dissent from some of the very broad propositions enunciated by the learned Chief Justice. Innes, J's, judgment is not really in conflict with my view. It was apparently found in that case that there was an Uralan in active management and that the hereditary Samudayi was appointed by that Uralan. The learned Judge points out that the religious institution was in the hands of trustees or Uralans. In that view of the facts the learned Judge was right in holding that the Samudayi could not maintain a suit in his own name. The learned Chief Justice states that the powers of the Samudayi are confined to the management of the temple and that when occasion requires, resort should be had to the course of applying to the Uralans to lend their names. If it was intended to lay down as a general proposition of law that under no circumstances could a Samudayi institute a suit in his own name, I would respectfully dissent from the proposition. But, as I said before, the facts of the case justify the conclusion arrived at in the judgment of the Court. The other case relied upon is *Kunjunneri Nambiar* v. *Nilakunden* (11). The judgment in that case is very short and from the statement of facts it is clear that the Samudayam was a hereditary one and that the Samudayi executed the Kanom deed as the agent of an existing Uralan. *Rama Varar* v. *Krishnen Nambudri* (12) was a case where the Samudayi managed the temple affairs under a written agreement executed to the Uralan. On the other hand, we have some unreported decisions in which it has been held that a Samudayi can maintain a suit in his own name. Second Appeal No. 61 of 1881, Second Appeal No. 1688 of 1888 and Second Appeal No. 2256 of 1914. The truth is, in a conservative country like Malabar, where the dead weight of pre-existing custom is found to be intolerable, recourse is being had constantly to circumvent that custom by circuitous methods.

It may not be the province of the Court to encourage such devices, but where as long-standing practice has come into existence which is not in strict conformity with preconceived notions and which is not opposed to reason or justice, Courts will not be justified in falling back upon old usage and to refuse to pay attention to the course of development in recent years. It may be that a Samudayi was not originally intended to usurp the functions of a trustee, but it would be idle to deny that they have successfully usurped the duties of the trustee in recent years, have completely ignored the Uralans, and

10. (1882) 4 Mad 141.

11. (1878-80) 2 Mad 167.
12. (1881) 3 Mad 270.

have placed themselves in possession of the Devaswom properties. I am not therefore prepared to accede to the contention of Mr. Ramachandrier that the moment a person is described as a Samudayi he must be confined to the exercise of the functions which in ancient times were considered to be his, and that he should not be premitted to acquire new rights and obligations. The cases quoted by him only show that there must be an open and notorious disavowal of agency before a new right is prescribed *Williams* v. *Pott* (13), *Burdick* v. *Garrick* (14), *Attorney-General* v. *Corporation of London* (15), *Corea* v. *Appuhamy* (16) and *Lyell* v. *Kennedy* (17) are all cases where the Courts required the strongest proof on the part of the agent who set up a title adverse to the principal. I do not take these decisions to lay down that under no circumstances can an agent prescribe for the rights of the principal. On the facts of the present case, I am prepared to hold that there has been a distinct repudiation of agency by the plaintiff's Illom and the acquisition of an independent right to manage the Devaswom affairs without recourse to an Uralan. It is not necessary for me to say that the plaintiffs have become trustees.

As was pointed out by the Judicial Committee in the case *of Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (18), in order to enable a person to sue on behalf of a religious institution, all that is necessary is possession and management of its affairs. If both these are found, it does not matter by what name the person is known. Moreover since 1892 the plaintiff's Illom had been granting demises in their own name and have been instituting suits to recover demised properties in their own name. Defendant 19th's Kovilagom never instituted any suit or granted any demise since at least 1860. Under these circumstances, I have come to the conclusion that the right to institute a suit on behalf of the Devaswom has become vested in the plaintiff's Illom and that it is not open to defendants 1 to 11 to refuse to surrender the properties which they obtained on demise from the plaintiff.

On the question of what would suffice as repudiation of agency, I may refer to *Dadoba* v. *Krishna* (19), *Nabab Mir Sayad Alamkhan* v. *Yasinkhan* (20) and *Sankaran* v. *Krishna* (21) quoted by Mr. Kutti Krishna Menon. It is true that in Travancore and Cochin, the Samudayi is regarded as being entitled to sue for rents but not to sue to recover possession. See *Nilakandaru* v. *Nilakandan* (22). These cases must be confined to Samudayis who have been appointed by the Uralans. In conclusion I must guard myself by saying that I do not decide that defendant 19 has no rights in the temple. Whether she is still Uralan, and if she is, whether her rights are only those of supervision and control may have to be decided. It is enough for the disposal of the present litigation to say that the plaintiff has acquired a prescriptive right to manage the Devaswom properties by granting Kanoms and by instituting suits for redemption, etc., and is entitled to possession. I must therefore reverse the decree of the Court below and remand the appeal. There is issue No. 8 regarding improvements which have to be decided by the Court of appeal. In the circumstances of this case, having regard to the extravagant rights set up by the plaintiff and to the fact that defendant 19 is not altogether an interloper, I think it is proper that each party should be directed to bear its own costs heitherto incurred.

Napier, J.—I agree and only wish to add that in my opinion the proposition that a hereditary Samudayi whose office entails the doing of many acts of management, is a mere agent of the Uralan and thus affected by the ordinary principles of agency, if that is what is intended to be laid down in the early cases, requires reconsideration.

Second appeal No. 925 *of* 1916. This second appeal follows the decision in Second Appeal No. 924 of 1916. The lower Appellate Court will have to decide issue 11 as well.

Second appeal No 926 *of* 1919. Following the judgment in the principal case, the decree of the lower appellate Court is reversed. The Subordinate Judge will now decide issues 2 and 6.

S.N./R.K. *Appeals allowed.*

13. (1871) 12 Eq 149.
14. (1870) 5 Ch 233.
15. (1850) 2 Mac & G 247.
16. (1912) A C 230.
17. (1889) 14 A C 437.
18. (1905) 32 Cal 129=31 I A 203=(PC).
19. (1883) 7 Bom. 34.
20. (1894) 17 Bom. 755.
21. (1893) 16 Mad. 456.
22 18 Travancore Law Reports 129.

A. I. R. 1918 Madras 191

SPENCER AND KUMARASWAMI SASTRI, JJ.

Venkata Ramayya Appa Row and *another*—Plaintiffs—Petitioners.

v.

Chakali Veeraswamigadu and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 1312 of 1917, (Originally filed as appeal against Order No. 185 of 1917), Decided on 19th December 1917, against order of Dist. Judge, Kistna in A. S. Nos. 110 and 116 of 1914.

(a) Madras Estates Land Act (1 of 1908), Ss. 3, 77 and 189—Remand order in appeal directing suit to be presented to Civil Court is not appealable.

No second appeal lies to the High Court against an order of the District Court in appeal remanding a suit instituted in the Revenue Court for presentation to the Civil Court. [P 192 C 1]

(b) Civil P. C., (1908), O. 7, R. 10; O. 43, R. 1 (a)—No appeal lies from order under R. 10 in suits in revenue Court by virtue of Madras Estates Land Act (1 of 1908), S. 192.

Order 43, R. 1 (a), Civil P. C., which gives the right of appeal against orders passed under O. 7, R. 10, is inapplicable to suits in Revenue Courts by virtue of S. 192, Madras Estates Land Act. [P 193 C 1]

(c) Civil P. C (1908), S. 115—Appeal can be treated as revision when question of jurisdiction is involved—S. 115 is not controlled by Madras Estates Land Act (1908), S. 192.

The High Court has power to treat an appeal as a petition in revision under S. 115, Civil P. C., especially when the question in issue is one of jurisdiction. S. 115, Civil P. C., is not controlled by S. 192, Madras Estates Land Act (1908). [P 193 C 2]

(d) Jurisdiction—Civil and Revenue—Rent suit alleging land to be raiyati is cognizable by revenue Court although land ceased to be service tenure on date of suit.

A suit for rent, based on the allegation of the land being a Raiyati land in which the defendant has occupancy rights, is cognizable by the Revenue Court notwithstanding plaintiff's admission that the defendant held at a favourable rent on condition of doing services which were discontinued and which discontinuance disentitled him to claim the reduction. Under the circumstances, the land cannot be said to be held on service tenure at the date of suit so as to bring it within the jurisdiction of the Civil Courts. [P 193 C 2]

(e) Madras Estates Land Act (1 of 1908), S. 77—Case under S. 77 on plaint allegation Revenue Courts have exclusive jurisdiction—Jurisdiction depends on plaint and not defence—Practice jurisdiction.

When the allegations in a plaint bring the case within S. 77, the suit must be filed in the Revenue Court and the jurisdiction of the Court will not depend on any pleas the defendant might raise. The fact that the Court will have to go into complicated questions will not affect the jurisdiction of the Revenue Court. [P 193 C 2]

P. Nagabhushanam—for Appellants.

B. Narasimha Row—for Respondents.

Judgment.—The Receiver of the Nidadavole and Medur Estates, who is the appellant, sued the respondent, in Revenue Court to recover Rs. 323-11-7, arrears of rent for Faslis 1320 to 1322. The case for the plaintiff was that the lands were granted by the former Zamindar at low rent to defendants 1 to 8 who were performing washerman's services, that they ceased to do so and conveyed a portion of the land to defendant 9 and that plaintiff was consequently entitled to recover the full rent claimed. Defendants 1 to 8 were ex parte. Defendant 9 pleaded inter alia that the lands were raiyati lands, that he has been paying the rent reserved ever since his purchase, that plaintiff has no power under the Estates Land Act to enhance the rent and that the suit was bad for misjoinder of parties. No question was raised as to the jurisdiction of the Court and at the trial plaintiff conceded that the lands were raiyati lands and that the defendants had occupancy rights. The Suits Deputy Collector decreed Rs. 51-13-9 as the proper rent payable. Respondent 9 appealed, but not on the ground that the Revenue Court had no jurisdiction. The grounds of appeal, on the contrary, proceed on the footing that the Estates Land Act applied. When the appeal was argued before the District Judge however a preliminary objection was taken by the appellant in the District Court to the effect that the lands were service inams and that the plaintiff ought to have sued in a Civil Court, the Revenue Courts having no jurisdiction.

The District Court upheld the contention and directed the plaint to be presented to the proper Court. The appeal before us is against the order of the District Judge. A preliminary objection has been taken by the respondent that no appeal lies against the order of the District Judge as the order was passed under O. 7, R. 10, Civil P. C., 1908 (corresponding to S. 57 of old Code), and O. 43, R. 1, Cl. (a), which gives the right of appeal against the order passed under O. 7, R. 10, is made inapplicable to suits in Revenue Courts by virtue of S. 192, Estates Land Act, which specifies the

provisions of the Civil Procedure Code applicable to suits, appeals and other proceedings under the Act and excludes Ch. 43 of the old Code which corresponds to O. 43 of the present Code. For the appellant it is contended that an appeal from the District Court to the High Court is not a proceeding under the Act but from one Civil Court to another and that O. 43 applies to such appeals.

There can be title doubt that if the Suits Deputy Collector had returned the plaint presented to him under S 77, Cl. (1), Estates Land Act, no appeal would lie to the District Court. The question however is whether a second appeal lies to the High Court where the order directing the return of the plaint is passed for the first time by the District Court, which is not a Revenue Court. S. 189 provides that decrees and orders passed by the Revenue Courts shall be subject to appeal as provided in the schedule. No further appeals are specially given by the Act except to the Board of Revenue under S. 190. The schedule to the Madras Estates Land Act gives the description of the suit and the Court to which an appeal lies. In respect of suits for rent under S. 77 of the Act an appeal lies to the District Court. S. 190 gives a right of second appeal to the Board of Revenue against certain orders passed on appeal by the Collector. So far as appeals from decrees of the District Court are concerned a second appeal has, though not expressly given by the Estates Land Act, been held to lie by virtue of S. 100, of the new Civil P. C., of 1908 and Ch. 43 of the old Code which are not excepted by S. 192. *Vide Ravi Veeraraghavulu* v. *Bomma Devara Venkata* (1), and *Venkataramier* v. *Vythilinga Thambiran Avergal* (2). As regards orders not coming within the definition of 'decree' in the Civil Procedure Code S. 192, Cl. (a), Madras Estates Land Act enacts that Ch. 43, which corresponds to O. 43 and relates to appeals from orders, shall not apply to appeals or other proceedings under the Estates Land Act. It is argued that this section can only apply to appeals from the Revenue Courts to the District Court, because it is only such appeals as are appeals under the Act, and that for appeals from the District Court to the High Court we have to fall back upon the provisions of the Civil Procedure Code, as appeals from orders of the District Court are not appeals or proceedings under the Estates Land Act. Reference been made to *Secy. of State* v. *Chelikani Rama Rao* (3) and it is argued that the observations of their Lordships of the Privy Council (at page 624 of 39 *Mad.*) to the effect that when proceedings reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code apply, would cover equally cases of appeals under the Estates Land Act. The Forest Act does not contain any provision analogous to S. 192, Estates Land Act 'excluding the operation of certain sections and chapters of the Civil Procedure Code, and *Secy. of State* v. *Cheikani Rama Rao* (3) can bedistinguished on that ground. There is a great deal to be said for the contention of the appellant, but the matter is not res integra. The point is covered by authority and we think we are bound by the decision of this Court to the contrary when the question directly arose for determination.

In appeals against Orders Nos. 349 to 353 of 1915 and *Visvanatha Mudaliar* v. *Mannar Naidu* (4) it was held by Ayling and Seshagiri Aiyar, JJ., and by Ayling and Napier, JJ., that no second appeal lies against an order of remand under O. 41, R. 23, Civil P. C., and in Second Appeal No. 235, of 1917, Ayling and Phillips, JJ., held that no second appeal lies against an order dismissing a suit for default. The contention now raised by the appellant before us that the appeals from the District Court to the High Court are not appeals contemplated by the Estates Land Act, and the question of the effect of the observations of the Privy Council in *Secy. of Seate* v. *Chelikani Ram Rao* (3) were not raised in the above cases, but as already pointed out there is nothing in S. 10, Forest Act which excludes any of the provisions of the Civil Procedure Code from its operation and second appeals have not been expressly excluded. It has been argued

1. A. I. R. 1914 P. C. 87=25 I. C. 305=37 Mad. 443.
2. A. I. R. 1914 Mad. 135=24 I. C. 754=38 Mad. 655.
3. A. I. R. 1916 P. C. 21=35 I. C. 902=39 Mad. 617.
4. A. I. R. 1915 Mad. 20=25 I. C. 425.

that S. 190, Estates Land Act would render the decision of the District Judge, who returns a plaint to be presented to the Civil Court on the ground that the suit does not relate to an estate within the definition of the Act, res judicata in all subsequent proceedings and can only be set right by the High Court in second appeal from the decision of the civil Court to which the plaint is presented under orders of the District Judge; that proceedings will then have to be begun de novo in the Revenue Courts and that it could hardly have been the intention of the Legislature that this circuitous course should be followed when an appeal from an order of the District Court to the High Court would be a quick and adequate remedy. We have to construe the plain meaning of S. 192, however desirable it may be that the Legislature should amend S. 192, by giving a right of appeal against orders of remand.

It is argued by the appellant's vakil that if O. 43, of the Code is not to apply to suits under the Estates Land Act, then the order directing the return of the plaint would be a decree within the meaning of the Civil Procedure Code, as it would be an adjudication as to which no appeal would lie under O. 43, by virtue of S. 192, Estates Land Act. It is difficult to see how the definition of "decree" in the Civil Procedure Code can be controlled by anything in the Estates Land Act. The preliminary objections must therefore prevail. We have been asked to treat the appeal as a revision petition under S. 115, Civil P. C. This section is not excluded by S. 192, Estates Land Act, and we have power to deal with the appeal as a revision petition as the question in issue is one of a jurisdiction. The case for the plaintiff is that the land is Ryoti land and that the defendants 1 to 8 who are pattadars are liable to pay the rent claimed. Defendant 9 is treated as subtenant. It is open to the plaintiff under S. 145, Estates Land Act to assent to the transfer of 5 acres odd out of the 13 acresodd held by defendants 1 to 8 in favour of defendant 9 and we take it that the suit against defendant 9 amounts to an assent. All that defendant 9 pleaded was that the lands are Jiroyati lands and that the rent was being paid for a long time. He also claimed occupancy rights. Defendants 1 to 8 raised no defence. At the trial plaintiff's vakil admitted that the lands were Ryoti lands and that the defendants had occupancy right. The only question that remained for consideration was whether the rent due was at the rate claimed by the plaintiff or the rate admitted by defendant 9. S. 3, no doubt excludes lands granted on service tenure at favourable rent so long as the service tenure subsists, but in the present case it is not alleged by the defendants in the written statement that the lands are now held on service tenure and on the evidence the Deputy Collector finds that the service is no longer rendered.

There is no particular formality or procedure prescribed by the Act for putting an end to service tenures or anything which the landlord has to do in case services are discontinued in order to make the lands Ryoti lands, in cases where lands which were once Ryoti lands are given to the occupancy Ryot on a favourable rent in consideration of services to be rendered. Under circumstances of this case it cannot be said that the lands must be deemed to be held under service tenure on the date of the suit When the allegations in the plaint bring the case within S. 77 of the Act, the suit must be filed in the Revenue Court and the jurisdiction of the Court will not depend upon any pleas the defendant might raise. The fact that the Court may have to go into complicated questions as to the right of resumption by the landlord or the continuance of the service on which lands were granted on favourable tenure will not affect the jurisdiction of the Revenue Court. *Vide, Polemera Thammu* v. *Godey Chitti* (5). We are of opinion that on the admission of the plaintiff and defendant 9 that the lands were at the date of suit Ryoti lands it must be taken that the lands in the possession of defendant 9 were not held on service tenure on the date of the suit so as to bring the case within the exception to the definition of Ryoti land in S. 3. Whether lands continue to be held on service tenure is a question of fact which must be raised on the pleadings. We set aside the decision of the District Judge and remand the appeal for disposal on the merits. Costs will abide and follow the result.

S.N./R.K. *Appeal allowed.*

5. (1910) 7 I C 809.

A I R. 1918 Madras 194

ABDUR RAHIM AND OLDFIELD, JJ.

Amba—Plaintiff—Appellant.

v.

Shrinivasa Kamathi — Defendant — Respondent.

First Appeal No. 24 of 1916 Decided on 28th November 1917 against decree of Sub-Judge, South Kanara, in Original Suit No. 73 of 1914.

(a) Transfer of Property Act (4 of 1882), S. 123—Gift repudiated before registration though presented by him for registration conveys no right.

A deed of gift which is repudiated by the donor before registration, though presented by him to be registered, is inoperative and confers no rights on the donee. [P 199 C 2]

(b) Transfer of Property Act (4 of 1882), S. 123—Non-delivery of deed to donee—Gift is inoperative.

Non-delivery of the document to the donee renders it unenforceable. 40 *Mad.* 759, *Expl.* and *Dist.* [P 200 C 1]

(c) Registration Act (16 of 1908), S. 17—Presentation is not equivalent to registration.

Presentation of a document for registration is not equivalent to its registration.

(d) Contract Act (9 of 1872), S. 16—Undue influence—Deed merely because it is prejudicial or unreasonable or not prudent is not void for undue influence when willingly executed - Undue influence—Proof of—No direct proof can be given—It is to be deduced from circumstances—Per *Oldfield, J.*—Even though there is direct evidence it cannot be insisted upon.

Per *Abdur Rahim, J.*—A deed cannot be treated as void for undue influence merely because it is unreasonable or its terms are prejudicial to the donor or his kinsmen. If the deed is true and a well-understood and voluntary act of the donor no legal objection can be taken to it merely on the ground that it is such as would not be expected from a man of ordinary prudence. [P 195 C 1]

Undue influence is not a matter always capable of direct proof, and must depend, in its very nature, on the conclusions to be drawn from the entire circumstances in which the transaction had its origin.

Per *Oldfield, J.*—The proof of undue influence may be either direct, though that cannot be insisted on, or indirect with reference to the opportunities for and disposition to the exercise of influence on the one side and the result of its exercise, as indicated by the merits of the transaction, the acceptance of false representations and the entertainment of false beliefs on the other. [P 195 C 1, 2]

K. Ramanath Shenai—for Appellant.

K. Srinivasa Aiyangar—for Respondent.

Abdur Rahim, J.—The appellant, who is a minor, instituted the suit by her next friend, her father, to recover certain properties from the respondent-defendant, her husband. Her title is based on a deed of gift executed by Krishna Kampti, the adoptive father of the respondent, who died on 17th April 1909. The defence on the merits, broadly speaking, was of two-fold character. Firstly, that the alleged deed of gift was executed under the undue influence of the appellant's father who procured it by means of misrepresentation and fraud and secondly, that the contemplated gift was never completed according to law and was in fact revoked by Krishna Kampti before it could be completed.

Krishna Kampti, who was possessed of considerable properties, moveable and immovable, was an inhabitant of a village called Karingan in the South Kanara District. He adopted the defendant when he was only 9 months old and until shortly before the date of the transaction in question, the defendant and his first wife lived in the same house with Krishna Kampti and his wife on the best of terms. The defendant however had no child though he was nearly 39 years old and his wife about 33. Krishna Kampti, who was 70 years old in 1908, being concerned that his son had no issue conceived the idea of marrying him to a second wife. The defendant was much attached to his first wife and did not want to marry again; but he was at last prevailed upon to marry the plaintiff who was at the time a girl of 11 years, she being the daughter of Krishna Kampti's wife's brother, one Ramayya Shanbhogu. The case of the defendant is that this Ramayya Shanbhogu had much influence over Krishna Kampti, that even before the marriage actually took place, he had formed designs with regard to Krishna Kampti's properties and that it was he who by means of misrepresentations and unfair devices succeeded within a few months of the marriage in alienating his father's affections from him and misleading his father to execute documents, the effect of which on his own and the family's interest he did not fully realize. The plaintiff's marriage with the defendant was brought about on 9th March 1908, and according to custom, she came and lived in the house of the husband for a few days. Then she went back to her father's house; 10 or 15 days afterwards, the defendant was asked to go and fetch her. The case of the plaintiff is that instigated by his first wife, he refused to do so and thereupon the old man Krishna

Kampti was very angry and in order to coerce the defendant to submission or to punish him and to make provision for the plaintiff, decided upon making a gift of his share of the immovable properties to her. He consulted his lawyers (witneses 2 and 3 for the plaintiff), and upon their advice had a deed of partition drawn up and also a deed of gift of the immovable properties which fell to his share. The defendant's version of what occurred was that it was the plaintiff's father who persistently maligned him to the old man and by means of various false representations and insinuations worked upon the mind of Krishna Kampti to such an extent that he did not in fact know what he was about. The defendant says that he did not refuse to bring the plaintiff back to is house when asked by his father, but only delayed doing so as his first wife's father was seriously ill and he wanted to see him, that in fact it is not the custom for immature girls of the plaintiff's age to live in the husband's house but that, among Hindus of his caste, girls before the attainment of puberty live mostly in their father's house. He says that there was nothing unreasonable in what he did and his conduct could not give offence to any reasonable man.

It may be that Krishna Kampti, in compelling the defendant to marry a second wife in the lifetime of his first wife to whom he was evidently much attached and afterwards taking offence at the hesitation or delay displayed by the defendant in bringing the plaintiff back from her house when asked to do so, was acting arbitrarily and harshly. But if the alleged gift to the plaintiff was a true, well-understood and voluntary act of Krisha Kampati's mind, no legal objection can be taken to it merely on the ground that it was such as would not be expected from a man of ordinary prudence. An owner of property is entitled to dispose of it as he pleases and the validity of his disposition does not depend upon whether it is prejudicial to himself or to his relatives and heirs. The point for consideration is whether the defendant has proved that in making the alienation in question, Krishna Kampti's mind was unduly influenced and dominated by the plaintiff's father. This is not a matter always capable of direct proof and must depend by its very nature on the conclusion to be drawn from the entire circumstances in which the transaction had its origin. The motive of the gift, its nature, its effect on the donor and his family, the state of the mind of the donor, whether he acted upon any misrepresentations or misconceptions, the benefit which the person who is alleged to have dominated the will of the donor derives by the act, how the donor regarded the act when removed from the influence of the person for whose benefit the gift was made, what independent and competent advice he had and whether the persons advising him knew of the influence he was acting under, these are some of the circumstances which have to be borne in mind in ascertaining whether the transaction is vitiated on the ground of undue influence. Krishna Kampti, as I have said, was entirely happy in his family relations until the marriage of the plaintiff with the defendant.

The defendant charges the plaintiff's father with having broached the idea of this marriage and on the evidence, I am inclined to the opinion that the plaintiff's father was mainly instrumental in bringing it about. He professes in his evidence that in fact he was reluctant to give his daughter to the defendant but gave in under the pressure of Krishna Kampti. He however knew or must have known that the defendant was much attached to his wife and was unwilling to marry a second time. Under these circumstances when the plaintiff's father showed readiness to give the plaintiff, a very young girl, in marriage to the defendant, it seems to me that his act must have been influenced by some strong motive, and the more so if, as I think, he actively suggested the idea to Krishna Kampti. Krishna, Kampti was generally speaking, an intelligent man, andmanaged his properties himself, which apparently he substantially improved, and also the household affairs.

He was much respected in the neighbourhood by reason of his position and wealth. But it is argued on behalf of the respondent that about the date of the transaction under consideration, his natural faculties and the strength of his mind must have undergone deterioration. This, it is contended, is evident from all that he did from the inception of these transactions in April 1908 till his death on 17th April 1909 as evidenced by the various documents executed by him during

this period. I cannot but hold that there is force in this argument.

All along, the relations between him and the son were of the most friendly character. The respondent was perfectly obedient to him, in fact he married the plaintiff simply to please him much against his own inclinations. The only cause of quarrel suggested by the appellant is that the respondent showed hesitation in bringing back the appellant a second time to the house after marriage. I believe the case of the respondent that this was not because he did not want to live with the appellant but because it is not customary for a bride of immature age to live in the house of the husband. Krishna Kampti himself could have had no apparent object to serve by insisting on the respondent bringing the appellant back to the house, for she was too young for connubial intercourse. No doubt, it is likely that the respondent's first wife did not like his marrying the plaintiff, and one reason why the respondent hesitated to comply with his father's wishes was to avoid unnecessary domestic unpleasantness. It is contended on behalf of the respondent that the appellant's father wanted to bring about a quarrel between the respondent and his father in order to accomplish the object he had in view, namely, to get hold of Krishna Kampti's properties. It is clear from the statements in Ex. 1 that the respondent was charged with the intention to marry a third wife and to adopt a stranger boy. The respondent says that he had no such idea and there was no such talk. Who is then responsible for the story? Krishna Kampti himself was not interested in inventing it and so it was in all probability the appellant's father who made these false representations to Krishna Kampti, for no one else is suggested as being interested in doing so. The appellant herself was too young to conceive such a plan. The respondent, according to the evidence, had no enemy and as the events showed, the only person who could have been interested in causing a breach between him and his father was the plaintiff's father.

To begin with, therefore, we have the fact that the motive for these transactions was supplied from outside by means of false representations and insinuations. If Krishna Kampti's mind had retained its original vigour, it is impossible to conceive that he would not have taken some steps to ascertain the truth of these representations or that simply because the respondent did not evince promptness in getting the appellant back to the house, he would have taken the extreme step of alienating his entire share in the family immovable properties. In his reply to Ex. P. by which Krishna Kampti notified his intention to the respondent to partition the family properties, the respondent as early as 9th May 1908, asserted that the appellant's father (he is alluding to him as "our relatives and friends who make a show of being our well wishers") had, for sometime, been trying, by various means and from interested motives, to poison Krishna Kampti's mind against him. The marriage of the appellant with the respondent took place only in March 1908. We find that a month or so later Krishna Kampti, who had hitherto been an affectionate father to the respondent, was so infuriated with him that he determined to give away half the family properties to a young girl of eleven years, reserving for himself and his wife, his partner in life for more than 30 years, the barest maintenance. The respondent it seems to me, must have had good reasons for stating in May 1908 that this state of things was brought about by unfair and insidious means by plaintiff's father.

By the deed of gift, following upon the deed of partition on 23rd May, he purports to give away to the plaintiff the bulk of what he possessed, on the ground that the respondent had been disobedient to him and that he did not care to have anything to do with such a person. He presents the deed for registration on the 1st June. The documents were not immediately registered, as the Sub-Registrar was not sure if the stamp was sufficient and made a reference to the District Registrar. Four days after presentation, however and within three weeks of the execution, this very Krishna Kampti put in a petition to the Sub-Registrar asking for a return of the documents on the ground that he did not want them to be registered. It is clear that by this time he was no longer under the influence of the appellant's father and that the real state of facts was explained to him by the respondent and his friends, so that he began to realise that he had been misled. The documents were not

returned because the appellant's father gave a notice of his intention to file a suit for compulsory registration and obtained an injunction. On 9th June 1908 he executes a document called Tahanamah, an agreement between himself and the respondent by which he treats the entire property as still joint, states that there was no necessity for alienating any portion (alluding apparently to the deeds of partition and gift) and undertaking on his part not to alienate any property. He states in so many words that he was old and had lost his peace of mind latterly owing to the disobedience of the respondent and that he had at the instigation of the relations of the appellant executed those documents. He obtains an undertaking from the respondent that he would not discard the appellant or marry a third wife or adopt any boy who does not belong to the family of certain dayadis.

This shows that he had not yet been able to shake off entirely the effect of the representations that must have been made to him to the effect that the respondent wanted to discard the appellant by marrying a third wife and to adopt a stranger boy. I may mention that the respondent was so much attached to his first wife that he did not want to marry the appellant at all ; and the suggestion therefore that he intended to marry a third wife, must have been entirely baseless and must have been as I have pointed out, made by some interested and scheming person, in all probability by the appellant's father who was taking steps to compel registration of the document and filed a suit in the District Court of South Kanara (Original Suit No. 44 of 1908) for the purpose. Krishna Kampti filed a written statement in this suit in November 1908. There he plainly states that the plaintiff's father, taking advantage of his old age, represented to him that the respondent had been wilfully disobedient to him, that he wanted to abandon the appellant to marry a third wife and to adopt a stranger boy, that when he was under the influence of these false representations the appellant's father prevailed upon him to execute a deed of partition and a deed of gift and that for these reasons he did not want that those documents should be registered. The learned advocate for the appellant argues that these allegations of misrepresentation, undue influence and fraud were untrue, and inserted at the instance of the respondent. But I have already tried to show that the representations alluded to are in fact false and must in all likelihood have been made by the appellant's father. At the least, it is clear that the old man was ready to make any statement suggested to him by the persons who happened to be about him at the time.

The next document is of 20th March 1909, that is to say four months after the filing of the written statement. It is called a "deed of rectification." It is clear that by that time Krishna Kampti had come again under the influence of the appellant's father and his friends. In this document the appellant's father finds it advisable to content himself with much less than under the deed of gift. The most important modification is the curtailment of the absolute gift in favour of the plaintiff to a gift of an estate for life and the fixing of a maintenance for his wife, but on the other hand the management of the property is made over to the appellant's father and two other persons one of whom is a clerk of the pleader who drafted the document. The reason given by Krishna Kampti for not retaining the management in his own hands is that he was weak in health. Furthermore it clearly indicates consciousness on the part of the appellant's father himself that the deed of gift was not a completed document or one which could stand scrutiny in a Court of law. It was on the basis of this document that the suit for compellieg registration was compromised. Krishna Kampti entirely resiled from his own written statement and consented to have the deed of gift registered, subject to considerable modifications or amendment as so called under Ex. F. This took place about a fortnight before he died. The appellant's father apparently did not leave him alone till the date of his death. On that very day he carried the old man, while he was suffering from fever and must have been in quite a prostrate condition, from his house in the village to Amtur, about two miles or so distant and there in the house of a stranger a will was executed. In this will it is stated that the respondent although he promised to behave obediently had again become disobedient and therefore all the rest of his property, moveables

and cash, whatever had not been disposed of by the so-called deed of rectification was disposed of in favour of the appellants.

This is the history as proved by documents of the last year of Krishna Kampti's life. Upon these facts, apart from the oral evidence, I should not have the least hesitation in holding that the man's mind had become enfeebled, that the various documents in favour of the appellant were got up when his mind had been poisoned by the influence exerted and the means adopted by the appellant's father. He worked upon the mind of Krishna Kampti by making all sorts of false representations and suggestsons to him with a view to secure the property for his minor daughter of which he would, in the circumstances, have entire control and management. The interval evidence furnished by the documents themselves is strongly corroborated by the citcumstances under which the deeds in question were executed and registered. For this purpose it is important to bear in mind the situation of the different villages mentioned in the evidence. Karingan, which is the residence of Krishna Kampti and the respondent, lies within the jurisdiction of the Sub-Registrar of Buntwal, only three miles distant. The appellant's father resides at Puttur, which is eight miles distant from Karingan. Puttur is within the jurisdiction of the Sub Registrar of Vittal. Vittal and Buntwal are in the opposite directions of Karingan. Buntwal which is the proper registration office for Karingan is, as I have said three miles distant while Vittal, where the Sub-Registrar within whose jurisdictcn Puttur is, is eight miles from Karingan. From Vittal to Puttur is ten miles. Exs. A and B, instead of being presented to the Registrar of Buutwal, were executed and presented for registration at Puttur, the Sub-Registrar of Vittal being called there for the purpose. No satisfactory explanation is given by the appellant why the document should have been executed away from Karingan and presented for registration to the Vittal Sub-Registrar and not to the Buntwal Sub-Registrar. The respondent's suggestion is that the Buntwal Sub-Registrar knew Krishna Kampti well and his affairs and if the documents were presented to him, he would have been more strict in requiring proof as to how far Krishna Kampti realised and understocd the effect of those documents.

The appellant's father took the precaution of having the documents executed at places other than Karingan, removing the old man for the purpose from his house to his own house about eight miles distant, lest the respondent, who happend to be away from Karingan on the particular days, might unexpectedly turn up and frustrate his designs. The execution of the will was part and parcel of the same scheme and cannot be separated from the rest of the transaction. According to the evidence, on that date the respondent happened to be away from Karingan in order to get some medicine from the doctor for his father, who was then suffering from ever. The appellant's father taking advantage of it, removes the old man to Amtur, which though 1½ miles distant from Karingan is situated within the jurisdiction of the Sub-Registrar of Vittal. He asks the Sub-Registrar to come to the house of an ordinary raiyat, a stranger to Krishna Kampti, and there the will is executed. These facts considerably strengthen the conclusion furnished by the nature and tenor of the various documents that he was in feeble heaith owing to old age and that all the dispositions in favour of the plaintiff must be attributed to the exercise of fraudulent means by which the appellant's father dominated the mind and will of Krishna Kampti. As regards the oral evidence as was to be expected, it is of a conflicting nature. But it is proved beyond any doubt that during the days of the transactions in question, the appellant's father was all along with Krishna Kampti, that he went so far as to write his books of accounts during those days so as to ingratiate himself with Krishna Kampti. (See Ex. 4). Much reliance has been placed and naturally so, by the learned Advocate for the appellant on the evidence of plaintiff witnesses 2 and 3.

The first is a second grade Pleader and the second a first grade Pleader. Both of them had been acting for Krishna Kampti for sometime before the transactions in question. These gentlemen were called in for consultation as to how Krishna Kampti could make a gift of his share of the family immovable properties to the appellant and for the purpose of preparing the necessary documents. They speak to Krishna Kampti having expressed much anger and displeasure at the respondents

delaying to get his second wife back from her father's house and to a quarrel between the two. But none of them were in a position to say how Krisha Kampti had been worked up to such a state of fury nor, could they be expected to speak as to what part the appellant's father or anybody else had been playing in the matter. We take it upon their evidence and upon other evidence in the case—in fact that was not disputed before us at all—that in executing the deed of partition and the deed of gift Krishna Kampti knew the nature of the dispositions he was making But that does not by itself dispose of the question as to whether those documents were brought about by the undue influence of any one. The value of these witnesses' evidence especially witness 3, must to my mind be taken to be much discounted by the fact that it was he who filed the written statement Ex. 3, which contains a statement that the deeds of partition and gift, to the drafting of which this Pleader was a party, were brought about at the instigation of the appellant's father and under the influence of misrepresentations and false suggestions made by him. P. W. 3 should have known that the statements in Ex. 3 must be false if he means to convey by his evidence in Court that the deed of partition and the deed of gift were not in fact brought about by improper means employed by the appellant's father. P. W. 2 says that it was at his suggestion and for his convenience that the deeds of partition and gift were executed at Puttur in the plaintiff's father's house, which is only a few yards off from his own house. But all the facts in connection with the execution of this and other various documents induce me not to accept this statement as the main reason for the execution of Exs. A and B in Puttur.

Krishna Kampti was made to give away by a deed of gift property of the value of Rs. 40,000 or more including the family house allowing himself and his wife, with whom he had been on loving terms to be maintained at the discretion of a young girl of 11 years or her father. The deed itself says that the gift was made in order to make provision for her. That could not be the true reason as she could not want so much for her maintenance. The real benefit would in fact go to the appellant's father. If the making of provision for the appellant was not the real motive, the other motive suggested is Krishna Kampti's displeasure with his son. No doubt, he was angry with him for not going to the appellant's father's house to bring the appellant as desired. But in the circumstances which I have mentioned that alone could not adequately account for Krishna Kampti's action. His mind must have been poisoned, as found by the Subordinate Judge by the appellant's father by means of false representation to the prejudice of the respondent. It can hardly be doubted that Krishna Kampti's intelligence must have considerably declined and his will power greatly weakened during the period covered by these transactions. And that made it possible for the appellant's father to influence him in the way he did. Krishna Kampti repudiated what he had done as soon as he was removed from the influence of appellant's father. It was part of the latter's plan in order to facilitate the object he had in view, to take Krishna Kampti away from his house to his own house for the purpose of getting him to execute and register those documents. I agree with the Subordinate Judge who saw the witnesses give their evidence, that the documents A and B were executed under undue influence and are therefore invalid.

This is sufficient to dispose of the appeal. But the appeal fails on another clear ground, namely, that Exs. A and B were repudiated by Krishna Kampti before they were registered. Under the Transfer of Property Act a gift can be made only by a registered instrument. They were presented for registration by Krishna Kampti on the 1st June but on the 5th June before they could be registered he put in a petition saying that he did not want the documents to be registered and asked that they may be returned to him. They were therefore entered in Book No. 2, which is the book containing entries of documents the registration of which is refused and the reasons for refusal to register. They were not actually returned to Krishna Kampti because the appellant had obtained an injunction from the civil Court The fact however remains that Krishna Kampti repudiated the gift and the partition on 5th June. On 9th June he executed the Tahanamah and registered it. The effect of this is the cancellation of the contemplated gift and partition. Some reliance

was placed on behalf of the appellant on a recent Full Bench decision of this Court in *Gangadara Mudali* v. *Sambasiva Mudali* (1), where it has been ruled that if a donor dies after the execution of a deed of gift but before registering it and the donee presents it for registration during time allowed by the Registration Act, the gift becomes complete on its being registered at the instance of the donee. The reasoning on which the decision is based is that a deed of gift may be registered not merely on presentation by the executant but also on presentation by the claimant, that is, the donee.

Therefore, if the donor, after executing a deed of gift, delivers the document to the donee, the latter is entitled under the law to present it for registration and once it is registered, it takes effect from the date of execution. But here the deed was not delivered to the appellant or her guardian or father or to any one acting on her behalf as guardian. The donor kept it with himself. He presented it for registration, but repudiated it afterwards and executed a document inconsistent with and having the effect of cancelling the contemplated gift. If the arguments addressed on behalf of the appellant were to be accepted, the logical result would be that directly a deed of gift is executed, even though the donor never delivers it to the intended donee or to any person on his behalf but keeps it locked in his own box, yet the donee can compel him to register it. The Full Bench decision referred to certainly does not go so far. All that it lays down is that if the donor has done all that lies in his power to complete the gift either by having it registered himself or by handing it to the donee, then he cannot afterwards retract the gift. To go any further would be to make a serious breach in the well-established principle of law, that a donor cannot be compelled to complete an incomplete gift. There were also other questions of law argued by Mr. K. Srinivasa Aiyangar, the learned vakil for the respondent, on which it was contended that the Ex. A is invalid and inoperative in law; it is not necessary to discuss them. I confirm the decree of the Subordinate Judge and dismiss the appeal with costs.

Oldfield, J.—I concur in the decree proposed by my learned brother and I deal with the question, on which I differ from him, that of undue influence, because plaintiff is entitled to the benefit of my finding in view of the possibility of an appeal. The doctrine of undue influence has been invoked by defendant to disable plaintiff, his second wife, from recovering on Ex. B, a deed of gift to her by Krishna Kampti, his adoptive father, of part of the property obtained in the partition under Ex. A. The former document was executed three days after the latter and they are according to defendant one transaction, into which Krishnasher was induced to enter by the undue influence of plaintiff's father, P. W. 7, with the result that defendant was cut out of a large part of the property, to which he would have been entitled in the event of Krishnan's death undivided from him. His allegations are in particular that, from shortly after his marriage to plaintiff and whilst he was absent from home, P. W 7 began to dominate the mind of Krishnan, who was aged seventy, and by telling him false tales induced him to execute these documents. The burden of proof of this is of course on defendant.

Firstly, as to the ostensible motives for the execution of Exs. A and B and next as to those alleged to have really secured it. In 1908 defendant, aged thirty-seven, had been married some years without issue and he admits that he had no mind to marry plaintiff or any other second wife and that he married her, because Krishnan pressed him to do so. He says generally that Krishnan did so at the instigation of plaintiff's father, his brother-in-law. But there is no evidence that the latter had begun to exercise undue influence at that time and no explanation as to his means of doing so. The undisputed fact is that from the beginning defendant was averse from the marriage, whilst Krishnan insisted on it. A few days after it plaintiff, a girl of eleven who had not yet attained her age, returned to her parent's house, where, as P. W's 2 and D. W's. 1 witnesses deposed, she would in accordance with custom mostly live until she did so. Krishnan however pressed defendant to go there and, as appears from P. W's. 7 evidence, to fetch her back in order that she might remain with him. He did not do so, but went away with his first wife to her family house, where her father was ill. Whilst he was

1. (1917) 40 Mad 759=40 I C 192.

there, Krishnan sent him Ex. P, in which he referred to his disobedient conduct and to his having left the house "on vain pretexts, uttering some improper words" and having taken with him all the jewels belonging to his first wife and certain valuable securities; he announced his intention of making a partition and called on defendant to choose the properties in one or other of two lists enclosed as his share.

The removal of the jewels could be matter for reproach, only if they were the family jewels in defendant's wife's possession; and the abstraction of the documents is not referred to again in the case. In his reply, Ex. Q, defendant denied having taken them or been disobedient, attributed Krishnan's decision to the intrigues of relatives and friends, attempted to dissuade him from dividing and, in case the decision was insisted on, chose the properties in one list. This was on 9th May 1908. Ex. A was executed ten and Ex. B fourteen days later. The period, in which all this took place, is important, because it was before the date of the document, which is attacked, and because during it the exercise of undue influence must be established, the later occurrences calling for attention only as indicative of Krishnan's mental position and capacity. There is, it may be conceded, no doubt according to any standard, Eurpoean or Indian, that his insistence, not only on defendant's remarriage contrary to his wishes, but also on his bringing back his bride, before he was willing or was obliged by custom to do so, was unreasonable. But that is not enough for defendant's case. He must prove further that this conduct was induced by influence, which was within the legal definition "undue." Such proof may be either direct, though that cannot be insisted on and is possible to a small extent only in this case, or indirect with reference to the opportunities for and disposition to the exercise of influence on the one side and the result of its exercise as indicated by the merits of the transaction, the acceptance of false representations and the entertainment of false beliefs, on the other.

Following the discussion of the decision in *Hugnenin* v. *Basely* (2), I deal with the evidence with regard to these points. Krishnan owned a half share in codsiderable property and, except for his age there was nothing against his capacity, defendant himself deposing that he joined in the management until his death, had taken leases and other documents in his name, in particular two mortgages in 1907, was managing well and except for P, W's. 7 influence, was a good and intelligent man. Generally, therefore there is no ground for any suggestion that he would be the prey of a designing relative, such as P. W,s. 7: and I see no reason for making the assumption, which defendant's case requires, but for which there is no distinct evidence, that his mental capacity deteriorated at this time. Plaintiff 7's witness's opportunities for influence before Ex. A can be stated shortly. He was Krishnan's brother-in-law and naturally his intimate.

He came, he says, at Krishnan's invitation, though that is not corroborated, to his house from his own house, whither he had gone after the marriage, and was then told of defendant's refusal to go for his wife and of his other conduct, which was perverse in Krishnan's eyes, and he was with the latter, when Ex. P was sent, as his entries in the accounts Ex. 4 on 6th to 7th May 1908 show. But this goes very little, if any, way towards proving that he dominated Krishnan's will. The proved facts, his relationship to him and the fact that he was plaintiff's father made it natural that he should be consulted, but did not entail that his opinion would be decisive. There is nothing on defendant's side to show that the story of an invitation by Krishnan is untrue and it cannot be assumed that it is so. The entries in the accounts are not shown to be of a character involving any confidential relation. There is neither at this nor any other stage any suggestion that attempts were made to prevent Krishnan and defendant meeting. Why should it be assumed that 7th plaintiff's witness was the moving spirit and that Krishnan's advocacy of plaintiff's claims was not the crotchet, unreasonable it may be, of an obstinate old man desirous of a grandchild and his endowment of her the means he adopted for bringing her and the defendant together? The suggestion, it has been said, is that Krishnan was deceived by plaintiff 7's witness's untrue statements as to the relation between plaintiff

2. White and Tudor's Leading Cases, Ed. 6 597.

and defendant. But there is no direct evidence of this, no witness having been called, who refers to any allegations as having been made by 7th pliantiff's witness in his hearing or as referred to by Krishnan; and there is no evidence that as regards the period before Ex. A 7th plaintiff's witness ever made any complaint, Ex. W referring to such later events. In fact, if anything to prejudice Krishnan had occurred between the couple, it must have been during plaintiff's short stay in his house or in connection with defendant,s refusal to bring plaintiff back there; and of those matters Krishnan's own information would be exhaustive. Defendant did not specify plaintiff 7's witness in Ex. Q as among the relations and friends to whose machinations he attributed Krishnan's desire for a partition, and although in evidence he said that his mother and the servants told him of the way in which Krishnan's mind was poisoned, he called none of them. If the charge in Ex. P of abstracting jewels and documents refers, as it must be understood to have done, to family jewels in defendant's first wife's possession, there is no more reason for supposing that Krishnan would have shrunk from making a false charge than that 7th plaintiff's witness would have done so; and in fact on defendant's denial, that matter does not seem to have been considered further. When as was the case, Krishnan's own information was full, there is no reason for assuming that he derived his prejudice from 7th plaintiff's witness or any other person.

It is next important that, whether the extent of his dependence on 7th plaintiff's witness, and it is not shown to have been material, the latter is not alleged to have attempted to keep him from intercourse with defendant or any other person likely to influence him. There is some conflict of evidence, which it is not possible to resolve, as to the presence of defendant and 7th plaintiff's witness, when Ex. A was being prepared, but the former eventually withdrew his statement that he returned home on receiving Ex. P and said that he did not do so as he knew Krishnan would not listen to him, a statement indicating that the two had parted on a strained footing, with which 7th plaintiff's witness could have had nothing to do. There is in fact no explanation given for defendant's failure to return instead of merely sending Ex. Q, and devote himself to undoing what had been done and counteracting 7th plaintiff's witness's influence in the future; and perhaps because he was conscious of more acute past disagreement than the evidence discloses, it will be found consistently with thisthat although he throughout had accesst to his father, he at no time attempted to protect Krishnan from undesirable influence or to prevent P. W. 7's retaining or regaining his ascendency. At the time of the partition, threatened in Ex. P and agreed to in Ex. Q, Krishnan's wife, of whom defendant makes no complaint, was with him and he executed Exs. A and B after consultation with P. W's. 2 and 3 the latter a first grade pleader and defendant's mother's step brother. P. W. 2 says that he advised both parties to be reconciled and P. W. 3 that he advised defendant. Neither witness is beyond criticism as regards credit and independence, plaintiff 2 giving P. W. 7 legal assistance at a later stage and P's. W's. 3 subsequent conduct in connexion with Ex 3 being explicable only on the assumption that he could act as a mere mouthpiece for his client without regard to facts (as he now speaks to them) or that client's previous professions. But nothing as to P. W. 7's exercise of influence over Krishnan was elicited from either of them. Similarly as regards P. W. 4 a retired 2nd grade pleader paying a substantial assessment, who had known Krishnan for thirty years privately and professionally and who attested Exs. A and B. In reply to his remonstrance Krishnan said that he must execute them, because he was bound to see to the welfare of his son's second wife and that defendant wanted to neglect her. Defendant admitted that, when he attested, P. W. 7 was present; but the latter did not support him further and no reason has been shown for distrusting his evidence. On the other hand defendant adduced nothing whatever on this part of the case.

Exhibits A and B were presented for registration at the Vittal office, which is not the nearest to Krishnan's house at Karingan. But there is no reason for doubting the explanation given that Vittal was more convenient for P. W. 2 who drafted them and had advised over the partition; and the suggestion that secrecy we intended is not established, since defen-

dant had been told in Ex. P of the partition at least and there is no reason for supposing that he would have heard of Ex. B also, if it had been registered at the nearest office at Buntwal, earlier than he actually did; that is within a fortnight, before Ex. C. The suggestion, that the reference in Ex. A to his purchase of a stamp for it was an attempt to fix him with concurrence in its terms, is unsustainable. He no doubt, denied the purchase and in the alternative has pointed out that it was made on 3rd April 1905 sometime before any question of partition arose. But against this denial there is no reason for distrusting the endorsement of the stamp vendor made in the course of his duty; and as regards the second point and the probability that the stamp was purchased for some other transaction, the suggestion that there was any sinister design in its use for Ex. A is sufficiently answered, when it is observed that such a design would be intelligible in connexion only with Ex. B, not with Ex. A, which he had admitted Krishnan's right to execute and to the terms of which he had consented in Ex. Q. It is possible, and a similar statement in Ex. B indicates, that it was the document writer's habit to include such recitals in his drafts; and in the circumstances no inference adverse to plaintiff has been sustained.

Exhibit B effected a transfer to plaintiff of all the immovable property comprised in Krishnan's share under Ex. A and of a mortgage with possession for Rs. 12,000 and left him with only other mortgages aggregating Rs. 8,015, moveables and cash in hand Rs. 3,271 and outstanding Rs. 1,854, in all over Rs. 13,000, although the last item might not all be realizable. It is difficult to arrive at the proportion of this to his share under Ex. A. But if the latter is taken, as it was by the Sub-Registrar in Ex G, as worth Rupees 41,424 Krishnan gave up three quarters of his property, retaining the remaining quarter and the benefit of a stipulation in Ex. B for his and his wife's maintenance at a specified and apparently a fairly liberal rate. Such arrangements by aged persons for their maintenance are not in my experience uncommon, although in this the selection of plaintiff, a young girl, as the donee was certainly exception and the provision for her would, it may be conceded, be excessively liberal according to ordinary opinion. But it is material that firstly no such total surrender and no creation of opportunity for such further aggrandisement by plaintiff or her father was created as complete domination of Krishnan's Will by the latter might naturally secure. For it must be noted that not only was the gift limited to a portion of Krishnan's property, but he retained the management of that portion as plaintiff's trustee until her majority; that is for as long as he was likely to be capable of it. And next in view of the occasion on which the arrangement was made and the surrounding circumstances, it is intelligible as an attempt to provide defendant with a motive for accepting plaintiff as his wife and eventually cohabiting with her.

I turn next to a portion of the case on which defendant has laid much stress, that relating to Krishnan's subsequent conduct and dispositions. The latter must of course be considered without reference to the formal objections to their validity and as they are relied on only as evidence of his liability to succumb to any temporary influence and of the intention as to his property which resulted from the free exercise of his will. It is to be observed that the simultaneous conduct of argument in each of these senses is difficult. For if Krishnan's successive dispositions varied according to the influence to which he was temporarily subject it will be hard to deduce from them any continuous underlying intention. It may be added that such intention, so far as it can be deduced, seems to me on the whole consistent with the desire to benefit plaintiff, expressed in Ex. B.

Exhibit B was executed on 23rd May 1908 and presented for registration seven days later. But on 5th June 1908, Ex. C, the petition for withdrawal of Exs. A and B, which, as defendant says, may have been drafted in his presence, was presented; and on 9th June 1908 after a panchayat had been held, Ex. I was executed and eventually registered, virtually cancelling Exs A and B. Next however apparently within the time fixed in Ex. N, the Sub Registrar's decision to return the documents unregistered, the plaintiff brought Original Suit No. 44 of 1908 for a direction to him to register them. It ended on 31st March 1909 in a compromise decree Ex U, directing their registration, as modified by an agreement, Ex. F dated 29th March 1909 executed

by Krishnan. Between Ex. I and Ex. F, P. W. 7 had been coming to his house and on two days in November 1908 made entries in his account, Ex. IV. It does not appear however that defendant, who no doubt was not a party to Ex .F or the compromise, was not there also and could not have counteracted P. W. 7's manoeuvres; and admittedly he was with Krishnan on the next important date 17th April 1908. On it during his temporary absence Krishnan was taken a mile and a half to a place within the Vittal Sub-Registrar's jurisdiction where he registered Ex. F and Ex. S, his Will, dying the same day.

Of these documents defendant relies mainly on Exs. C and I as evidencing a total revulsion of feeling on the part of Krishnan. But although the registration of Exs. A and B was in terms abandoned and inconsistently with them and especially the former the father and son decided to remain joint and agreed not to change their status in the future and although Ex. I starts with a recital regarding the previous instigation of plaintiff's relatives and (a suggestion not persevered in) the insertion in the previous documents of unauthorised matter, there is also a recital regarding defendant's disobedience and the necessity for preventing quarrels between his two wives and there are stringent provisions for the protection of plaintiff and also of the first wife against the contingencies of defendant's discarding either marrying a third wife or adopting a stranger. These provisions require attention because it is suggested that nothing in defendant's conduct made them necessary and that they were due to the further misrepresentations as to his intentions by P. W. 7 to Krishnan, referred to by the latter in his written statement in the suit Ex. 3. Reference to Ex. 3 however, does not improve the argument. For, although it was no doubt signed by Krishnan and presented by P.W. 3, it is not clear how far it really embodied the former's views, since the only first hand evidence is that the draft for it was given to P. W. 3 by D. W. 3, who is brother of defendant's first wife and would, therefore naturally assist him; and, as D. W. 3 says that he had it from another Pleader, not examined, there is only Krishnan's signature as security for his responsibility for its details. It is worth noticing that Krishnan signed it within a week of P. W's. 7 writing entries in his accounts, when, on the defence case, he should still have been subject to the latters' influence.

The provisions of Ex. 1 need not in fact be explained by reference to any particular mistaken impression, however produced. For they correspond with obvious possibilites in conjugal relation, as it exists between members of the parties' community; and there is no necessity to suppose that they were founded on misrepresentations by P. W. 7 when Krishnan was equally aware of those possibilities and had expressed and was again to express distrust of defendant's intentions and when the precautionary provisions insisted on were calculated also to protect the interest of defendant's first wife. Their primary object was, it may fairly be taken, that already suggested for Ex. A, although it was now ito be effected more simply and at less expense, to promote a reconciliation between defendant and plaintiff by imposing terms for the latter's protection. Those terms were arrived at under defendant's influence and after a panchayat had been held, the members of which could presumably have been called to support this part of defendant's case; and there is no ground for ascribing them to the misrepresentation of P. W. 7. In fact they indicate that Krishnan, in spite of defendant's presence and after due deliberation and advice from his friends, persisted in his apprehension for and intention to protect plaintiff.

This intention is more clearly expressed in Ex. F. For, although Krishnan returned to Exs. A and B and a scheme for plaintiff's endowment and transferred the immediate management of her property from himself to P. W. 7, he displayed a greater regard for defendant's claim in case his conduct should be satisfactory. Firstly, a separate maintenance is provided for Krishnan's wife and next there is an important explicit provision for defendant's right to manage the property, in case he

> "brings plaintiff and keeps her with him and lives with her in the family house amicably."

Further, the absolute estate conferred on plaintiff by Ex. B is replaced by provisions (1) giving her only a life interest, (2) directing the devolution of the properties on her children, if she has any, and otherwise on those of the first wife, if any, and in case an adoption is necessary on a son,

if adopted from specified families. On this I observe firstly that. although Ex. F refers generally to the inclusion in Ex. B of unauthorised matter, that matter is not specified and the dispositions made are, though less favourable to plaintiff, still sufficiently so to indicate Krishnan's persistence in the intention already attributed to him to protect her. Secondly, we have nothing in detail as to the execution of Ex. F or its presentation to the Court and nothing to explain, if defendant's case is true, how P. W. 7 was able to re-establish his influence and defendant was unable to counteract it, although we know that he was with Krishnan within three weeks of the execution of the date of Ex. S. The inference must be that Krishnan acted on a well-formed intention throughout, though with discrimination, the concessions to defendant's interests being evidence on the latter point.

Lastly as to Ex. S which, in the absence of any thing definite to the contrary and in view of its registration, must be treated as made with full capacity. It was made during defendant's temporary absence and he contends that it and the simultaneous registration of Ex. F correspond with a revival of P. W. 7's influence since his own departure in the morning. This, it is said, is indicated first by the journey to register the document within the Vittal jurisdiction; and no doubt, if (as would have been natural) the Bantwal Sub-Registrar had been sent for to the house, he would not have had so far to come as the Vittal Sub Registrar to the place chosen.

But, previous dispositions (including Ex. 1) having been registered by the latter, there was good reason for employing him again ; and in view of defendant's merely temporary absence it is difficult to believe that there could have been any serious expectation of concealing the transaction from him. There is nothing clear as to the time he had been in Krishnan's house. But it is extremely unlikely that he was ignorant of Ex. F, since it is mentioned in the compromise petition, Ex. R, and he had presumably had notice of the passing of the compromise decree, Ex. U ; and it is then remarkable that Ex. F had not been destroyed at his instance. And next, Ex. S is significant, because, whilst it refers to the course of the dispute between Krishnan and defendant, it confirms Ex. F, except as to one particular, the appointment of P. W. 7 as one of the executors for the disposal of the items of property not included in the earlier documents. This is not favourable to defendant. But the disposition of those items in no way supports an intention to despoil him. For it benefits only Krishnan's widow, defendant, who is to take the residue, if he lives with plaintiff within ten years, and various charities, except as regards an annual allowance to the two executors of Rs. 50 each. It is not possible to recognize in Ex. S any material result of the exercise of influence adversely to defendant ; and it is impossible to believe that any would have been exercised by P. W. 7 to secure so little advantage.

It has been pointed out that the burden of proof is on defendant. He has, in my opinion, proved only that P. W. 7 had some opportunities of influencing Krishnan ; that the latter was in Ex. B unduly liberal to plaintiff ; and that for one short period he changed his mind as to benefitting her directly, although he never did so as to the general necessity for protecting her interest. There is no reason in the circumstances for the assumptions, which we are asked to make, that Krishnan's intelligence was failing and that he was moved by misrepresentations regarding matters mostly within his own knowledge, which P. W. 7 is not proved to have made and which defendant, his adoptive mother and the friends consulted could have corrected. On the other hand it is not proved that any attempt was made to keep Krishnan from the influence of defendant or any other person or that the former either before or after Ex. B acted as though he has anything to fear from P. W. 7. The case is in fact one of an old man of full capacity, which is not shown to have been impaired, anxious, no doubt unreasonably, to secure the continuance of his family and to interfere in his son's affairs, who made a disposition, unduly liberal, but not so extravagantly comprehensive as to be irreconcilable with his own comfort or his exercise of independent volition ; and who persisted in the sentiment, which dictated it, almost continuously and in defendant's immediate society until his end. That does not justify a finding for undue influence and I would there-

fore dissent from this part of the lower Court's decision.

There remains the defence that Exs. A and B are unenforcible, because they have not been registered either by Krishnan or after delivery by him by any person legally competent on plaintiff's behalf ; and I agree that it must prevail. It is not disputed that these documents cannot be given in evidence or enforced, if they are not registered. Then firstly, the original registration proceedings initiated by Krishnan were abortive, since an order was passed for the return of the documents unregistered and this cannot be affected by the actual failure of Krishnan to receive them. It has no doubt been argued that, having presented them, he had done everything in his power to make them effectual. But the principle, that presentation of such documents can be treated as equivalent to registration as against their executants, is not supported by anything in S. 47 or elsewhere in the Act or, so far as we have been shown, by any authority. And secondly, if it is assumed that the decree, Ex. U, was equivalent to a delivery of the documents by Krishnan to plaintiff, there is first the difficulty that Ex. A and therefore Ex. B had impliedly een cancelled before its date by Ex. I and are therefore unenforcible, whether or no the subsequent presentation and registration were regular. I should moreover be ready to hold that they were invalid, because under S. 32, Registration Act, the documents could be presented only by plaintiff's representative or assign; and P. W. 7, who presented them, was not her assign, or her representative under S. 2 (10), since he had ceased to be her natural guardian on her marriage and had not been appointed her legal guardian. In these circumstances I agree with my learned brother's decision, dismissing the appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 206

OLDFIELD AND BAKEWELL, JJ.

S. K. Mohideen Kadirshaw Maraikar —Appellant.

v.

Official Receiver, Tinnevelly and *another*—Respondents.

Appeal No. 58 of 1916, Decided on 23rd February 1917, against order of Dist. Judge, Tinnevelly, in O. P. 395 of 1915.

Provincial Insolvency Act (3 of 1907), Ss. 24, 26, 36 and 52 - Enquiry under S. 52 is not judicial enquiry—Entering name of creditor in schedule does not bar application under Ss. 26 and 36 - S. 26 implies judicial enquiry.

The power deligated to the Official Receiver under S. 52 is to fraine the schedule after an ex parte examination of the evidence tendered by the alleged creditors of the insolvent and he does not decide judicially or finally upon contested claims. His entering a creditor,s name in the schedule does not prevent the Court from entertaining applications under S. 236 and 36.

The provisions of Ss. 26 contemplate a judicial enquiry. [P 206 C 2; P 207 C 1]

C. V. Ananthakrishna Ayyar and *K. R. Rangasami Aiyangar*—for Appellant.

M. D. Devadoss—for Respondents.

Judgment.—The first question in this case relates to an order passed by an Official Receiver upon the claim of a creditor of an insolvent to rank as a secured creditor under an hypothecation bond which was disputed by another creditor. The Official Reeeiver received oral and documentary evidence and held that the bond was supported by consideration and was not fraudulent. His successor in office seeks to impeach the transaction not withstanding this decision. By virtue of S. 52, Provincial Insolvency Act, 1907, and rules of this Court made thereunder, an Official Receiver has power (b) to frame schedules and to admit or to reject proofs of creditors, and (f) to hear and to determine any unopposed or ex parte application. S. 24 (1) directs the Court to frame a schedule of creditors and the debts proved by them, and S. 25 prescribes the ordinary procedure for proof of debts. Under these provisions all persons alleging themselves to be creditors are required to produce evidence of the amount and particulars of their debts, which may be upon affidavits containing certain particulars and the Court, by order, determines the persons who have proved themselves to be creditors and the amount of their debts, and then frames the schedule.

Section 24 (3) then provides for an application by a creditor after the schedule has been framed that his name may be entered therein, and S. 26 provides that the Court may expunge an entry in the schedule or reduce the amount of a debt upon the application of a receiver or, in certain cases, of a creditor or the debtor: and both provisions contemplate a judicial inquiry. Having regard to these express

provisions for a judicial enquiry upon the rectification of the schedule when framed, and to the absence of any such provision in relation to the framing of the schedule in the first instance, we think that the latter operation is intended, at least in general, to be an ex parte determination by the Court upon the evidence furnished by the alleged creditors. If this construction be correct and the sections and rules already mentioned be read together, it is clear that the power delegated to the Official Receiver is to frame the schedule after an ex parte examination of the evidence tendered by the alleged creditors and that he does not decide judicially or finally upon contested claims. For these reasons we are of opinion that the action of the Official Receiver amounted only to an entry of the appellant in the schedule of creditors under S. 24, and does not preclude the Court from entertaining an application under S. 26 and 36. [Their Lordships then dealt with the evidence and holding that the appellant's mortgage bond was a bona fide transaction supported by consideration, allowed the appeal with costs.]

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 207

SPENCER, SRINIVASA AIYANGAR AND KRISHNAN, JJ.

Govindasami Pillai—Defendant—Appellant.

v.

Pethaperumal Chetty and another—Plaintiffs—Respondents.

Second Appeal No. 719 of 1915, Decided on 18th September 1917, from the decree of Sub-Judge, Tanjore, in appeal Suit No. 388 of 1914.

(a) Civil P. C. (1908), O. 21, R. 96—Symbolical possession when given stated—It is not to be confounded with paper delivery.

Symbolical possession is given only in cases were the party in actual possession is entitled to remain in such possession as in cases of delivery under O. 21, R. 96, Civil P. C. and should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery i e., where he gets no possession at all [P 208 C 2]

(b) Mortgage — Lease by mortgagee —On redemption lease ipso facto determines — *Obiter*

A lease created by a mortgage determines ipso facto on redemption of the mortgagee by the mortgagor or the purchaser of the equity of redemption. The position is however, different where the mortgage is only assigned. [P 208 C 2]

G. S. Ramchandra Aiyar—for Appellant.

T. Narasimha Iyengar—for Respondents.

Judgment.—The facts are somewhat complicated, but when once they are apprehended it appears to be clear that there is no finding on the point now in dispute. The suit was for rent of certain lands for the years 1910-1911, 1911-1912, and 1912-1913. The defendant's plea was that he was dispossessed of the land by one Ramasami Mooppan who was the real owner and was not, therefore, bound to pay rent after the date of his dispossession to the plaintiff, who is the assignee of his landlord Subramania Josier. As regards the first two years there is a concurrent finding of fact by both the lower Courts that the defendant was not evicted by any body and we accept that finding. As regards the third year which began in March 1912, and ended with March 1913, it is said that evidence clearly proved eviction at least in May 1912 by Ramasami Mooppan. The first Court found it was not proved by the defendant that there was any eviction. In appeal the lower Appellate Court does not find definitely one way or the other. A certain amount of donfusion has arisen owing to the history of the title to this property. The lands originally belonged to a Mahratta gentleman, who mortgaged them with possession to Chithambaram Chetty or to a predecessor of his in title. While Chithambaram was in possession as mortgagee, a suit was instituted against him for money by one Srinivasa Aiyangar who got the mortgage right attached before judgment, which he brought to sale in execution after obtaining a decree and purchased it himself. The attachment appears to have been made in 1904. The mortgagee Chithambaram Chetty leased the lands to one Alagiri, who in his turn leased to Subramania Josier, the landlord of the defendant. After the lease to Alagiri, Chithambaram appears to have sold the othi right to Kandasami Mooppan. Ramasami Mooppan had become the owner of the equity of redemption of Mahratta gentleman and appears to have redeemed Kandaswami, the assignee of the mortgage, and appears to have claimed actual possession of the property from the lessees of Chithambaram on the ground that after redemption by him, there was no subsisting title in the mortgagee Chi-

thambaram to sustain any lease by him. On this claim, Ramaswami Mooppan appears to have obstructed the defendant in cultivating the land and on his complaint his landlord Subramania Josier applied to a Magistrate under S. 145, Criminal P. C. to protect the possession of his lessee, the defendant. This petition was, however, dismissed in August 1912 on the ground that the property had been delivered to Srinivasa Aiyangar who took certain proceedings in execution as purchaser against Chithambaram, the mortgagee. Ramasami Mooppan claimed the land against Srinivasa Aiyangar, the purchaser. The merits of that claim it is unnecessary to specify now. Ramasami Mooppan's claim was disallowed and he filed a suit to establish his claim. In the meantime the execution-purchaser Srinivasa Aiyangar applied to be placed in possession of the lands as purchaser of the mortgage interest of Chithambaram. That application appears to have been opposed by Subramania Josier, the landlord of the defendant, but Srinivasa Aiyanger was, according to the language of the receipt, placed in possession in August 1912 (Ex. 5). Whether he was actually placed in physical possession of the land, who was then in possession, whether it was the defendant or Ramasami Mooppan who is said to have obstructed the defendant and taken possession in May 1912, is not found.

The pleader for the appellant contends that the defendant was evicted by Ramasami Mcoppan at any rate by the end of May 1912 and that Ramasami Mooppan was the real owner as his title was established against Srinivasa Aiyangar the purchaser and if Srinivasa Aiyangar did get possession in August 1912 he got it from Ramasami Mooppan and so far as he, the defendant was concerned, when once he was evicted by the real owner (that is) Ramasami Mooppan, it did not matter to him, whether the real owner was subsequently ejected or not. The respondent's pleader contends that defendant was not ejected at all, and if he was ejected by Ramasami Mooppan Ramasami must be considered to be a trespasser as he had agreed with Subramania Josier to allow him to continue in possession as lessee during the whole period of his lease. Whether this is so or not is again not found. Further it is not found whether as a matter of fact Srinivasa Aiyangar dispossessed any body when he is said to have obtained possession under Ex. 5. It is said he obtained symbolical possession. We must point out that symbolical possession is given only in cases where the party in actual possession is entitled to remain in such possession as in cases of delivery under O. 21, R 96, Civil P. C., and should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery (that is) where he gets no possession at all. It is clear from the above statements of facts that there must be a finding on the following points: (1) Whether the defendant was actually ousted from the lands in May 1912 by Ramasami Mooppan. (2) If he was, whether Ramasami Mooppan had a title paramount to that of Subramania Josier, the landlord of the defendant. The effect of the alleged agreement Ex. C must also be considered. (3) If the defendant was not evicted by Ramasami Mooppan, was he evicted in August 1912 by Srinivasa Aiyangar by reason of the delivery evidenced by the receipt Ex. 5? And if he was so evicted, had Srinivasa Aiyangar a paramount title? (4) Did the defendant remain in possession without being evicted by any body during the year 1912 to 1913?

The finding must be on the evidence on the record except as to issue (2) on which any adjudication between Srinivasa Aiyangar and Ramasami Mooppan may be admitted. Finding is to be returned before 17th July 1917 and seven days are allowed for objections.

(In compliance with the order contained in the above judgment, the Subordinate Judge of Tanjore submitted the following:)

Findings.—The four issues remitted to this Court for finding are:

"(1) Whether the defendant was actually ousted from the lands in May 1912 by Ramasami Mooppan? (2) If he was whether Ramaswami Mooppan had a title paramount to that of Subramania Josier, the landlord of the defendant? (3) If the defendant was not evicted by Ramasami Mooppan, was he evicted in August 1912 by Srinivasa Aiyangar by reason of the delivery evidenced by the receipt Ex. 5? And if he was so evicted had Srinivasa Aiyangar a paramount title? (4) Did the defendant remain in possession without being evicted by any body during the year 1912 to 1913?"

The findings were directed to be on the evidence on record, except as to issue 2 in

which any adjudication between Srinivasa Aiyangar and Ramaswami Mooppan was allowed to be received. The defendant produced a number of documents under that provision and Exs. 10 to 13 were filed as they alone related to adjudication between Srinivasa Aiyangar and Ramaswami Mooppan.

Chidambara Chetti leased the lands while he was in possession as usufructuary mortgagee to Alagiri Chetti in 1905 and the latter is said to have leased the same to Subramania Josier in 1907. Subramania Josier leased to the defendant's father Perumilu Pillai for three years under Ex. A, dated 2nd March 1910. Although the documents relating to the leases to Alagiri and Josier are not filed, it appears that the former obtained a lease for ten years from 1905 and that the latter obtained his lease for eight years under a registered deed, dated 10th August 1907 : vide Exs. 4 and C. The lease would therefore expire in April 1915.

The plaintiff derived his interest from Josier on 21st March 1911. A mistake has been made by the first Court and also my predecessor in reading this document as one of transfer of lease. It appears to be a transfer of debt in favour of the plaintiff, because the assignee merely gets the right to recover the rent due under the lease Ex. A and nothing more.

The date of the sale of the equity of redemption in Original Suit No. 372 of 1906 under which Muthayya Chetti the decree-holder purchased it is not in evidence, but Ramaswami Mooppan purchased it from him on 21st April 1911. The agreement Ex. C was made on 29th May 1911 between Subramania Josier and Ramaswami Mooppan, under which the latter agreed that Josier should enjoy his lease-hold for the remaining four years according to the lease in his favour and deliver it to Ramaswami Mooppan on 13th April 1915. The sale of the mortgage interest of Chidambara Chetti in favour of Kandaswami Mooppan was on 25th September 1910. Ramaswami Mooppan purchased this interest on 2nd September 1911. Upon the strength of it he filed a claim petition in Original Suit No. 234 of 1904 on 30th September 1911, which was dismissed on 11th October 1911 on the ground that the attachment was in 1904 and the claim was made late. There was no investigation. The purchase under the Court sale in Original Suit No. 324 of 1904 which followed upon this was on 6th December 1911. Immediately Ramaswami Mooppan filed his suit, Original Suit No. 6 of 1912, on 18th December 1911. In April 1912 Ramaswami Mooppan and Subramania Josier were parties to some obstruction proceedings in respect to the delivery of property as per this sale : see Exs. 6-a and 6-b. The obstruction was evidently overruled, because delivery was made to Srinivasa Aiyangar on 23rd August 1912 (Ex. 5).

On 1st June 1912 Subramania Josier applied under S. 145, Criminal P. C., against Ramaswami Mooppan complaining of disturbance of possession and for establishing him in possession of the property free from interference of Ramaswami Mooppan. Ramaswami Mooppan on the other hand applied to the Court in Execution Appeal No. 1088 of 1912 in Original Suit No. 234 of 1904 that his possession may not be disturbed by Srinivasa Aiyangar, the purchaser in Original Suit No. 234 of 1904, pending disposal of the suit Original Suit No. 6 of 1912 (Ex. 2). The petition to the criminal Court was dismissed on 31st August 1912 on the representation of the petitioner Subramania Josier that the properties had gone into the possession of a third party under a civil Court sale. The delivery receipt Ex. 5 shows that Srinivasa Aiyangar obtained delivery of possession on 23rd August 1912.

Ramaswami Mooppan failed to obtain a decree (in Original Suit No. 6 of 1912) in his favour in the first and second Courts but their Lordships of the High Court set aside those judgments and remanded the suit for disposal on the other issues which were raised in the case. The contention of Ramaswami Mooppan in that suit was that the attachment (in Original Suit No. 234 of 1904) made in 1904 was invalid and had ceased to exist when Chidambara Chetti transferred his interest in the mortgage to Kandaswami Mooppan in 1910. Their Lordships held that the attachment was invalid as not having been made under S. 268 of the old Civil P. C., and a payment to the mortgagee or his representative by the person who held the equity of redemption was not in contravention of any attachment validly subsisting.

The further trial was held by the District Munsif of Tiruvadi who raised another question, that the validity of the attachment did not invalidate the subsequent sale held upon it and that the bona fides and validity of the transfer to Kandaswami Mooppan should be decided before ths Court sale in favour of Srinivasa Aiyangar could be held null and void as against Ramaswami Mooppan, the assignee from Kandaswami Mooppan. He held that the transfer was not void or in fraud of creditors and upheld the plaintiff's contention in the revised judgment in Original Suit No. 6 of 1912 (Ex. 12). That decision was confirmed in appeal by the Sub Court of Kumbakonam (Ex 13). The position, therefore, is that Ramaswami Mooppan became the owner of the property free of all incumbrances on 2nd September 1911.

The case of the defendant in the present suit is that Ramaswami Mooppan disturbed his possession in 1911. The evidence of D. W. 1, Ramaswami Mooppan, shows that the sub-lessees of defendant obstructed him when he went to take possession in Purattasi of 1911, that Sundarappayyar (co-owner with or agent of Subramania Josier) also clamied itle and obstructed him and that they carried away the crops. But in the Masi following he took possession to the land and defendant or his father did not enjoy it afterwards. He raised Cumbu in Vaikasi of 1912 and harvested the crops. His surety Govinda Mooppan raised it and it was harvested in the presence of the Police Inspector. Evidently this refers to the possession proceedings which took place about that time. D Ws 2 and 3 state that from Chitrai 1912 Ramaswami Mooppan was in possession and that though Subramania Josier claimed from the cultivator Govinda Mooppan, he did not get any share of the crops. P. Ws. 2 and 3 also admit that from Chitra 1913 Ramaswami Mooppan was in possession.

From the saveral judicial proceedings referred to above it is clear that Ramaswami Mooppan would have no locus standi if he had not possession. He gave security and had delivery to Srinivasa Aiyangar stayed. It is unlikely that he would not have taken possession in order to substantiate the case which he was then fighting against Srinivasa Aiyangar. He had no doubt undertaken under Ex. C in May 1911 that he would allow Subramania Josier to continue in possession till the expiry of the term of the lease in his favour and it was argued on plaintiff's behalf that it is unlikely that he would have broken his agreement so soon after. It was pointed out that defendant's case was that Ramaswami Mooppan trespassed upon the land in Purattasi 1911 and dispossessed defendant and that there is a change of case now about dispossession in Chitrai 1912. The explanation about the change of case is found in the evidence of Ramaswami Mooppan as D. W. 1. As to his breaking the agreement so shortly after it was made, a reference to the dates of the proceedings recited above clearly shows the motive and renders his action in taking the matter into his own hands, instead of leaving Subramania Josier to fight out Srinivasa Aiyangar and perhaps to jeopardise his interests, quite intelligible. When he mede the agreement Ex. C Srinivasa Aiyangar was not in the field So long as it was a matter between himself and the tenant Subramania Josier, Ramaswami Mooppan might have been quite willing to continue the lease because in putting an end to the lease there may be questions of repayment of premium and so forth and Ramaswami Mooppan actually appears to have paid Rs. 400 for certain improvements effected by Subramania Josier. But when Srinivasa Aiyangar came forward with his claim under an old attachment of 1904, which if substantiated would render invalid the transfer of mortgage by Chidambara Chetti in favour of Kandasami Mooppan, he could not be expected to sit idle and let Subramania Josier continue in possession throwing suspicion on the sale to himself by leaving room for the argument that Ramaswami Mooppan was not even in possession of the land, as he ought to be if he was a real purchaser.

On issue 1, therefore, I find that Ramaswami Mooppan actually dispossessed the defendant in May 1912

On issue 2, I find that Ramaswami Mooppan had a title paramount to that of the landlord of the defendant, because in him had become vested in September 1911 both the usufructuary mortgage and its equity of redemption.

Turning now to the effect of the agreement Ex. C upon this title, I have to point out that it is an agreement entered into between Subramania Josier and Ramaswami Mooppan. Plaintiff became

a transferee in March 1911, while this agreement was made in May 1911 to enure beyond the period of defendant's interest. The defendant or his father was not a party to this agreement. There was therefore no privity of contract between the two and I cannot see how defendant can claim the benefit of that agreement. It rested on defendant to show that he was ousted by a person having a paramount title and Ex. C is put forward in answer by the plaintiff to depreciate it. If he is not bound by the agreement I cannot see how he could claim benefit under it.

It was suggested by the defendant's vakil in argument that when the paramount title was proved, it mattered little whether the holder of such title actually dispossessed the defendant or not, because an incumbrance created by the usufructuary mortgagee had come to an end when the mortgage was redeemed. Leases created by him would not stand on any higher footing. It may be that a tenant will have the right to emblements or there may be an apportionment of the rent, but apart from such rights and liabilities specially created by the law for the current agricultural year, the tenant holding over was at the best but a trespasser who would be liable to pay the mesne profits to the person who was entitled in ownership Subromania Josier's title to recover rent terminated with the redemption and therefore the assignee of Josier could be in no better position. It is unnecessary to say anything about this argument, because I have found that Ramaswami Mooppan did as a matter of fact take possession of the land from the tenant. I refer to this argument only because the vakil further argued that Ex. C was inoperative or ineffective because it was entered into by Ramaswami Mooppan at a time when he was not the owner of the mortgage rights. He was only the owner of the equity of redemption and had therefore no title to immediate possession. Any agreement entered into by him in respect of future possession was therefore invalid. I am unable to accept this argument because the owner of the equity of redemption, as he is called, is in reality the owner of the land. The mortgage is only a subsidiary interest and subordinate to ownership. The owner could always enter into agreements with tenants in possession holding under precarious titles so as to confirm them in their possession at his pleasure. Moreover, even if Ramaswami Mooppan was not full owner capable of giving effect to the agreement into which he entered, it is clear that when the estate came into possession he would be bound by such agreement. The argument, moreover, contains a fallacy that the agreement was not to have future effect. Ramaswami Mooppan could not have entered into any agreement about present possession but only about the future and what he did was therefore perfectly valid. I therefore find on issue 2 that Ramaswami Mooppan had a paramount title.

The vakil for defendant informed me that he did not press issues 3 and 4, that it was not his case that he was dispossessed by Srinivasa Aiyanger and that no finds need therefore be recorded upon them.

This second appeal coming on for final hearing after the return of the findings of the lower appellate Court upon the issues referred by this Court for trial, the Court delivered the following.

Judgment —On the findings now returned the decrees of the lower Courts must be modified. It is argued however that the finding that Ramaswami Mooppan had a title paramount is not correct, because it is alleged that he having obtained the equity of redemption took an assignment of the usufructuary mortgage right from the mortgagee and as such assignee he was bound by the lease in respondent's assignor's favour which had been created by the mortgagee prior to the assignment of the mortgage itself. This argument depends entirely on the position that Ramaswami Mooppan was an assignee; but this is not clear. The appellant states that he, the Mooppan redeemed the mortgage and thus became the full owner, in which case, of course, the lease created by the mortgagee will not bind the Mooppan. Respondent has raised this question for the first time now; as the facts are not clear in his favour, we cannot allow him to take it. If he had intended to rely on the point he should have laid a proper foundation for it by proving the necessary facts at the proper time.

Accepting the findings, the decree of the lower Court must be modified by substituting Rs. 1,152-4-0 and interest on it

for Rs. 2,041-8 0 and interest on it. Parties will pay and receive proportionate costs throughout.

S.N./R.K. *Decree modified.*

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AYLING AND NAPIER, JJ.

Bezwada Kotayya and *others*— Accused.

v.

Konathalapalli Venkayya —Complainant.

Criminal Revn. No. 866 of 1916[1] and Case Referred No. 117 of 1916, Decided on 9th March 1917, referred by Dist. Magistrate, Kistna, D/- 30th November 1916.

Criminal P. C. (5 of 1898), Ss. 247 and 403—Acquittal under S. 247 does not make S. 403 applicable— Term "tried" in S. 403 is not surplusage.

A judgment of acquittal following on complainant's default of prosecution under S. 247, does not entitle the person acquitted to plead autrefois acquit on a fresh prosecution on the same facts and S. 403 does not operate as a bar to the Court taking cognizance of a second complaint. [P 212 C 1]

The word "tried" in the early part of S. 403 (1) should not be treated as surplusage and the section does not apply to a case where even the particulars of the offence were not stated to the accused under S. 242: 34 *Mad.* 253; *not Foll.* 4 *C. W. N.* 346; 7 *C. W. N.* 493, 7 *C. W. N.* 711 and 2 *Weir* 457, *Dist.* [P 212 C 2]

Public Prosecutor—for the Crown.

Order.—The complainant in this case K. Venkayya, presented a complaint to the Taluk Magistrate, Nandigam, on 8th August 1916 against accused B. Kottayya and others charging them with an offence under S. 426, I. P. C. The case was duly taken on file and posted for hearing and eventually adjourned to 20th September 1916; on which date in consequence of the absence of complainant an order of acquittal was passed under S. 247 Criminal P. C. Subsequently on 22nd September 1916, complainant presented a fresh complaint of the same offence based on the same facts and explained his absence on 20th September 1916 to the satisfaction of the Magistrate. The Magistrate thereupon took cognizance of this second complaint and directed the issue of process to the accused. The sole question is whether S. 403, Criminal P. C. is a bar to the Magistrate's taking cognizance of the second complaint by reason of the order of acquittal passed on 20th September 1916.

In our opinion it is not. S. 403 only bars the retrial of a person who has once been tried and convicted or acquitted and in this case it does not appear that the accused were tried on the first complaint. The trial of a summons case cannot be said to begin until the particulars of the offence are stated to the accused under S. 242, Criminal P. C. and there is nothing in the record to indicate that this was done. In fact from the Magistrate's explanation it may be safely inferred that it was not. No trial having even commenced on the first complaint S. 403 does not bar the Court from taking cognizance of the second complaint. Our attention has been drawn to the ruling in *Guggilapu Peddaya* In re (1) in which a different view of S. 403 has been taken but with all respect we feel unable to concur in the reasoning of the learned Judge who decided that case. In our opinion some meaning must be attached to the word "tried" in the early part of S. 403 (1). It should not be treated as mere surplusage as the learned Judge would seem to do. It would have been quite simple to word the section thus:

(1) "A person who has once been convicted by a Court of competent jurisdiction of an offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236 or for which he might have been convicted under S. 237."

This would clearly include an acquittal under S. 247 at the very outset before anything had been done in the case. But since the word "tried" has been inserted we must give it due weight. We are unable to see that this construction renders ths provisions of S. 247 nugatory or that any inference can be drawn from the omissian to refer to S. 247 in the explanation to S. 403. None of the three Calcutta cases quoted in *Guggilapu Peddaya*, In re (1) appear to us to be in point. In *Panchu Singh* v. *Umor Mahomed Sheikh* (2) the Court simply deals with the power of the District Magistrate to direct further enquiry under S. 437, Criminal P. C., and the effect of S. 403 is not considered at all, *Bishun Das Ghosh* v. *King-Emperor* (3) deals with exactly the same point and the order in the first proceed-

1. (1911) 34 Mad 253=9 I C 253.
2. (1900) 4 C W N 346.
3. (1903) 7 C W N 493.

ings was one under S. 258, not S. 247. The judgment in the last case of *Kedar Nath Biswas* v. *Adhin Manji* (4) simply follows the two previous rulings and deals also with an order under S. 437, Criminal P. C. Assuming that it is not within the power of a District Magistrate or Sessions Judge to direct a Magistrate to make further enquiry into a case which has been acquitted under S. 247, Criminal P. C. it does not follow that the Magistrate may not himself entertain a fresh complaint on the same facts. He is only debarred from doing so by S. 403, which is not even referred to in any of these rulings.

The case relied on by the District Magistrate in his Order of Reference, *Suraiya Sastri* v. *Venkata Rao* (5), is easily distinguishable. The accused in that case not only appeared, but "answered to the charge." Another good reason for declining to treat the word "tried" as mere surplusage is, that it is essential to a plea of autrefois acquit under English law. The law is stated in Russell on Crimes at p. 1983, Edn. 7:

"At common law a man who has once been tried and acquitted for a crime may not be tried again for the same offence if he was in jeopardy upon the first trial. He was so in jeopardy if (1) the Court was competent to try him for the offence, (2) the trial was upon a good indichment, (3) the acquittal was on merits, that is, by verdict on the trial or in summary cases by dismissal on the merits followed by a judgment or order of acquittal".

It is clear that the mere fact of a judgment of acquittal is not in England sufficient to entitle the person acquitted to plead autrefois acquit. The matter was exhaustively considered by the Court of King's Bench and the law was laid down as follows by the Lord Chief Justice:

"The true meaning of this great fundamental maxim is that a man shall not twice be put in peril after a verdict has been returned by the Jury, that verdict having been given on a good indictment and one on which the prisoner could be legally convicted and sentenced. It does not however, follow that if from any particular circumstance a trial has proved abortive, that the case should not again be submitted to the consideration of a Jury and determined as right and justice may require"

The law being so clear in England and its requirements having been reproduced in the Indian law we are satisfied that we cannot eliminate the word "tried" from the section. The accused has not been tried and the Magistrate acted in accordance with law in taking the complaint on his file. The papers will be returned.

S.N./R.K. *Answered accordingly.*

4. (1903) 7 C W N 711.
5. 2 Weir 457.

** A. I. R. 1918 Madras 213
Full Bench

AYLING, SESHAGIRI AIYAR AND BAKEWELL, JJ.

Kopparthi Lingayya and *others*—Creditors—Petitioners.

v.

Araveti Chinnarayana and *others* — Debtors—Respondents.

Appeal No. 137 of 1916, Decided on 26th September 1917, against order of Dist. Judge, Cuddapah, D/- 11th October 1915, in Insolvency Petn. No. 9 of 1915.

** **(a) Limitation Act (1908), Ss. 4, 5, 12 and 29—Provisions do not apply to applications and appeals filed beyond period fixed under Provincial Insolvency Act.**

Recourse should not be had to the general provisions of the Limitation Act in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act: 34 *Mad.* 505 *Foll.* 12 *Mad.* 168 (*F. B.*); 38 *Mad.* 92, 12 *Mad.* 467, 18 *Mad.* 99 and 12 *Mad.* 1 *Cons.*

[P 215 C 2; 216 C 2]

*(b) **Provincial Insolvency Act (1907), S. 46 — Extension of period fixed by special act by provisions of Limitation Act—It must be deemed to "affect" that period within Limitation Act, S. 29.**

Per *Ayling, J.*—The application of the general provisions of the Limitation Act extending, in certain circumstances the period fixed by a special law must be deemed to "affect" that period within the meaning of S 29, Lim. Act.

[P 216 C 1]

Per *Seshagiri Aiyar, J.*—Wherever an attempt is made to construe a special period fixed by an enactment with reference to the general provisions of the Limitation Act contained in Ss. 5 to 18, the effect of such a process would be to effect the period of limitation fixed by the local Act.

[P 217 C 1]

* **(c) Provincial Insolvency Act (1907), S. 46 (4) — General provisions of Limitation Act do not apply to S. 46.**

The Provincial Insolvency Act is not a self-contained enactment, nevertheless the general provisions of the Limitation Act should not be introduced into the construction of S. 46, Cl. (4), of the former Act. [P 217 C 2; P 218 C 1]

* **(d) Limitation Act (1908), S. 29— Period fixed by special Act is sought to be extended by provisions of Limitation Act—Period will be deemed to be affected within S. 29.**

Even where an Act is not complete in itself, if by importing the general provisions of the Limitation Act the period fixed in a special Act is likely to be enlarged either by the process of computation in obtaining copies or by excluding the period during which a fraud was practised or during which another litigation was proceed-

ing in a different Court, still the period of limitation would be affected. [P 217 C 2]

C. A. Seshagiri Sastri — for Appellants.

S. Swaminadhan, P. Somasundaram for *V. Subramanyam Pantulu* and *V. S. Narasimha Chariar* — for Respondents.

Order of Reference—This is an appeal against an order of the District Judge of Cuddapah passed under S. 15, Provincial Insolvency Act dismissing an application made by creditors to declare the respondents insolvent. The learned Judge dismissed the application on the ground that the act of insolvency complained of occurred more than 3 months before the presentation of the petition, the last date for presentation having fallen in the period during which the Court was closed for vacation. He held that the petition could not be presented on the re-opening day as S. 4, Lim. Act was not applicable, and that S. 10, General Clauses Act could not save the petitioners, as a question of limitation was involved. The appeal against the District Judge's order, for which S. 46 of the Act provides, has not been presented within 90 days of the order. Unless the time occupied in obtaining a copy of the order appealed against be excluded under S. 12 or S. 5, Lim. Act, this appeal must be rejected. The question for our decision therefore is whether S. 4, 5 or 12, Lim. Act are applicable to proceedings under the Provincial Insolvency Act.

The latest decision of this Court on the point is *Munjuluri Sivaramayya* v. *Singumahanti Bujanga Rao* (1), wherein Oldfield, J., expressed his opinion that S. 12 (2), Lim. Act could not be applied to proceedings under the Provincial insolvency Act. The learned Judge was inclined to think that S. 5, being one of the general provisions of the Act and not altering or affecting any period of limitation within the meaning of S. 29 (1) (b), might be applicable, but he felt himself bound to follow the decisions in *Veeramma* v. *Abbiah* (2) and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (3). Sadasiva Aiyar, J., who sat with him, considered that S. 5 was applicable. He distinguished *Veeramma* v. *Abbiah* (2), dissented from *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (3) and followed *Nijabutoolla* v. *Wazir Ali* (4), Reference under S. 39 Forest Act 5 of 1882 (5) and *Seshama* v. *Sankara* (6). Both learned Judges agreed to cut the Gordian knot under the exceptional circumstances of that case by treating the time-barred appeal as a revision petition and dealing with it under S. 15, Charter Act, a course which can be taken only when the High Court in the exercise of its power of superintendence considers that a Subordinate Court has failed to do its duty, [Vide *Abdullah* v. *Salaru* (7)]. The present appeal purports to have been brought under S. 15, Charter Act, as well as under S. 46, Cl. (2), Act 3 of 1907, but the circumstances are not such as to warrant our proceeding under the Charter.

Duraisami Aiyangar v. *Meenakshi Sundara Aiyar* (8), to which Oldfield, J., was again a party, is a direct decision that S. 12, Lim. Act is not applicable to applications under the Provincial Insolvency Act, and was followed by the same learned Judge in *Trasi Deva Rao* v. *Parameshraya* (9) in respect to an other section, namely S. 14, Limitatiom Act, with the remark that the whole of that Act is inapplicable to proceedings under the Provincial Insolvency Act.

In none of the above cases was the decision in *Srinivasa Ayyangar* v. *Secy of State* (10) considered. That was a case wherein Benson and Sundara Aiyar, JJ., after a very full consideration of the law on the subject, applied S. 15, Lim. Act to a suit instituted under S. 59, Revenue Recovery Act (2 of 1864). They held (we think rightly) that the special period for bringing suits under that Act was governed by the provision in S. 59, which allows six months' time, rather than by any Article in the schedules to the Limitation Act, but that the general provisions in he body of the Act were intended to be applicable, in the absence of anything to the contrary, to proceedings under special or local laws. In so doing, they followed the authority of a Bench of this Court in *Seshama* v. *Sankara* (6)

1. (1915) 39 Mad 593=30 I C 703.
2. (1895) 18 Mad 99.
3. (1897) 20 Mad 249.
4. (1882) 8 Cal 910.
5. (1887) 10 Mad 210.
6. (1889) 12 Mad 1.
7. (1896) 18 All 4.
8. A I R 1915 Mad 360=25 I C 610.
9. (1915) 39 Mad 74=27 I C 144.
10. (1915) 38 Mad 92=18 I C 617.

and of a Full Bench in *Venkata* v. *Chengadu* (11). The Full Bench decision in *Abu Baker Sahib* v. *Secy. of State* (12), which formed the basis for the decision in *Duraisami Aiyangar Meenakshi Sundara Aiyar* (8), was to the effect that appeals under S. 10, Madras Forest Act (5 of 1882) are independeut of the general provisions of the Limitation Act. The rights conferred by Ss. 10 and 14 of the Madras Forest Act to appeal, against decisions of Forest Settlement Officers upon claims to have certain rights recognised at the time of afforestation, to a District Court and to a Forest Court respectively are evidently rights of a very special nature. As pointed out by the Chief Justice, the vesting of a power to extend time for appealing in the hands of the Governor-in- Council is in itself an indication that the Courts were not intended to exercise a similar power under the Limitation Act in regard to these so called appeals.

The cases in *Veerama* v. *Abbiah* (2) and *Appa Rau Sanayi Aswa Rau* v. *Krishnmurthi* (3) related to the applicability of the provisions of the Limitation Act to acts done in relation to the Registration Act. *Sivarama Pattar Kariakar* v. *Krishna Iyer* (13), which followed these two decisions, held that independently of the Limitation Act, S. 10, General Clausse Act would operate to make a presentation on the first day after the Court re-opened, though after the time allowed in the Registration Act, a good presentation. So too in *Official Assignee of Madras* v. *Sabapathi Mudaliar* (14), an appeal presented under the Insolvency Act on the re-opening day, when the last day for filing it fell on a holiday, was admitted. In *Veeramma* v. *Abbiah* (2) and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (3), as in other decisions, it has always been held that what must be looked to in deciding whether the Limitation Act can be applied to a special or local law is the question whether the particular Act is or is not self-contained and complete in itself. It has been settled by a course of decisions that the Madras Forest Act and the Registration Act are special Acts complete in themselves, and we do not here propose to question the reasoning by which that result has been arrived at. But Ss. 6 and 47, Provincial Insolvency Act show that that enactment is at least not independent of the rules of civil procedure followed in the trial of regular suits and appeals under the Civil Procedure Code. We also think that the analogy of the Madras Forest Act did not justify the assumption in *Duraiswami Aiyangar* v. *Meenakshi Sundara Aiyar* (8) that the general provision of the Limitation Act were not applicable to the Provincial Insolvency Act on the strength of *Abu Baker Sahib* v. *Secy. of State* (12).

In our opinion the correct view is that taken by the Allahabad High Court in *Dropadi* v. *Hira Lal* (15), where the matter has been fully discussed by a Full Bench. We consider that the cases in *Durasimai Aiyangar* v. *Meenakishi Sundra Aiyar* (8) and *Trasi Deva Rao* v. *Parameshraya* (9) we were wrongly decided, and that the dictum of Oldfield, J., in *Munjuluri Sivaramayya Singumahanti Bujanga Rao* (1) as to the applicability of Ss. 5 and 12 Lim. Act, to proceedings under the Provincial Insolvency Act was also incorrect. But as there is so much divergence of opinion on the point, we refer to a Full Bench the question whether recourse can be had to the general provisions of Act 9 of 1908 in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Intolvency Act (3 of 1907).

Opinion.

Ayling, J.—The question propounded for our decision is: Whether recourse can be had to the general provisions of Act 9 of 1908 in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act 3 of 1907? The obstacle to the application of these general provisions is S. 29 of the same Act, which says

"Nothing in this Act shall . . . . . affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India."

The meaning of this section has been considered by a Full Bench of this Court in *Abu Baker Sahib* v. *Secretary of State* (12), and in my opinion that judgment effectively answers the ques-

11. (18 9) 12 Mad 168 (F B).
12. (1910) 34 Mad 505=5 I C 884.
13. A I R 1915 Mad 442=23 I C 23.
14. (1912) 14 I C 579.
15. (1912) 34 All 496=16 I C 149 (F B).

tion before us. In place of S. 29 Act 9 of 1908 and the Provincial Insolvency Act, the learned Judges were dealing with S. 6 Act 15 of 1877 (the previous Limitation Act) * * * * * * *

The learned vakil for appellants has in fact been forced to argue that the decision in *Abu Baker Sahib* v. *Secretary of State* (12) was wrong and requires re-consideration. How far we are entitled to question the correctness of a considered ruling of a Full Bench of equal numerical strength is a matter into which I do not propose to enter for I entirely and respectfully concur in the ruling now called in question. It is a pure question of interpretation of a statute. The juxtaposition of the words "affect" and "alter" compel us to give an independent meaning to the word "affect;" and I cannot understand how the application of the general provisions extending in certain circumstances the period fixed by law can be held not to "affect" that period. The cases mainly relied on by appellants' vakil are *Venkata* v. *Chengadu* (11) and *Srinivasa Aiyangar* v. *Secretary of State* (10). In the latter case the two learned Judges were inclined to question the correctness, or rather the general applicability of the decision in *Abu Baker Sahib* v. *Secretary of State* (12), largely because the Full Bench ruling in *Venkata* v. *Chengadu* (11) had had not been considered; but they deemed it unnecessary to decide whether S. 29, Lim. Act, rendered the general sections of the Limitation Act inapplicable to special and local Acts generally. They disposed of the case before them with an eye solely to the peculiar features of the Act with which they were dealing—Act 2 of 1864; and I need hardly point out, even if the two were mutually destructive, the authority of this ruling cannot be held to counterpoise the Full Bench decision. The decision in *Venkata* v. *Chengadu* (11) was that of a Bench of four Judges, the main judgment being that of Muthusami Aiyar, J., the question referred for their decision did not relate to the applicability of the general sections of the Limitation Act, or the interpretation of S. 6 of the same (corresponding to S. 29 of the present Act); but to whether the provisions of the Limitation Act (Art. 95, Sch. 2) or S. 59, Act 2 of 1864 should be followed in computing the period of limitation. No doubt Muthusami Aiyar, J., expressed the opinion, with the concurrence of Kernan, J., that S. 6, Lim. Act did not bar the application of the general sections. *Kullayappa* v. *Lakshmipati* (16) is another pronouncement of the same two learned Judges to the same effect. But the other two Judges, who were parties to *Venkata* v. *Chengadu* (11) (Parker and Wilkinson, JJ.,) expressed no opinion on the point; and this is remarked by Benson and Sundara Aiyar, JJ., in their judgment in *Srinivasa Aiyangur* v. *Secy. of State* (10). The decision in *Kullayappa* v. *Lakshmipathi* (16) is certainly not entitled to be treated as a Full Bench decision on the question now before us.

Veeramma v. *Abbiah* (2) is another Full Bench case in which Muthusami Aiyar and Shephard, JJ., expressed contrary views as to the effect of S. 6 of Act 15 of 1877. Collins, C. J, does not refer to the section; but, by implication, he would seem to have favoured Shephard, J.'s view. I can find nothing in these cases, which would induce me to differ from the view of the learned Judges in *Abu Baker Sahib* v. *Secy. of State* (12). It has been suggested that in the case of an appeal to a District Court (with which we are not concerned here) the period allowed by S. 47 (4), Provincial Insolvency Act (30 days), is so short that it might be impossible to procure copy of the order in time for presentation with the appeal, as required by O. 41, R. 1 (mutatis mutandis), and that in such a case a Court could not be asked to enforce the limitation clause, S. 46 (4). That is not the case here and we are not called on to say what a Court should do, if such facts were established. The possibility of such a difficult case may be a ground for legislation, or possibly the provision of a remedy in the rules and orders under the Civil Procedure Code. But we have merely to interpret the law as it stands: and I feel no hesitation in answering the reference in the negative.

Seshagiri Aiyar, J.—Both sides are agreed that the only question to be considered in this reference is whether the time taken up for obtaining copies of the order appealed against should be deducted in computing the period of limitation fixed by S. 46, Cl. 4, Provincial Insolvency Act. The decision of the question turns largely upon the interpretation to be

16. (1889) 12 Mad 467.

placed upon S. 29, Lim. Act. A very learned argument was addressed to us by Mr. A. Krishnasami Aiyar upon the meaning to be attached to the word "affect" in Cl. 1 (b) of that section. Apart from authority, if I were deciding this question for the first time, I would have respectfully concurred in the view taken by three learned Judges of this Court including the present Chief Justice in *Abu Baker Sahib* v. *Secy. of State* (12). The word alter would apply directly to similar provisions in the Limitation Act, if any, giving an extended period to suits or appeals of the nature provided for in the special Act. The word "affect" is more comprehensive. Whenever by a process of computation or exclusion or deduction the special period fixed by the enactment is indirectly extended or cut down, it must be taken that that period has been affected.

The illustration which Mr. Krishnasami Aiyar suggested would also be connoted by the term "affect"; for example, there may be a special period compelling a party to take steps to set aside the order of a Special Officer under the Boundaries Act. When a party instead of adopting that course wants to avail himself of the general period of limitation prescribed for declaration of title in Art. 120, Lim. Act, the relief granted to him would indirectly affect the period of limitation prescribed in the special law. The decision of the Full Bench in *Secy. of State* v. *Illikkal Assan* (17) is an illustration of this mode of affecting the period of limitation fixed in a special Act. But I am not prepared to agree with the learned vakil that this category of cases exhausts the significance of the word "affect." Nor am I prepared to accede to the contention that a computation of period of limitation which in effect extends the time fixed does not affect the period of limitation. In my opinion, wherever an attempt is made to construe a special period fixed by an enactment with reference to the general provisions of the Limitation Act contained in Ss. 5 to 18, the effect of such a process would be to affect the period of limitation prescribed by the local Act. Therefore may reading of the section apart from authority is in accordance with the pronouncement in *Abu Baker Sahib* v. *Secy. of State* (12). But the matter has been complicated a great deal by other decisions to which I shall presently very briefly refer.

Before dealing with the cases quoted at the Bar, I may dispose of one aspect of the case which was very strongly pressed upon us by Mr. Krishnasami Aiyar. He did not dispute the proposition that where a special Act is self-contained the general provisions of the Limitation Act should not be imported into the consideration of questions arising under the former Act. Upon this point we have the judgment of the Judicial Committee in *Mahomed Buhaddor Khan* v. *Collector of Barielly* (18) that to Acts of special kind which are self-contained, the general provisions of the Limitation Act should not be annexed. Sir Arthur Collins, C. J., and Muthusami Aiyar, J., followed this decisions in *Veeramma* v. *Abbiah* (2). There are other decisions to the same effect; and therefore it may be taken as settled that where the Code is complete in itself the general provisions of the Limitation Act commencing from Ss. 5 to 18 should not be read as forming part of that Code. In the present case it was contended that the Provinciai Insolvency Act is not a Code complete in itself. I think this contention is well founded. We have only to refer to Ss. 6 and 47 to show that the Civil Procedure Code was intended to be largely utilized in regard to proceedings under the Act. Therefore the Act has to be supplemented by the importation of the general rules of procedure as to suits. One special matter affecting limitation may also be pointed cut, and that is, by S. 47, Provincial Insolvency Act the procedurs to be followed in presenting appeals under that Act is to be the same as in the case of appeals under the Civil Procedure Code. As the learned vakil pointed out, under the Civil Procedure Code an appeal can be filed only if the memorandum is accompanied by copies of the decree and of the judgment. It is well recognised that an appeal filed without these annexures must be regarded as no presentation in the eye of law: see *Chammela Kuar* v. *Amir Khan* v. (19) and *Abdul Hakim Hem* v. *Chandra Das* (20). It therefore follows that under the Provincial Insolvency Act, it is incumbent upon the party preferring an appeal that he

17. (1916)39 Mad 727=32 I C 755.
18. (1873-74) 1 I A 167 (P. C.).
19. (1894) 16 All 77.
20. (1915) 42 Cal 433=30 I C 165.

should file copies of the order or judgment appealed against. It is not disputed that in a considerable number of cases such a copy may not be obtainable within the 30 days allowed for presenting an appeal to the first appellate Court. It was not, therefore unreasonably suggested that the legislature could not have intended that the period of 30 days fixed by S. 46, Cl. 4, should be inclusive of the period taken for obtaining copies of the order appealed against.

The result of such a construction would be to deny the right of appeal in many cases. If it were shown in the present case that an application was made immediately after the order was passed and that more than 90 days had elapsed before the copies were obtained, I world have hesitated a great deal before coming to the conclusion that the party is not entitled to prefer the appeal after obtaining the copies, because to hold otherwise would be to deny the right of appeal given by the section. However it has not been shown that in this particular case the copies were not granted expeditiously.

Apart from this particular aspect of the case, the general question now remains whether by virtue of the fact that the Provincial Insolvency Act is not self-contained we are at liberty to introduce into the construction of S. 46, Cl. 4, the general provisions of the Limitation Act.

In *Venkata* v. *Chengadu* (11) a Bench of four Judges had to consider this question with reference to S. 18, Lim. Act. That was a case under the Revenue Recovery Act. Two Judges, Kernan, J., and Muthusami Ayyar, J., held that S. 18 was applicable to the Revenue Recovery Act. Parker and Wilkinson JJ., expressed no definite opinion on the question. In *Seshama* v. *Sankara* (6) Collins C. J., and Muthusami Ayyar, J., in dealing with a case under the Madras Boundaries Act 27, of 1860, held that S. 14, Lim. Act was applicable to the special period fixed in that Act. In *Kullayappa* v. *Lakshmipathi* (16) Kernan and Muthusami Aiyar, JJ., applied S. 14, Lim. Act to a case arising under the Rent Recovery Act. In *Iswara Patter* v. *Karuppan* (21) Collins C. J., and Justice Davies J., applied S. 18 Lim. Act, to a case arising under Revenue Recovery Act. In *Veeramma* v. *Abbiah* (2), which was a case under the Registration Act, all the three learned Judges who took part in it, viz., Collins, C. J., Muthusami Aiyar, J., and Shephard, J., held that the Act was complete in itself and that consequently there was no eccasion for invoking the aid of the general provisions of the Limitation Act. The Chief Justice and Muthusami Aiyar J., once again reiterated the proposition that if the Act was not complete in itself the general provisions of the Limitation Act may be looked into for construing a special Act. On the other hand Shephard, J., gave an interpretation of the term "affect" which subsequently found favour with the Judges who decided *Abu Baker Sahib* v. *Secy. of State* (12). All these decisions were passed under S. 6, Lim. Act 1877. There was thus a considerable divergence of opinion regarding the interpretation to be placed upon the word "affect" at least in Madras and yet when the new Limitation Act of 1908 was passed, the Legislature did not choose to give an authoritative interpretation of the term.

My mind has beenexercised considerably as to whether the Legislature intended to adopt the inter pretations placed upon the term by Collins, C. J., Muthusami Aiyar, J., Kernan, J., and Davies, J., or whether it preferred the interpretation placed upon the word by Shephard, J., The opinion of Arnold White, C. J., Miller, J., and Wallis, J., was not given until after the new Act was passed, although they had to construe the language of S. 6 of the old Act. The view taken by Shephurd, J., is shared by a very large number of Judges in the other High Courts, and as that view is in consonance with the natural interpretation to be placed upon the word "affect," I prefer to hold with the Judges who decided *Abu Baker Sahib* v. *Secy. of State* (12) that even in cases where the Act is not complete in itself, if by importing the general provisions of the Limitation Act the period fixed in a special Act is likely to be enlarged, either by the process of computation in obtaining copies or by excluding the period during which a fraud was practised or during which another litigation was proceeding in a different Court, still the period of limitation would be affected.

It seems to me that this is eminently a matter in which the Legislature should interfere. I fail to see why litigants preferring appeals under special Acts should

21. (1893) 3 M L J 255.

not have the same privilege of extension provided by the general provisions of the Limitation Act as they have in cases directly coming under the Civil Procedure Code. There is no conceivable reason for putting one class of litigants under a disability of this kind. I may also be permitted to suggest that until the Legislature intervenes to amend the Limitation Act, our High Court should amend the rule in O. 41, by saying that the presentation of an appeal in cases under the Insolvency Act need not be accompanied by copies of the order, decree or judgment appealed against. My answer is in the negative.

Bakewell, J.—I agree with Ayling J.

S.N./R.K. *Reference answered.*

A. I. R. 1918 Madras 219

ABDUR RAHIM AND OLDFIELD, JJ.

(*Chalikani*) *Venkatarayanim Garu* and *others*—Defendants—Appellants.

v.

(*Raja Vatsavya*) *Venkatasubhadrayamma* and *others*—Plaintiffs—Respondensts.

Appeal No. 209 of 1916, Decided on 21st November 1917, against decree of Temporary Sub-Judge, Vizagapatam in O. S. No. 30 of 1910.

(a) Transfer of Property Act (4 of 1882), S. 84—Expression of readiness to pay is no tender.

The mere expression of willingness on the part of a mortgagor to pay the amount due on the mortgage cannot amount to a tender within the meaning of S. 84, T. P. Act. [P 220 C 1]

(b) Transfer of Property Act (4 of 1882), S. 84—Assertion of title and statement of amount due on requisition by mortgagor will not dispense with tender to stop interest.

The assertion of a title by the mortgagee in himself, coupled with a statement of the amount due by the mortgagor on the mortgage in reply to a requisition by the latter for accounts, will not amount to a dispensation of tender, nor cause a cessation of interest as from that date. 8 *B. H. C. R.* 133, *Owners of the "Norway"* v. *Ashburner* (1865), 3 *Moore P. C.* (*n. s*) 245; 28 *Cal.* 557, (*P. C.*) and 43 *Cal.* 632 *Dist.*

[P 220 C 1, 2]

(c) Legal Practitioner's Act (18 of 1879), rules under R. 41—Two sets of fees can be granted to same party when pecuniary value is large though no intricate question is involved.

Under R. 41 of the rule framed under the Legal Practitioners Act, it is competent to a Court to award two sets of fees to a party where more than one vakil has been engaged by him owing to the large pecuniary value of the case, even though it does not involve questions of special difficulty. [P 222 C 1]

(d) Transfer of Property Act (4 of 1882), S. 84—Setting up title in himself by mortgagee will not stop interest if no deposit is made.

Per *Abdur Rahim, J.*—The Transfer of Property Act lays down the conditions relating to a valid tender and a valid deposit. It nowhere says that, even if a valid tender has not been made interest will cease to run if the mortgagee happens to set up a right to the property in himself. [P 220 C 1]

(e) Transfer of Property Act (4 of 1882), S. 84—There is distinction between tender and proposal to make it—Latter will not stop interest.

Per *Oldfield, J.*—The foundation of S. 84, T. P. Act, is that the liability for interest on the amount due on the mortgage shall cease from the date of the tender, inasmuch as the person who has made the tender not merely has to produce money in order to make it but must also keep it ready for payment in Court or otherwise. There is a distinction between the proposal to make a tender and an actual tender, and there is no reason why a person who makes the former should be treated any better than a person who makes the latter. [P 221 C 2; P 222 C 1]

P. Narayanamurthi and *Patanjali Sastri*—for Appellants.

T. Prakasam, D. Appa Row, K. Srinivasa Aiyangar V. Ramesam, T. Ramachandra Row, B. Somayya and *D. V. Krishnama Razu*—for Respondents.

Abdur Rahim, J.—This appeal is in a suit to enforce a usufructuary mortgage, and the question that is argued before us is as to whether there was a valid tender of the amount due on the mortgage on 17th January 1899 or whether the respondents dispensed with the necessity for such a tender. On either ground the claim is that interest ceased to run from the date mentioned. Mr. Narayanamurthi who has argued the case for the appellants before us conceded, and we think rightly, that what happened could not be stated to amount to a valid tender within the meaning of S. 84, T. P. Act. The so called tender really depends on what appellant 2 wrote to the respondent on the date in question. That letter is Ex. 5a, and there he asked the mortgagee to give him an account of what was due to him and expressed his willingness to pay what was due to the mortgagee. In his reply the mortgagee stated that under the terms of Ex. A, the deed of mortgage, he had acquired an absolute right to the property and therefore he was not bound to render any account to the appellants and refused to do so. He did however mention what was the amount that had become due on his mortgage. That amount was Rs. 3,19,946. It is argued

that that would be the correct amount upon the terms of the mortgage, that is, calculating interest at the rates specified therein. This or any amount was never actually tendered by the appellants, nor was it sought to be deposited in Court. In fact, before the institution of the suit, no deposit or tender was made, and even now after decree, no portion of the amount due to the respondents has been paid. The mere expression of willingness on the part of a debtor to pay a debt cannot possibly amount to a tender within the meaning of the law. In fact, as we have said, Mr. Narayanamurthi did not contend so far. But he has strongly urged upon as that inasmuch as the respondent put forward the allegation that he had acquired an absolute right to the property and therefore the appellants were not entitled to redeem him, it must be taken in law to amount to a dispensation of tender.

On this point we have been referred to a number of Indian and English cases dealing with contracts for sale or other cases of reciprocal contracts; for instance, *Dayabhai Dipchand* v. *Dullabhram Dayaram* (1), *Owners of the "Norway"* v. *Ashburner* (2). But the principle laid down in those cases is that where there are reciprocal promises and one of the promisees waives or dispenses with the performance of the promise made to him, he cannot afterwards put forward the non-performance of that promise as an answer to a suit for damages. But as regards the question whether the interest on a debt ceases from the date of tender or deposit, that class of cases depends upon the provisions of the Transfer of Property Act and upon a different principle. That Act lays down the conditions relating to a valid tender and valid deposit. It nowhere says that even if a valid tender has not been made, interest will cease to run if the mortgagee happens to set up a right to the property in himself. If the argument of the appellants were well founded, the position would be this:

In every case where the mortgagee in good faith, as in this case asserts that he has acquired an absolute right to the property, the mortgagor or the person who has purchased the equity of redemption, by reason of that fact alone, would be exempted from payment of interest, provided he has expressed his willingness to pay the debt. No authority whatever has been cited in support of such a proposition which, in our opinion, is altogether untenable. We have been referred to a Privy Council decision in *Harendra Lal Rai Chowdhri* v. *Maharani Dasi* (3). There what happened was that under the contract between the parties the mortgagee engaged to appraise the mortgaged property if there was any proper negotiation for the sale of that property and it was brought to his notice. There was in fact a bona fide offer to purchase the property which was brought to the notice of the mortgagee in that case and he was asked to say whether he would appraise the property and fix the value. He refused to do so and in consequence the mortgagor was unable to find a purchaser for the property and re-pay the mortgage amount. Their Lordships hold that the mortgagee having rendered impossible the sale of the property by the mortgagor by which the latter would have been in the position to re pay the debt the matter stood 'as if it was a case of tender.' Mr. Narayanamurthi has attempted to build an argument upon this phrase to the effect that their Lordships treated the case as one of a tender. But we do not think that there is any warrant for such an interpretation.

There was no case of tender there and the Judicial Committee merely cited the case of a tender only by way of analogy. The other case referred to *Gopeswar Saha* v. *Jadab Chandra* (4), stood apparently on the same footing and none of those cases support the broad proposition which has been contended for before us on behalf of the appellants. We therefore hold that what happened between the appellants and the respondents in 1899 did not have in law the effect of making interest cease to run from that date. The Subordinate Judge also finds upon the evidence that in fact appellant 1 had not the necessary amount at his disposal on the date of Ex. Va. He is no doubt a large landlord with an income of about Rs. 40,000 a year. But the evidence does not show that he had on the date in question, the amount which would be required to discharge the mortgage debt at his disposal. He was obliged to borrow even small

1. (1871) 8 B H C R 133.
2. (1865) 3 Moore P C (n s) 245.
3. (1901) 28 Cal 557=28 I A 89 (P C).
4. (1916) 43 Cal 632=32 I C 537.

sums of money and sometime after 1899 he got cnosiderably involved in debt. He swore in the witness box that he had Rs. 1,50,000 in his chest. The Subordinate Judge has disbelieved that evidence and we think rightly. If he had anything like that amount with him at the time, his account books would have been the best evidence to show it. He must have kept accounts which he has withheld from Court, and it was not the case of defendant 8 the principal appellant before us that he had been negotiating to raise money, still less that he had actually raised money in that way. We therefore accept the conclusion of the Subordinate Judge that if Ex. Va would be construed as an offer to pay, it was not a bona fide offer in the sense that the appellants had the means of making the payment at the time. It may be pointed out that defendant 8 bought the bulk of the mortgaged properties for Rs. 2,40,000, while on 17th January 1899 the amount payable to the mortgagees was over Rs. 3,00,000. That also supports the finding of the Subordinate Judge that the so-called offer in Ex. Va, if offer it can be called at all, was really not bona fide for we are not prepared to hold that defendant 8 was able and willing to pay that amount on the date in question.

The 3rd point which has been raised before us relates to costs. The Subordinate Judge has given a personal decree against defendants 3, 8 and 12 for the entire costs. As regards the conduct of the suit we think that the Subordinate Judge was right in saying that the way in which the defence was conducted was vexatious. Defendants 3, 8 and 12 have been rightly made liable to pay the costs finally. But we do not think that they ought to be made personally liable for the costs relating to the stamp duty. So that amount must be deducted from the amount of costs for which defendants 3, 8 and 12 have been made personally liable. In other respects, the decree of the Subordinate Judge is confirmed. Respondent 1's memorandum of objections relates to the expenses of the establishment charges, repairs to canals, etc., expenses for the village headman, service Inams to village headman, and village duties and other similar expenses. The Subordinate Judge has allowed Rs. 3,000 a year for all these charges, which are amounts actually spent by the mortgagee. But the contention is that Rs. 4,000 is provided for in a lump sum in the deed of mortgage, that being the amount which was settled with the mortgagee as payable on account of these charges. The clause in question says that it is agreed that after deducting for Government taxes so much and Rs. 4,000 on account of establishment charges, etc., and other payments mentioned therein, the mortgagors should take an account of the balance of the net income from the mortgagee's officials on 1st February of each year. The agreement is only to account for the balance and not with regard to any of the items mentioned in that clause. This view is suggested also by the clause at p. 7 of the document which says that, if in addition to the usual earthwork which may have to be executed, any extensive repairs have to be done in respect of river bunds, etc., in respect of these unusual expenses, the mortgagee is entitled to charge the actual amount paid in excess of the Rs. 4,000. There is no mention here as to the other items comprised in the Rs. 4,000, that is to say, it is not provided that, if for establishment charges, the mortgagee has actually spent more than what was taken into account, he would be entitled to the excess. Nor is it anywhere provided that if anything less then Rs. 4,000 is spent the mortgagee must account for the rest. It seems to us that with respect to these petty and recurring items of expenditure, which were of a variable character, both the parties agreed that they should be fixed at a certain figure. If all that they intended was that the actual expenses incurred under these heads should alone be allowed to the mortgagee, there would have been no necessity to fix this figure at all. We must allow the memorandum of objections with costs to come out of the estate.

The respondent 3's memorandum of objections is not pressed and is dismissed.

Oldfield, J.—I agree with my learned brother's judgment; but I prefer not to base my conclusion on any implication from the particular reason which plaintiff 1 gave in his letter, Ex. 5, for refusing to receive money from the defendant. The foundation of S. 84, T. P. Act is that liability for interest on the amount due on the mortgage shall cease from the date of the tender, inasmuch as the person who has made the tender not

merely has to produce money in order to make it, but must also keep it ready for payment in Court or otherwise. It is clear that no money could have been produced in this case and that none was kept ready for payment. There is, no doubt, a distinction to be drawn between the proposal to make a tender, such as we have in this case, and an actual tender; but there is no reason why a person who makes the former should be treated any better than a person who makes the latter. In these circumsances, it seems to me that the appellants, who made no bona fide proposals and who, it is admitted, made no tender of any sort, cannot benefit by the principle of S. 84. On the other points, I entirely agree with my learned brother's judgment.

(This case coming on for hearing for orders this day, the Court made the following.)

Order.—In this appeal Mr. K. Srinivasa Ayyangar for the respondent has applied to us for fees for two vakils under the new R. 41 framed under the Legal Practitioners Act. This Rule empowers the Court in cases of special difficulty or importance to allow two sets of fees to a party who has engaged more than one Vakil. This case involved about seven lacs of rupees, but it did not strike us that there was any specially difficult question involved in the appeal and in fact we did not call upon the learned vakil for the respondent to reply. It is, however, urged that the case is of special importance having regard to the amount involved. We are inclined to agree with that contention; for the respondent, in view of the fact that no less than seven lacs were concerned in the litigation, was justified in engaging two Vakils. We therefore, allow fees for two Vakils, which will be taxed according to the rules.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 222

SADASIVA AIYAR AND SPENCER, JJ.

Ramasami Servaigaran and *another*—Defendants—Appellants.

v.

Athivaraha Chariar and *others*—Plaintiffs—Respondents.

Second Appeal No. 979 of 1916, Decided on 1st November 1917, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 640 of 1915.

(a) Madras Estates Land Act (1 of 1908), S. 4—Agreement not to charge rent for waste land in holding is not affected by S. 4.

Section 4 does not override any custom or agreement not to charge rent upon portions left waste in a tenant's holding. [P 223 C 1]

(b) Madras Estates Land Act (1 of 1908), S. 4—Lands let on waram tenure—Rent for land left waste through no fault of tenant is not payable—Land used for other than agricultural purpose rent remains payable.

Where lands are let on waram tanure, it is open to the tenant to claim exemption from rent for portions that were left fallow through no default of his.

A raiyat cannot claim exemption from rent by reason of his having put an agricultural holding to some other use. The landlord is entitled to claim rent at punjah rate for use of agricultural land as a house site. [P 223 C 1,2 P 224 C 2]

(c) Landlord and Tenant—Rent—Custom—Exemption of rent for lands allowed to remain waste by custom held not reasonable.

Per *Sadasiva Aiyar, J.*—A custom to let lands lie waste without regard to reasonble area and without regard to good or bad seasons and existence or absence of facilities for irrigation for indefinite periods at the tenant's will and pleasure with absolute freedom from liability to payment of any rent, is not a reasonable custom which can be recognized by the Courts. [P 223 C 2]

(d) Madras Estates Land Act (1 of 1918), S. 4—Onus of lands allowed to lie waste through no fault of his is on tenant.

The onus is on the raiyat to prove that the lands were left waste through no default of his. [P 223 C 2]

(e) Civil P. C. (5 of 1908), S. 11—Finding by civil Court not embodied in decree in matter exclusively triable by Revenue Court is not binding unless decree is by competent Court.

A mere finding by a civil Court as to the existence of any right in a landlord will not operate as res judicata in a subsequent suit in a Revenue Court having exclusive jurisdiction over such a suit. But where the right is embodied in the decree of a competent Court in the former suit, such decree is res judicata between the parties as regardsed the rights establish thereby. [P 223 C 2]

T. Rangachariar—for Appellants.

T. R. Venkatarama Sastri—for Respondents.

Sadasiva Aiyar, J.—Defendants 1 and 2 are the appellants in this case. The plaintiffs are landlords and the defendants are tenants under the Madras Estates Land Act. The only questions involved in the second appeal and in the connected memorandum of objetions are: (1) whether the plaintiffs are entitled to claim rent on the lands left wastein the defendants' holding if the defendants do not establish that the lands were so left waste without their default (2) whether the defendants are bound to pay ordinary dry rate of rent on the area of a house site included in the defendants' holding

and whether that question is res judicata in favour of the defendants (as the defendants contend) or in favour of the plaintiffs (as the plaintiffs contend) and (3) whether the plaintiffs are entitled to claim rent for the house site, item 70 at Nanja rates and not merely at Punja rates.

As regards the first point, I have come to the conclusion (after the best consideration that I have been able to give to the question) that the law on this point has been correctly expressed in the judgment in *Arunachallam Chettiar* v. *Mangalam* (1), where all the principal authorities have been carefully considered. Under S. 4, Madras Estates Land Act, the land holder is entitled to collect rent in respect of all raiyati land in the occupation of a raiyat and it does not make this right subject to any custom. Prima facie, S. 4, entitles the landlord to collect rent on the land left waste by the tenant. [See *Segu Rowthen* v. *Alagappa Chetty* (2). The intention of the parties was however held in the above case to override S. 4. In the case in *Arunachatlam Chettiar*, In re (3) the custom of allowing a reasonable portion of land in a tenant's holding to be left fallow without being charged rent on it was held a valid custom. In *Imandi Appalaswami* v. *Rajah of Vizianagaram* (4) it was held that if the tenant chooses to build on the agricultural site instead of using it for agricultural purposes, he cannot escape payment of rent on the basis of its continuing to be agricultural land. I think the observations in the judgment in *Arunachallam Chettiar* v. *Mangalam* (1) establish that the tenant is bound to pay rent on land left waste, unless be establishes an agreement or custom allowing a reasonable extent in area to lie fallow for reasonable periods or some other reasonable custom or a contract for consideration exempting him from payment of rent on lands left waste out of the lands in his holding.

In *Vedanta Chariar* v. *Ayyasami Mudali* (5). Innes and Kindersley, JJ., express an opinion that the landlord had the right to collect the whole rent notwithstanding that a portion of the land was left uncultivated through want of rain. In *Nagu Chetty* v. *Bhaskara* (6) it was held that for the protection of the "just interests of the zamindar" it is reasonable to have a provision in a Pattah that the raiyat must pay Melwaram or Theerwa if through his fault the lands are not cultivated. I do not think that a custom to let lands lie waste (without regard to reasonable area and without regard to good or bad seasons and existene or absence of facilities for irrigation) for indefinite periods at the tenant's sweet will and pleasure, with absolute freedom from liability to non-payment of any rent, is a reasonable custom which can be recognized by Courts. In the present case, it is such a custom that seems to have been set up. I think the learned District Judge was right in throwing on the raiyats the burden of proving that the lands were left waste not through the default of the raiyats. I would therefore decide the first point in plaintiff's favour. As regards points 2 and 3, I am clear that the former decision (see Exs. A, B, C and D) establishes and declares the plaintiff's right to get a reasonable rate of rent on the site on which the tenants chose to build houses.

If the judgment in the former suit, which was stituted in a civil Court, merely contained a finding on the question of the plaintiffs' right, such a finding may not be res judicata in the present suit for rent brought in a Revenue Court which has now exclusive jurisdiction over such a suit. But the plaintiffs' said right was embodied in the decree (see Ex. B) in the former suit and a decree of a competent Court is clearly res judicata between the parties as regards the rights established thereby. Sites which are capable of being used for house building are presumably dry holdings, and not wet holding and I do not think I could interfer with the lower Court's view that the plaintiffs are entitled only to claim the dry rate of rent on such sites. It follows from the predecing that the memorandum of objections filed by the plaintiffs and which relates solely to the rate at which the rent due on the house sites has to be calculated has to be dismissed with costs. As regards the second appeal, I was at first inclined to take the view that we might dismiss the second appeal also at once, accepting the findings of the District Judge (1) that the

1. (1916) 35 I C 329=40 Mad 640.
2. A I R 1914 Mad 200=22 I C 834.
3. (1915) 30 I C 679.
4. (1913) 20 I C 838.
5 (1882) 4 Mad 322.
6. (1911) 9 I C 41.

defendants had failed to prove a contract or a custom that they are entitled to let any lands lie waste at their pleasure without liability to pay rent thereon, and (2) that the defendants had failed to prove that the lands lay waste without any default on their part.

But my learned brother is not satisfied that the District Judge did not arrive at his second finding of fact above referred to more on presumptions than after duly considering the whole evidence in the case and I shall therefore concur with him in remanding the case for a fresh and definite finding on this question. In submitting such a finding, the District Judge is requested to indicate whether or not all the lands left waste were so left uncultivated for identical reasons in each of, the two Faslis in qusstion.

Spencer, J.—The main question in this second appeal is whether the appellants were liable to pay rent for lands in their holding left uncultivated, the tenure upon which they hold being "varam" tenure, according to which the crop is divided between the land holders and the raiyats. The District Judge observed that if there had been a fixed money rent or a fixed grain rent on the lands, the raiyats would have been bound by S. 4 of the Act to pay rent so long as the land was in their holding. If he meant by this observation that where a money assessment, is fixed on the lands the provisions of S. 4 would override any custom or agreement not to charge rent upon portions left waste, he was wrong; vide *Segu Routhen* v. *Alagappa Chetty* (2), *Udayal* v. *Arunachala Chettiar* (7), *Arunachallam Chettiar*, In re (3) and *Arunachallam Chettiar* v. *Mangalam* (1). For the holdings concerned in this suit the Varam system admittedly prevails and as regards such lands plaintiff 2 and his witnesses 2, 4, 5, and 6 admitted in their evidence that hitherto Varam had only been collected for lands cultivated and not for lands left waste. The District Judge was conscious of this. For he says :

"It is true that Varam has never been paid for waste lands, but I do not think this fact establishes a custom not to pay for waste under any circumstances. I therefore find the appellants are entitled to Varam for the waste lands."

If he was of opinion that certain circumstances would justify the non-payment of rent and that certain other circumstances would not do so, it was his duty to find what the special circumstances were that differentiated the defendants' case from others. Now in the plaint it was alleged that items Nos. 28 to 69 were wantonly left waste in Faslis 1321 and 1322, owing to defendants' carelessness and bad intention. In the written statement it was alleged that some of these lands were not fit for cultivation and that the rest had been left waste for over 12 years owing to want of proper rain and water. Which of these versions is true is not found by either of the lower Courts. The District Judge notices that in Fasli 1271 the lack of raiyats was the cause of non-cultivation and he states that there is really no evidence in this case that the lands could not be cultivated. He then proceeds to the presumption that the raiyats have deliberately omitted to cultivate the waste lands. There must be some foundation either in law or in fact for such a presumption being made, but the judgment does not refer to any. I think the case should be remanded for a definite finding as to what was the cause of the lands, which were left waste in the suit Faslis, not being cultivated in those years. Either side may adduce fresh evidence on this point. Two months for finding and ten days for objections. Item 70, Sch. 17, is occupied by house. I am of opinion that the District Judge was right in allowing rent to be paid for this land at the punjah rate. So long as the raiyats' right to use the land for agricultural purposes subsists, they cannot claim to be exempted from paying rent by reason only of their having put it to some other use : vide *Imandi Appalaswami* v. *Rajah of Vizianagram* (4). The memorandum of objections must be dismissed with costs.

(In compliance with the order contained in the above judgment, the District Judge of Tanjore submitted the following)

Finding.

The High Court has remanded this suit for a finding as to :

"what was the cause of the lands, which were left waste in the suit Faslis, not being cultivated in those years."

2. Fresh evidence has been taken. The evidence on both sides however is so vague that it is difficult to come to any conclusion. The plaintiff's case is that the defendant has left the lands waste in

7. (1915) 27 I C 872.

order to spite him and to compel him to dispose of the melwaram right also to him. This explanation seems to me a little far-fetched. The defendant's case is that the lands are unfit for cultivation except at considerable cost, the Punja being overgrown with prickly pear and the Nanja buried in mud and sand; that the tanks are in bad repair and cannot hold water for a larger extent than the present cultivation and that this deficiency affects both Nanja and Punja, as the only crop suitable for the Punja land is Ragi which also requires water to be baled from the tanks. No definite evidence has been given as to the reason for any particular field lying waste.

But it is at least evident, I think, that much of the present waste has been waste for many years (see the evidence of plaintiff 1 under cross-examination and that of P. W. 6 and P. W. 1 at the original trial). The statement of P. W 2 in the original trial that there is no immemorial waste is clearly false. The evidence of P. W. 7, the village Munsif, so far as the reason for waste is concerned, is hearsay and of no assistance. P- W. 8 is a fellow Melavaramdar of the plaintiff and clearly interested in the plaintiff's case. He admits, however, that there is waste even in the lands wholly owned by the Melavaramdar and that the tanks have not been properly repaired. He asserts that the tanks will fill without a dam being constructed in the river, but the village Munsif contradicts him on this point. It is admitted that no dam has been put up for several years. The evidence on the plaintiff's side is wholly insufficient to show that the waste is due to neglect by the defendants with a deliberate purpose to spite him. The defence witnesses examined state that the tank is badly out of repair and that on that account and on account of lack of labour the lands lie waste. D. Ws. 6 and 7 seem to me disinterested. 3. It is the duty of the Melawaramdars to have the tanks put into order and it is therefore their neglect if the tanks are not repaired. On such evidence as there is, I record a finding that the lands left waste in the suit faslis were left waste chiefly because the tanks are out of repair and partly perhaps because of the lack of labour. No distinction is made by any witness between the conditions affecting each suit fasli and therefore the finding applies equally to both faslis. (The second appeal coming on for final hearing after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following)

Judgment.—We accept the finding that the omission to cultivate items 28 to 69 was not due to the fault of the appellants. They are therefore not liable to pay rent on those items. The appeal is allowed so far as the lower appellate Court's decree makes the appellants liable to pay such rent also and the lower appellate Court's decree will be modified accordingly. The respondents will pay 3/4ths of the appellants' costs in this Court and in the lower appellate Court and bear their own. The order of the first Court as to costs of that Court will stand.

S.N./R.K. *Appeal partly allowed.*

A. I. R. 1918 Madras 225

COUTTS-TROTTER AND SESHAGIRI AIYAR, JJ.

Palaniandi Chetty and *others*—Plaintiffs—Appellants.

v.

M. V. Appavu Chettiar and *others*—Defendants—Respondents.

Socond Appeal No. 24 of 1915, Decided on 5th October 1917.

(a) Transfer of Property Act (1882), S. 53—S. 53 makes transfer voidable and not void.

A transfer effected with intent to defeat or defraud the creditors of the transferor confers a good title on the transferee, until it is set aside by a suit by the creditors for that express purpose. The creditors cannot plead the colourable nature of the transaction by way of defence to an action by the transferee to establish his title under the sale, if they have not already sued for its cancellation. [P 227 C 1]

(b) Transfer of Property Act (1882), S. 53—Mere obtaining of decree is not sufficient—It must be followed by attachment to enable creditor to impeach transfer as fraudulent.

Per *Coutts Trotter J.*—The mere obtaining of a judgment in India creates no title or only an inchoate title in the judgment creditor, and therefore a creditor who inpeaches a transfer must follow up his judgment by attaching the properties in order to enable him to utilize S. 53 in answer to a claim founded on the impeached deed of transfer. [P 227 C 1]

(c) Transfer of Property Act (1882), S. 53—Suit should be representative for all creditors.

It is inconvenient to allow each and every creditor in turn to attack such deed independently. [P 227 C

(d) **Transfer of Property Act (1882) S. 53 —S. 53 does not contradict principles of Hindu law.**

Per *Seshagiri Aiyar J.*,—There is nothing in Hindu Law which is inconsistent with S. 53, T. P. Act. At any rate, the section may be taken as indicating the principles of equity, justice, and good conscience which ought to guide Courts in the absence of specific legislative provisions. [P 228 C 1]

(e) **Transfer of Property Act (1882), S. 53— Plaint mustallege transfer as fraudulent.**

On the language of S. 53, it is open to any creditor to impeach a conveyance made by his debtor provided he alleges in the plaint that the sale was intended to defraud him and others similarly placed. [P 228 C 2]

Advocate General and *A. Krishnaswami Aiyar*—for Appellants.

C.V. Ananthkrishna Aiyar for Resdts.

Coutts Trotter, J.—Although this appeal raises questions of difficulty and importance the facts material to it can be stated very shortly. The plaintiff sued for a declaration that he was the absolute owner by purchase of the suit properties as against the defendants who were holders of decree against his vendor. The plaintiff's title was based on a sale-deed dated 5th September 1903 from Velayudan Chetty to himself for a consideration of Rs. 14,250. It has been found that this deed on the transaction which it carried out was brought into existence with intent to defraud and defeat the creditors of the transferor, and that finding is not and cannot be challenged; but the appellant contends that it is not competent to the defendant to invoke that finding in aid in the present proceedings. For the moment, I am assuming that the transaction in question was in this sense a real one, that it effected and was meant to effect a real transfer of the property from the transferor to the transferee, that is to say, it was not a merely colourable paper transaction leaving the real beneficial enjoyment of the property with him who purported to transfer it. Had the transaction been a merely colourable one, it would, no doubt, have been void and the plaintiff could not have succeeded in his action. His contention is that if it is only voidable it stands good until set aside in proceedings appropriate for the purpose, such proceedings being a suit brought for the express purpose by or on behalf of all the creditors of the transferor. The material section is S. 53, T. P. Act, which is as follows:

"Every transfer of immovable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded defeated or delayed."

The section broadly reproduces the effect of the famous Statute of Elizabeth, 13 Eliz. C. 5, and the English decisions on that Statute are always referred to in India as authorities for the construction of the Indian section. In England it has been held that a suit to avoid a settlement must be brought on behalf of all creditiors: *Reese River Silver Mining Co.* v. *Atwell* (1), and that decision has been followed in India in *Hakim Lal* v. *Mooshahar Sahu* (2) and *Burjorj Dorabji Patel* v. *Dhunbai* (3). But it has been held by the English Courts that where the plaintiff is a judgment-creditor who has sued out a Writ of Elegit, he may sue on his own behalf without reference to the general body of creditors and impeach the transfer as having been executed with intent to defraud his particular claim: *Blenkinsopp* v. *Blenkinsopp* (4). That case expressly left open the question as to whether the deed could be set aside by a person who had signed judgment but not sued out the writ. We are asked to say that in India the section may be called in aid by a creditor who has obtained a decree but has not attached the properties, it being conceded that a creditor who has attached the properties can use the section as a weapon of defence as well as of offence in a case like the present. See *Rajani Kumar Dass* v. *Gaur Kishore Shaha* (5) and *Chidambaram Chettiar* v. *Sami Aiyar* (6). The matter has been definitely decided by the High Court of Bombay in *Ishar Timappa* v. *Devar Venkappa* (7), a decision to which Jenkins, C. J., was a party. In the absence of this Court, I propose to consider the matter on principle. The remedy sought may be treated as the equivalent of a remedy by way of equitable execution in aid of the legal right given by the judgment.

The English authorities subsequent to *Blenkinsopp* v. *Blenkinsopp* (4) seem clearly to show that such an equitable

1. (1869) 7 Eq 347.
2. (1907) 34 Cal 999.
3. (1802) 16 Bom 1.
4. (1852) 1 De G M & G 495.
5. (1908) 35 Cal 1051.
6. (1901) 30 Mad 6.
7. (1903) 27 Bom 146.

execution will not be granted until the title of him who seeks it has been completed; that is to say, according to the technical language of the English law, a judgment creditor cannot invoke the equitable relief until he has followed up his judgment by suing out a writ of fi fa or Elegit, as the case may be. This was expressly decided by Turner, V. C., (as he then was) in *Smith* v. *Hurst* (8) and he cites in his judgment an interesting passage from Lord Redesdale's Treatise on Pleading.

An authoritative and clear exposition of the principle on which Turner, V. C., founded his decision is contained in Lord Cottenham's opinion in *Neate* v. *Duke of Marlborough* (9). Applying that principle I think it must be held that the mere obtaining of a judgment in India creates no title or only an inchoate title in the judgment-creditor, and therefore he must follow up his judgment by attaching the properties in order to enable him to utilize S. 53 in answer to a claim founded on the impeached deed of transfer. The inconvenience of allowing each and every creditor in turn to attack the deed independently is obvious and is amply illustrated by the history of the presentt plaintiff who has been ccmpelled to by off a series of creditors one after the other. Accordingly I am of opinion that *Ishvar Timappa* v. *Devar Venkappa* (7) is correctly decided and is in accordance with principle and I respectfully follow it. I therefore hold that the fact that the deed was executed with intent to defraud the creditors of the transferor affords the defendants no answer to the plaintiff's claim. As the learned Judge has not decided the question as to whether the transaction is merely colourable, the case must go back to him for a finding on the point. Six weeks are allowed for submission of findings and seven days are allowed for filing objections. Costs will be reserved.

Seshagiri Aiyar, J.—The property in this suit belonged to one Velayudham Chetty. He executed a sale-deed to the plaintiff in respect of it on 5th September 1903. It is not disputed that at the time of the sale Velayudham Chetty was heavily involved in debt. The defendants in this suit had a number of decrees against him for sums of money due to them before the date of the sale to the plaintiff. They attached the properties in execution of their decree. The plaintiff filed a claim petition which was rejected in September 1910. Thereupon he filed the present suit for a declaration that the property belonged to him by virtue of the sale and that Velayudham Chetty had no interest lfet in the property for the defendants to attach and sell. The Subordinate Judge who tried the original suit held that the sale was binding to the extent of Rs. 9,946 old, as that sum was applied towards discharging certain mortgages upon the property created by Velayudham Chetty. He dismissed the suit as regards the rost of the claim put forward by the plaintiff. On appeal to the District Judge, the Subordinate Judge's decree was confirmed. In this second appeal a point was raised for the first time by Mr. A Krishnaswami Aiyar to the effect that as the defendants had not sued to set aside the sale in favour of the plaintiff before they attached the properties in execution of their decrees, they were not entitled to resist the claim of the plaintiff in this suit. Mr. Anantakrishna Aiyar objected to this contention being heard for the first time in second appeal, as he might have rectified the defect if the objection had been raised before the trial Court.

It is difficult to see what new evidence could have been let in by the defendants in answer to the abstract legal position argued in this Court. The plaintiff's case is that at the time of the attachment Velayudham Chetty had no interest in the property; because at that time no suit had been brought to set aside the sale in plaintiff's favour. To such a contention, if it is sound, the only answer will be that the sale had been set aside in a properly framed suit. That is not the answer. The decision in *Hakim Lal* v. *Mooshahar Sahu* (2), where it was pointed out that an objection like this should not be entertained in second appeal, does not help the respondents. In that case the suit was brought by some of the creditors, and when objection was taken in second appeal that the suit should have been brought in a representative character, it was met by the plea that if the objection had been taken in time this defect could have been cured. That is not the present case Although it is unfortunate that this question was not

8. (1852) 10 Hare 30.
9. (1838) 3 My and Cr 407.

raised in the earlier stages, I do not see my way to refusing to hear the question argued.

On the merits, the first contention of Mr. Krishnaswami Aiyar was that under S. 53 T. P. Act, it is not open to any one of the creditors of the transferor to challenge the validity of the conveyance; he relied on the observations of Mookerji and Holmwood, JJ., in *Hakim Lal* v. *Mooshahar Sahu* (2). In the first place it should be pointed out that S. 53 does not in terms apply to the present case, as it is in Ch. 2 which preserves to Hindus, Mahomedans, and Buddhists their own law on the question covered by its provisions. This will not however materially affect the decision, as there is nothing in the Hindu law which is inconsistent with S. 53 T. P. Act, see *Rangilbhai Kalyandas* v. *Vinayak Vishnu* (10). At any rate S. 53 T. P. Act, may be taken as indicating the principles of equity, justice and good conscience which ought to guide Courts in the absence of specific legislative provisions. The decision in *Hakim Lal* v. *Mooshahar Sahu* (2), no doubt, lays down that it is settled law in England that if the debtor is alive and not a bankrupt at the time the action is brought to set aside a conveyance on the ground that it was voidable under Statute 13, Elizabeth, Ch. 5 it should be by a creditor or creditors on behalf of himself or themselves and all other creditors of the debtor The learned Judges say that the rule appears to be based upon a perfectly sound and intelligible principle and point out the difficulties which the contrary conclusion may lead to speaking for myself, there are as many difficulties in demanding that all the creditors should join in a representative action as there are in permitting a number of actions being brought against the same purchaser. However that may be, the language of S. 53 T. P. Act, to my mind, is clear that any person who was defrauded, defeated or delayed can impeach the transaction.

Before dealing with the English cases quoted by the learned vakil for the appellant, I wish to draw attention to S. 11, Expl. 6, Civil P. C. That will apply to actions which may be brought by one of the defeated or delayed creditors if he claims a right which is common to himself and to other creditors similarly situated. It may be that S. 53 T. P. Act has been so worded having regard to the language of this explanation to S. 11 Civil P. C. The case of *Hakim Lal* v. *Mooshahar Shau* (2) went up on appeal to the Judicial Committee but their Lordships did not decide the case on this point. See *Musahar Sahu* v. *Hakim Lal* (11). The only other Indian cases bearing on the question are *Burjorji Dorabji Patel* v. *Dhunbai* (3) and *Ishvar Timappa* v. *Devar Venkappa* (7). Among a number of points decided by Telang J. in *Burjorji Dorabji Patal* v. *Dhunbai* (3) the learned Judge points out that the plaintiffs in that suit were only some of the creditors and that they were not entitled to succeed inasmuch as the suit was not filed by them on behalf of and for the benefit of all the creditors. When this decision was passed, the Transfer of Property Act did not apply to the Bombay Presidency and the decision proceeded solely upon English authorities. *Ishvar Timappa* v. *Devar Venkappa* (7) was after the Transfer of Property Act was applied to Bombay. It does not appear from the judgment that the learned Judges required that the other creditors should eo nomine be parties to the suit. Some observations of the Judicial Committee in *Chatterput Singh* v. *Maharaj Bahadur* (12) were relied upon by the appellant. The observation that

"such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose"

does not necessarily imply that a representative action is the only mode of setting aside a fraudulent sale. Therefore I am of opinion on the language of S. 53 T. P. Act that it is open to any creditor to impeach a conveyance made by his debtor, provided he allegee in the plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not give any personal rights to the litigating plaintiff but would enure for the benefit of all creditors like himself.

The English cases to which our attention was drawn do not in unmistakeable terms lay down that all the creditors should join in a representative action before a fraudulent sale can be set aside. All that Williams J., in *Veys* v. *Brown* (13) held was that the settlement should not be treated as void but it was liable to

10. (1887) 11 Bom 666.

11. A I R 1915 P C 115=32 I C 313=42 A 104=43 Cal 521 (P C.)
12. (1905) 32 Cal 198 (P C).
13. (1884) 13 Q B D 199.

impeachment in a proper action. *Glegg* v. *Bromley* (14) does not take the matter any further. But both these cases are authorities for the position that the assignment by the debtor will be good and valid until it is set aside in a proper proceeding. There are certain observations in Mav on Fraudulent Conveyances which on their face appeared to mean that a judgment creditor was in a different position from an ordinary creditor and that it was open to the former by virtue of his judgment to levy execution without having the assignment set aside in a suit for that purpose. The proposition is thus stated:

"Where a creditor has a judgment or order of Court, or process of execution in respect of his claim and might obtain relief in equity thereunder against property held by or in trust for his debtor and the debtor is living a Court of equity can declare a settlement made by the debtor, which is fraudulent within 13 Eliz. C 5 to be void against the plaintiff without also declaring it to he void against the creditors generally and may direct the settled property or a sufficient part of it to be applied in satisfaction of the plaintiffs claim."

When the cases cited for this proposition are examined they show that if a judgment was obtained at common law and a further action was brought in the equity Court to have it declared that the settlement or conveyance by the debtor in fraud of creditors was voide the Court of Chancery will not move in the matter until all the common law remedies had been exhausted. See *Smith* v. *Hurst* (8) and *Neate* v. *Duke of Marlborough* (9) and *Reese River Silver Mining Co* v. *Atwell* (1). But since the Judicature Act and since the Act of Elward I which define the rights of judgment creditors, these decisions have no practical value. A judgment-creditor in England is in a very favourable position as compared with a judgment creditor in this country. He becomes practically the owner of the property which he seizes either under a writ of Elegit or of fi fa. I do not think the the English decisions which differentiate between the position of the judgment creditor and that of an ordinary creditor are of much use in deciding Indian cases. The judgment creditor in India, for all practical purposes is in the same position as any ordinary creditor. If he attaches the property it gives him no lien: if he realizes moneys they would be subject to participation by those who may be entitled to rateable distribution. But the position in England is altogether different. Therefore the passege in May relating to the judment creditor has no relevancy in this country. Nor is there anything in the words of S. 53 to differentiate between the position of the decree-holder and that of an ordinary creditor.

The next question is whether the judgment-creditor can protect his rights to proceed against the property of the judgment-debtor by pleading in defence that the sale wich the plaintiff seeks to establish in the suit should be set aside. There is no question that if the sale is void or is found to be a sham transaction it will not be necessary either for the creditor individually or conjointly with others to sue to set aside the sale. But if it is only voidable it seems to me that the creditors can have no remedy against the property conveyed until the sale is set aside. It is well settled that in cases of voidable transactions until the transaction is avoided it continues in force. See *Raja Rajeswara Dorai* v. *Arunachellam* (15) and *Mahamad Haji Zakeria* v. *Ahmadbhai Habibbhai* (16). Therefore at the time that the creditor attached the property the sale was effective to confer title upon the plaintiff.

It was held by the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* (17) that the effect of a decree in a suit brought by a defeated claimant is to place the parties in the position they occupied at the time the claim was put in. Consequently if the defendant succeeds in his defence, the result of it will be to allow him to attach the property as if it were the property of the judgment-debtor. This, as I already pointed out, can do him no good so long as the sale is not set aside. Therefore I am of opinion that the defendant is not entitled to avoid the sale by his defence. Mr. Anantakrishna Aiyar drew our attention to *Vasudeo Raghunath Oka* v. *Janardhan Sadashiv Apte* (18). All that was decided in that case was that a subsequent transferee was not entitled to impeach a completed sale. It is true that another answer to the defence could have been that the sale was subsisting at the time of the transfer. However, this

14. (1912) 3 K B 474.

15. (1913) 38 Mad 321=19 I C 596.
16. (1901) 25 Bom 327.
17. (1908) 35 Cal 202=35 I A 22 (P C).
18. (1915) 39 Bom 507=29 I C 497.

is no authority for the position that without setting aside the sale a judgment-creditor can impeach the transaction as a defence to the action commenced by the purchaser. The point we have to decide was not considered in *Narayana Pattar* v. *Viraraghavan Pattar* (19), *Chidambaram Chettiar* v. *Sami Aiyar* (6) and *Ishan Chunder Das Sarkar* v. *Bisu Sirdar* (20), to which the learned vakil for the respondents invited our attentian. I have therefore reluctantly come to the conclusion that the objection raised by Mr. A. Krishnaswami Aiyar should be allowed. (In compliance with the order contained in the above judgment, the District Judge of Tanjore submitted the following.)

Finding.—The issue on which I have been directed to record a finding is whether the transaction created by the sale-deed, dated 5th September 1903, is merely colourable. It has been found, and the finding stands good, that the transaction evidenced by the sale-deed was intended to defraud and defeat the creditors. The question now for consideration is whether the transaction was merely colourable or whether it was intended that the property should pass to the vendee. The consideration for the sale-deed was Rs. 14,250 made up of (1) mortgage debts on the properties to the extent of Rs. 8,842 which the vendee undertook to discharge, (2) a debt of Rs. 2,408 due on a promisscry not to Narayanasami Iyer, (3) Rs. 3, 000 to be paid in cash to the vendors to discharge sundry debts. With regard to the mortgage debts, I think on the evidence on record it must be held that they were paid by plaintiff. Exs. B to J show that they were paid and that they were paid by plaintiff. There is really no evidence that the payments nominally made by plaintiff were really made by his vendor. It is true that the debts were not paid at once and no payments were made until the creditors of the vendor began to be troublesome, but this fact proves nothing. The vendor was obviously more or less bankrupt and it is difficult to see how he could raise the money. The payment of the debt due on the promissory note to Narayanasami Iyer has not been satisfactorily proved. Narayanasami Iyer was not examined. There is no satisfactory evidence that the note is genuine as it was the plaintiff who alone spoke to it.

The cash payment is not satisfactorily proved. It was to be utilized for paying off sundry debts. There is no evidence at all that the whole sum was utilized in paying debts and not one of the persons who are alleged to have been paid off has been examined. The conclusion therefore is that some Rs. 9,900 were paid and that the rest of the consideration was not paid. The next point for consideration is whether the plaintiff had possession of the properties after the sale-deed. It is clear from the evidence on record that the family house which was sold under the sale-deed was occupied by the vendor and his relations. The vendor and the vendee are closely related, and I do not think that the fact that the vendee allowed his vendor's family to live in the house shows that the sale was meant to be inoperative. The more important question is with regard to the lands. The plaintiff has produced a number of lease deeds Ex. M series, though he has not examined the lessees. The evidence of these deeds is attacked on the ground that none of these are earlier than 1904, i. e, after the vendor's creditors had begun to execute pressure. I do not think there is much in this. The sale-deed was in September 1903 and it is not usual to enter into leases at that time or until the next year. Ex N series are receipts for payment of kist.

The earliest date of any of these receipts is January 1904 but kist would not in any case be paid till January. As to the oral evidence it necessarily has to be received with caution. But there is this fact. Sundaram Chetti, one of plaintiff's agents lives in one of the villages were the lands are. It is true that Sundaram Chetti is related by marriage to the vendor, but I see really no reason to doubt that he is agent of the plaintiff. This man formerly lived in Swamimalai. It seems probable that the reason he has moved to Ayyavadi is that he is plaintiff's agent and plaintiff has bought the lands there. It is difficult to explain his change of residence otherwise. The evidence on the other side is entirely oral and to a certain extent hearsay. It has been proved that the plaintiff paid over Rs. 9,000 and it seems unlikely that even a close relation would pay so large an amount without getting something for it. It is true that the whole

19. (1900) 23 Mad 184.
20. (1897) 24 Cal 825.

consideration for the sale was not paid and it seems certain that the consideration even if fully paid was not adequate. Otherwise there is no explanation at all for Ex. R, a release deed by which the plaintiff was to pay an extra Rs. 6,000. This release deed was executed after plaintiff had been worsted in litigation. Plaintiff no doubt, thought that his sale deed would be attacked on the the grounnd of inadequate consideration and wanted to save himself further trouble. Though the full consideration was not paid and though the consideration was inadequate, it does not follow that the sale was merely nominal. The vendor was in a very bad way at the time of sale and was not in a position to dictate terms. He wanted to prevent his creditors getting his property and he had recourse to a relation. The relation, though willing to oblige him, was not likely to do it for nothing and it was quite likely that the relation would impose hard terms.

The subsequent conduct of the plaintiff is rather in favour of the theory that the transaction was a real one. He paid off under pressure a considerable number of creditors and unless it is shown that he did not really pay them off, the presumtion is that he paid them off because the transaction was a real, though a fraudulent, one. There is really no evidence at all that money which went to pay off the various debts came from the vendor and not from the vendee and it is certainly not shown that the vendor who was hopelessly bankrupt was in a position to find the money. It is contended that some of the debts may have been paid out of the income of the land, but though, as pointed out in para. 11, of the Subordinate Judge's judgment, this might apply to the Rs. 6,000 supposed to have been paid under Ex. R, yet it is clear that this sum represented the income of some five years. It is not explained how the vendor could have raised the money to pay the other debts which were undoubtedly discharged. (The probabilities are therefore all in favour of the position that the sale was real and not nominal. I, therefore, find that the transaction created by the sale-deed, Ex. A, is not merely colourable. This second appeal coming on for final hearing after the retnrn of the finding of the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following.)

Judgment.—We accept the finding, reverse the decree of both the Courts below and give a decree to the plaintiff as prayed for. Costs will be awarded to the appellants in this Court. Each party will pay his own costs in the lower Courts.

V.B./R.K. *Appeal allowed.*

✻ A. I. R. 1918 Madras 231

WALLIS, C. J.

On difference between

ABDUR RAHIM AND NAPIER, JJ.

Dudekula Lal Sahib—Accused, *In re*

Criminal Revn. Case No. 85 of 1917 and Case Referred No. 9 of 1917, Decided on 4th May 1917, by Dist. Magistrate Guntur D/- 20th January 1917.

(a) Criminal P. C. (5 of 1898), Ss. 494—Summons case—Acquittal under S. 494 bars fresh trial.

The statutory acquittal under S. 494, in a summons-case operates as a bar to further proceedings on the same facts. [P 235 C 2]

(b) Criminal P. C. (5 of 1898), Ss. 403 (1) 247, and 494—Sub-section (1) of S. 403 (1) does not affect acquittal under S. 247 or S. 494.

The provisions of S. 403 clearly imply that every order of acquittal so long as it is in force is a bar to further proceedings except in the circumstances specified in the section itself and the words in sub-S. (1) do not affect an order of acquittal under S. 494, or S. 247, Criminal P. C. [P 233 C 2]

✻ (c) Criminal P. C. (5 of 1898), Ss. 403 and 494—(Per *Curiam, Napier, J.* dissenting) Charge under S. 447 I. P. C. withdrawn by public prosecutor—Accused acquitted under S. 494—Fresh complaint by owner under Ss. 143, 447 and 341 I. P. C.—Previous acquittal bars fresh trial.

The Police filed a charge-sheet under S. 447 I. P. C. against a person before a Magistrate with second class powers, whereupon a summons was issued but before it was served the Public Prosecutor, with the consent of the Court, withdrew from the prosecution under S. 494, and the accused was acquitted as required by that section. Thereafter the person on whose field the offence of criminal trespass was alleged to have been committed preferred upon the same facts a complaint charging the accused with offences under Ss. 143, 447 and 341, I. P. C. The accused was convicted and sentenced separately for each of the offences:

Held: (Per *Curiam, Napier, J.* dissenting) that the previous order of acquittal operated as a bar to further proceedings and that the conviction was therefore bad in law and must be set aside. [P 235 C 2 P 236 C 1]

Per *Napier, J.*—S. 403, is intended to reproduce what is the law in England, namely the plea of autrefois acquit, but in order to plead autrefois acquit successfully in India the accused must have been put in peril either before the Jury or the Magistrate. [P 235 C 1]

Public Prosecutor—for the Crown.

Abdur Rahim, J.—The question of law which we are asked to consider in the

letter of reference arose under the following circumstances: The Police had filed a charge-sheet under S. 447, I. P. C. against a certain person before a Magistrate with second class powers a summons was issued but before it was served the Public Prosecutor with the consent of the Court withdrew from the prosecution under S 494, Criminal P. C. and the accused was then acquitted as required by that section. Thereafter the person on whose field the offence of criminal trespass was alleged to have been committed preferred upon the same facts a complaint charging the accused with offences under Ss. 143, 447 and 341, I. P. C. That case was tried and the accused convicted and sentenced separately for each of the offences. The convictions were on appeal confirmed but the sentences reduced. The District Magistrate under S. 438, Criminal P. C. has asked us to revise the conviction and sentence under S. 447, on the ground that the acquittal under S. 494 in this case where no charge was required to be framed operated as a bar to further trial for the same offence.

The effect of an order under S. 494 in a summons case does not appear to have been the subject of any decision so far as the present question is concerned. I had however sitting singly to consider the effect of an acquittal under S. 247, in a case of *Guggilapu Peddaya In re* (1) and held that it operated as a bar to further proceedings for the same offence so long as the order remained in force. But a Divisional Bench consisting of my learned brother and Ayling, J. have in a recent case. Criminal Revision Case No. 866 of 1916. [*Bezwada Kotayya* v. *Konathalapalli Venkayya* (2)] held otherwise. It seems to me that no distinction can be drawn between an acquittal under S. 247 and one under S 494 for the purposes of the present question and I need hardly say that in deference to the views expressed by Ayling and Napier, JJ., I have cerefully reconsidered the matter. But even a more detailed examination of S. 403 and the other provisions of the Criminal Procedure Code and of the authorities has only confirmed me in my former opinion. The question turns on the construction of S. 403. Its sub-S. (1) says that:

"a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted"

is not liable to be tried again for the same offence while sub-Ss. (2) and (4)—sub-S. (3) does not throw much light on the question as all convictions must be after trial, in dealing with certain cases where the previous acquittal or conviction would not bar further trial, speak of 'a person acquitted or convicted of any offence,' dropping the words 'who has once been tried.' It can hardly be doubted that by the words:

"a person who has once been tried by a Court of competent jurisdiction for an offence and 'convicted,' in sub-S. (1) and a person 'acquitted' or 'convicted' of any offence"

in sub-Ss. (2) and (4) the Legislature contemplated the same set of facts. Now what is the sense in which the Legislature has used the two phrases? In the first place, it must be taken to be a clear implication of sub-Ss. (2) and (4) that in cases other than those mentioned therein the provisions of sub-S. (1) should apply and the person who has been 'acquitted' or 'convicted' should not be tried again. Then the explanation to the section is important in ascertaining what is intended by sub-S. (1). It mentions the orders which are not to be regarded as acquittals for "purposes of the section" and this can have little signification, if all orders of acquittal passed in accordance with the express provisions of the Code were not intended to have the effect defined by the section, viz., the barring of further proceedings. There is no attempt made to discriminate between different orders of acquittal.

An examination of the other provisions of the Criminal Procedure Code shows at once the solicitude evinced by the legislature on the question of the form of orders which the various Criminal Tribunals are to pass in different kinds of proceedings in given circumstances, with a view mainly to indicate their respective effects and to provide suitable remedies in case of wrong orders of each category. The list of the orders terminating proceedings given in the explanation seems to be exhaustive and of these the main classes are orders of "discharge" and "acquittal." In summons-cases the proceedings against an accused person commence with the issue of process (Ch. 17) on the Magistrate taking cognizance of the offence in one of the ways mentioned in the previous chapters. But if in a case of "complaint" he refused to take cognizance, his order would be one dismissing

1. (1911) 34 Mad 253=9 I C 253.
2. A I R 1918 Mad 212=45 I C 257.

the complaint (S. 203). If the Magistrate took cognizance and issued process, the proceedings are to be terminated by an order either of "acquittal" or "conviction" (S. 245), unless the proceedings are stopped under S. 249. The order of "acquittal" is to be passed if after hearing the evidence the Magistrate finds the accused not guilty (S. 245), or if the complainant does not appear (S. 247), or upon withdrawal of the complaint by the complainant (S. 248), or upon the Public Prosecutor withdrawing from the prosecution (S. 494).

In warrant-cases tried by a Magistrate the accused is to be "discharged" where no case is made out and so no charge need be drawn (S. 253) or the Public Prosecutor withdraws from the prosecution before a charge is framed (S. 494), he is to be "acquitted" if the Magistrate finds him not guilty after a charge has been drawn (S. 258) or the Public Prosecutor withdraws from prosecution (S. 494), after the framing of the charge. Similarly also in sessions cases the legislature has carefully provided when an order terminating proceedings is to have the effect of a "discharge" and when it will operate as an "acquittal:" see Ss. 209, 213, 305, 307, 333 and 494. Then we find that express provisions are made for the setting aside of orders of discharge (see Ss. 436, 437, 438 and 439) and of acquittal either under S. 417 or under the general powers of revision of the High Court S. 439:

All this leaves no room for doubt that the legislature intended that a person once "acquitted" shall not be liable to be prosecuted for the same offence so long as the acquittal is not set aside by the High Court. Even in cases of discharge it has been ruled that no fresh prceedings can be had with respect to the same matter unless the order has been first set aside as provided for in the Criminal Procedure Code. It is suggested in the judgment of Ayling and Napier, JJ., in Criminal Revision Case No. 866 of 1916 *Bezwada Kotayya* v. *Konathalapalli Venkayya* (2) that it does not follow from their construction of S. 403 that an order of acquittal when there has been no decision on the merits, such as for instance an acquittal under S. 247, would be nugatory, but, so far as I can find, they do not point out, nor can I see for myself, what other effect it can have if it is to be no bar to further proceedings for the same offence.

Not only do the provisions of S. 403 itself clearly imply that every order of acquittal so long as it is in force is a bar to further proceedings except in the circumstances specified in the section itself, but I do not think that the words of sub-S. (1) necessarily deny that effect to an order of acquittal under S. 494 or S. 247. In summons-cases the "trial" commences as soon as the Magistrate has taken cognizance of the matter and issued process. The mere fact that Ch. 20 is headed "of the trial of summons cases by Magistrates" and S. 242 lays down that the first thing that a Magistrate has to do when the accused appears or is brought before him is to ask him to show cause why he should not be convicted, does not indicate that the "trial" did not commence at an earlier stage within the meaning of the Code. In fact Ch. 17 shows that the proceedings before the Magistrate commence with the issue of process, and that the draftsman did not think of distinguishing between "commencement of proceedings" and "commencement of trial," will be apparent from the way both the phrases are used in the marginal notes of S. 271 and in the heading.

The word "tried" or "trial" has not been defined anywhere. If the trial of a summons case commences as soon as the process is issued, is there any good reason for saying that an order of acquittal would not come within the meaning of sub-S. 1, S. 403, unless it was passed at a particular stage? It seems to be conceded that if the accused on being questioned under S. 242 denied that he committed the offence and he is acquitted, then sub S. (1), S. 403, would apply. But such an order may be made without any decision on the merits, on the ground of absence of the complainant (S 247) or withdrawal from prosecution (S. 248) or (S. 494). It would follow therefore that S. 403, sub S. (1), does not require that there should have been a finding on evidence that the accused is not guilty, and if it is not correct to say that in summons-cases proceedings commence only after the accused has been questioned under S. 242, it seems to me that the only possible meaning we can give to the words "who has once been tried" is:

"against whom proceedings have been commenced in Court, i. e., against whom the Court has taken cognizance of an offence and issued process."

On comparing sub-S. (1) with the sub-Ss. (2) and (4) it is clear that the draftsman intended to assign the same scope to the phrase in question in sub-S. (1) as to the phrase "a person convicted or acquitted" in sub-Ss. (2) and (4) so far as this matter is concerned, though it was not a happy idea of his to use different expressions to signify the same thing. I think that if we are not to frustrate the clear intentions of the legislature we must not construe the words "who has once been tried" in sub-S. (1) in any sense other than what I have suggested. The decided cases, so far as they go, support the view of the law which I expressed in *Guggilapu Peddaya, In the matter of* (1). One important case which was not then brought to my notice is reported as *Suraiya Sastri* v. *Venkata Rao* (3). There it was held by Kernan and Wilkinson, JJ., that a second charge for the same offence against an accused person, who was erroneously "discharged," but who ought to have been "acquitted" on withdrawal by the Public Prosecutor from the prosecution under S. 494, Criminal P. C,, at the Court of Session, was bad. If a narrow meaning were to be given to the word "tried" in S. 403, it could not be said that the "trial" had commenced at the date of withdrawal. because up to commitment the proceedings are described in the Criminal Procedure Code as "inquiry" and the word "trial" is used only in connection with proceedings after commitment.

The Public Prosecutor withdrew from the prosecution before any charge was framed in the Sessions Court, according to the practice then obtaining. This makes it clear that the charge framed by the Committing Magistrate could not have been read to the accused and he could not have answered to any charge in the Sessions Court, when the Public Prosecutor withdrew on the ground that the sanction on which the prosecution was based was bad. The ruling in *Suraiya Sastri* v. *Venkata Rao* (3) related to a summons case and it was held there that since the accused had appeared and answered to the charge apparently meaning that he had been questioned under S. 242, Criminal P. C., he had been "tried" within the meaning of S. 403, but it was not laid down that if he had not appeared and been questioned, S. 403 would not apply. In *Panchu Singh* v. *Umor Mahomed Sheikh* (4) an order of "dismissal" in a summons-case under S. 247, Criminal P. C., with respect to the case of an accused person who did not appear, was treated as a bar to the revival of the charge against him. The two cases in *Bishun Das Ghosh* v. *King-Emperor* (5), *Kedar Nath Biswas* v. *Adhin Manji* (6), it may be said, do not specifically deal with the question under consideration, because it is not stated that the fresh proceedings were quashed on the ground that S. 403, Criminal P. C., applied. The ground of the decisions however was that the acquittal of persons other than petitioners on the same allegations had not been set aside in accordance with the law.

I do not propose to discuss the provisions of English law relating to "autrefois acquit," as the system of criminal procedure in this country is obviously so different from that of England that to draw any sort of inference from the state of law on the subject in England, where no such clear distinctions exist between different kinds of orders terminating proceedings and which does not provide similar measures for rectifying wrong orders of acquittal and discharge, would to my mind be only misleading. I therefere agree with the District Magistrate that the conviction and sentence under S. 447, I. P. C., are bad in law and should be set aside. My learned brother holds a different view of the law. The paper will therefore he placed before his Lordship the Chief Justice for such orders as to the disposal of the case as he may think fit to pass. I may mention that as the question involved is one of importance, it is desirable, in my opinion, that it should be decided by a Full Bench.

Napier, J.—I adhere to the opinion expressed by me in Criminal Revision Case No. 866 of 1916 [*Bezwada Kotayya* v. *Konathalapalli Venkayya* (2)] that it is impossible to treat the words "once been tried by a Court of competent jurisdiction" in S. 403, Criminal P. C., as surplusage, or to apply the word "tried" to a case where a man has not even been

3. 2 Weir 457.

4. (1900) 4 C W N 346.
5. (1903) 7 C W N 493.
6. (1903) 7 C W N 711.

served with the summons. I have no doubt that the section is intended to reproduce what is undoubtedly the law in England, namely, that to plead autrefois acquit successfully the accused must have been put in peril either before the jury or the Magistrate. As my learned brother takes a different view the case should, I think, go before a third Judge under Ss. 439 and 429, Criminal P. C., but, as my learned brother thinks otherwise, the matter will be laid before the Chief Justice for orders. (On difference Wallis, C. J., delivered the following)

Order.—Two learned Judges having differed in a criminal revision case, S. 439, Criminal P. C., read with S. 429, requires the case to be decided by a third Judge and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the Rules of the Court. With reference to this case I have arrived at the same conclusion as Abdur Rahim, J., If Ss. 403 and 494, Criminal P. C., had been originally enacted at one and the same time, I should find it very difficult to come to that conclusion. But seeing that the Code of Criminal Procedure, which is founded on the English Law of Criminal Procedure, has been repeatedly modified in the successive Codes of 1861, 1872, 1882 and 1898, when an apparent conflict arises between what would appear to be the intention of the legislature in one section and what would appear to be its intention in another section, the best method of ascertaining what the intention of the legislature really is appears to me to be to examine what is the English rule upon the subject and how far that rule has been adopted and what modifications have been subsequently introduced in the successive Codes.

Now in English law a plea of autrefois acquit or convict can only be raised n bar of subsequent proceedings when the conviction or acquittal has been for the same offence in a trial had before a Court of competent jurisdiction. The Attorney-General at any stage of a criminal prosecution may enter "a nolle prosequi" and bring the proceedings to an end. But that does not bar fresh proceedings against the accused. Consequently in England when the prosecution desire not to go on with the case, the practice is not to tender further evidence and for the Judge then to direct the jury to acquit. That rule of English law was embodied in the Criminal Procedure Code of 1861 in S. 55 as follows:

> "A person who has once been tried for an offence and convicted or acquitted of such offence shall not be liable to be tried again for the same offence,"

words which with certain explanations are still retained in S. 403 of the present Code. Under that Code Public Prosecutors were directed by the Calcutta Court not to withdraw the graver charge and proceed upon the lesser charge, because such a course would have the effect of depriving the accused of the benefit of acquittal on the graver charge (5 Sutherland's Criminal Letters 4). Then came the Code of 1872, S. 61:

> "A Public Prosecutor may, with the consent of the Court, withdraw any charge against any person in any case of which he is in charge; and upon such withdrawal, if it is made whilst the case is under inquiry, the accused person shall be discharged. If it is made when he is under trial, the accused person shall be acquitted."

This was an entirely new departure, because it entitled the accused to an acquittal by statute on the withdrawal by the Public Prosecutor and without any reference to the evidence at the trial. It has never been doubted that when the Public Prosecutor withdraws under this section and the accused is acquitted, he cannot be subsequently charged for the same offence. Yet, it seems difficult to bring such an acquittal within the language of S. 460 of that Code (now S. 403) and say that he is a person who has been "tried" for an offence and convicted or acquitted. Supposing the Public Prosecutor to intervene immediately after the case is taken up by the Sessions Judge and to withdraw and the accused then to be acquitted, I find great difficulty in saying that the accused has been "tried" and acquitted within the meaning of S. 403 of the present Code. It seems to me that in S. 61 of the Act of 1872 the Legislature introduced a fresh form of statutory acquittal under that section, which was intended to have the same operation as an acquittal in accordance with the English rule under S. 460 (now S. 403). So much for the Code of 1872. It was only in the Code of 1882 that the alteration was made which has given rise to the present case. S. 494, dealing with the withdrawal by the Public Prosecutor, provided that

> "if the withdrawal is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted."

The reference in the latter part was clearly to summons cases which deal with more trivial offences, and it seems to me the intention of the Legislature was that the withdrawal by the Public Prosecutor at any stage in those trivial cases was to have the same effect as his withdrawal under the previous part of that section, that is to say, that there was to be a final bar of fresh proceeding. A similar change was introduced as regards this class of cases into what is now S. 247 of the Code, as regards non-appearance of the complainant in a summons case. In the Code up to that time such failure to appear by the complainant had merely led to a dismissal of the complaint. But in 1882 to make the law more stringent it was provided, as it still is, that on the non appearance of the complainant the Magistrate might acquit the accused unless he chose to adjourn. Here, again, I think that the intention of the Legislature was that the acquittal shou'd operate as a final bar of further proceedings. The history of the legislation shows, to my mind, a distinction between what I may call the common law plea of autrefois acquit as embodied in S. 403 of the Code, and the statutory acquittals which have been introduced in Ss. 494, 247 and 345 It has not been suggested in this case that the withdrawal from the prosecution by the Public Prosecutor was irregular, and in these circumstances I agree with the conclusion arrived at by Abdur Rahim, J. that the conviction and sentence are bad in law and should be set aside.

S.N./R.K. *Conviction set aside.*

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WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Subba Reddi—Defendant—Appellant.

v.

Alagammal and *another*—Plaintiff and Defendant—Respondents.

Appeal Suits Nos. 47 of 1913 and 243 of 1914, Decided on 25th October 1915, against decree of Temporary Sub Judge, Ramnad, in Original Suit Nos. 76 and 151 of 1911.

Hindu Law — Partition — Division of all family properties except outstandings — Family becomes divided in status even in respect of outstandings.

A deed of partition executed between a Hindu father and son recited that the division was effected owing to misunderstandings among the female members of the family and that the properties mentioned in the schedule were divided. The outstandings due to the family were not mentioned in the schedule:

Held: (*Wallis, C. J. dubitante*) that the family became divided in status even in respect of the outstandings. [P 236 C 1; P 237 C 2]

Per *Wallis, C. J.*—The mere fact that members of a joint Hindu family execute a document dividing a particular item of property is not sufficient to raise a presumption that they intend to become divided in status. If such a presumption is to be raised, there must be something else in the document to raise it. 1 *I. C.* 408, *Expl.* [P 236 C 2]

Per *Seshagiri Aiyar, J.*—When one member of a joint family intimates his willigness to get separate from others, that effects a division in status and where a partition is effected not specifically dealing with some items of the joint property, the status of coparcenary cannot be deemed to be continued in respect of this property which is not divided. [P 238 C 1]

T. Rangachariar and *K. V. Krishnaswamy Ayyar*—for Appellant.

S. Srinivasa Aiyangar and *A. Krishnaswamy Aiyar*—for Respondents.

A. S. No. 47 *of* 1913.

Wallis, C. J.—The only question of any difficulty in this case is whether Ex. 6 is to be construed as effecting a division in status as well as a division of the specific properties with which it deals expressly. This appears to me to be mainly a question of the construction of the document. In *Vaidya nath Aiyar* v. *Aiyasamy Aiyar* (1), where a partial partition of property was held to raise a presumption of division in status, there was no deed of partition and I do not think that case is an authority for holding that wherever the co-parceners execute a document dividing a particular item of property, that raises a presumption that they intended to become divided in status. If such a presumption is to be raised, there must, in my opinion, be something else in the document to raise it. This was a case of partition between defendant 1 and his father, defendant 1 being the son by the second of the father's three wives, and the partition was brought about by the father who was ill and anxious to make provision for his first and third wives, as he did immediately afterwards in the will, Ex. 7 which he executed on the 3rd September, the partition deed Ex. 6 having been executed on 25th August. Whereas the partition deed appears to have included expressly all the joint family properties except the outstanding decrees and debts which were not mentioned and were considerable, the will bequeaths to the two wives not only the moveable and immo-

1. (1909) 32 Mad 191=1 I C 408.

vable properties taken by the testator under the partition deed, Ex. 6, but also "all the moveable and immovable properties, outstanding loans and properties belonging to me at present but not included in this will, and the moveable and immovable properties, outstanding loans and properties which I may hearafter acquire."

This shows, if proof were necessary, that at the time of Ex. 6 all parties must have been perfectly well aware of the existence of other joint family properties which were not included in the partition deed and the question, in my opinion, is whether from the terms of the deed we can gather that it was the intention of the parties to remain joint or become separate as to these items also. I do not think any strong presumption arises from the situation of the parties who were father and son. If the father was anxious to partition all the joint family properties with a view to leaving his share to his two wives, it is strange he did not do so expressly and it has been argued that such was not his intention and that he probably thought that the Rs. 20,000 he took under the deed would be sufficient for these wives, and was willing that his son should take the rest by survivorship. As against this, there is the recital in the deed that there had been differences between defendant 1 and his father as well as between the women of the family. On the whole I do not think it is safe to draw any inference as to the motives actuating the parties. The partition deed, however after providing for the division of the scheduled properties, goes on: "As we have effected partition in this manner," and provides that defendant 1's mother who had been living in his family should be maintained by him and not by her husband. I have come to the conclusion, though not without hesitation, that these provisions are sufficient to enable us to raise a presumption that the parties intended to become divided in interest and that the decrees and outstanding debts were not divided then, simply because they had not been collected and it was not possible to make a satisfactory division then as it could not be foretold what they wonld realize. The appeal will be dismissed with costs.

A. S. No. 243 *of* 1914.

This case follows my decision in Appeal No. 47 of 1913, and I dismiss the appeal with costs.

A. S. No. 47 *of* 1913.

Seshagiri Aiyar, J.—I agree. Mr. Rangachariar frankly conceded that in the face of the overwhelming evidence there is regarding the consent of his client to the division, he is not prepared to argue that the partition was brought about by undue influence. The only question remaining for consideration is whether the father and son were divided in status with reference to the outstandings not specifically mentioned in the deed of partition. In my opinion the language of the document shows that the parties to it were no longer to remain joint. It says: (a) we have lived hitherto as members of a joint family; (b) that owing to differences among females, it has become necessary to effect partition; (c) we shall effect a partition in respect of the undermentioned properties. The list of outstandings is not among the properties mentioned, in the schedule. It has also to be mentioned as pointed out by Mr. Rangachariar, that the usual clause:

"that from this day forward there shall not be property relationship but only blood relationship"

is not to be found in this document. Nonetheless I am of opinion that the intention of the parties was to get separated from each other; the reason for the necessity is given in the document. The defendant 1 is the son by one of the wives who was not living with her husband, and the pleadings and the evidence in this case show that the father effected the partition with a view to devise his share of the properties to his other two wives. I am unable to see that the father had any object in allowing particular portions of the property to continue as joint property. The explanation suggested by Mr. Srinivasa Aiyangar for their omission from the schedule is the most natural one. There were debts and decrees. It was apparently thought that the moneys should be apportioned as they were recovered. Some may have been or proved to be bad debts and it was not thought expedient to divide the debts at that time. On principle. I am clear that the father and son became divided in status. It is pointed out by Mr. Ghose in his Hindu law that there is nothing in the Smirithis to encourage a partial partition. The practice has grown up in recent years. Mr. Mitra in his Tagore lectures dealing with this special question quotes from the Smirithis and commentaries to show

that partial partition was unknown to Hindu law. I do not think it necessary to quote excerpts from the texts to substantiate this position: see Mitra on the "Law of Partition." pp. 330 and 331. As regards the decided cases, Sir Richard Garth in *Radha Churn Dass* v. *Kripa Sindhu Dass* (2) says:

"It seems indeed very doubtful whether by the Hindu law any partial partition of the family property can take place except by arrangement."

The decisions in *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee* (3), *Bhowani Prosad Shaha* v. *Juggernath Shaha* (4) and *Ajodhaya Pershad* v. *Mahadeo Pershad* (5) prove that with the consent of the coparceners a partial partition is possible. The decisions in *Timmi Reddy* v. *Achamma* (6), *Kandasami* v. *Doraisami* (7) only say that there can be a partial partition. On the other hand in *Vaidyanath Aiyar* v. *Aiyasamy Aiyar* (1) it was clearly laid down that when once a partition was made, the presumption is that it effected a complete severance of interest. This was followed in *Sundaramma* v. *Kamakotiah* (8). In *Anandibai* v. *Hari Suba Pai* (9) Chandavarkar, J., says:

"If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to confine the partition to the rest, or, if the partition was intended to extend to the interests of all individually, there must be proof that some of them re-united."

I entirely agree. The recent decision of the Judicial Committee in *Suroj Narain* v. *Iqbal Narain* (10) indicates that when one member intimates his willingness to get separate from the others, that would effect a division in status. In the present case there was an agreement to become divided in consequence of misunderstandings among the female members of the family. I am unable to hold that the status of coparcenary was intended to be continued with regard to the properties not specifically dealt with in the partition deed. It is conceded that, apart from the language of the document there is no evidence to prove that the parties intended to remain joint with reference to the properties not specifically mentioned. I would dismiss the appeal with costs.

A. S. No. 243 *of* 1914.

I agree that this appeal also should be dismissed with costs.

S.N./R.K. *Appeals dismissed.*

2. (1880) 5 Cal 474.
3. (1909) 3 I C 247.
4. (1909) 3 I C 241.
5. (1909) 3 I C 9
6. (1864-65) 2 M H C R 325.
7. (1878-80) 2 Mad 317.
8. (1915) 26 I C 514.
9. (1911) 35 Bom 293=10 I C 911.
10. (1913) 35 All 80=18 I C 30=40 I A 40=16 O C 129 (P C)

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* A. I. R. 1918 Madras 238

AYLING AND SESHAGIRI AIYAR, JJ.

P. L. A. Palaniappa Chettier—Plaintiff—Appellant.

v.

V. L. A. R. Veerappa Chettiar and *others*—Defendants—Respondents.

Civil Appeal No. 134 of 1911, Decided on 30th August 1917, against decree of Temporary Sub-Judge, Ramnad, in Original Suit No. 72 of 1910.

(a) Limitation Act (9 of 1908), S. 20—Entries in debtor's account books cannot be treated as acknowledgment of payment of interest.

Entries in the account books of a debtor cannot be treated as payments of interest within the meaning of S. 20. [P 239 C 1]

(b) Limitation Act (9 of 1908), S. 13—Suit for accounts against firm — Absence from British India of some of partners saves limitation against them only.

In a suit against a partnership firm for moneys due on accounts, the plaintiff is entitled to a deduction of the time during which any of the partners was absent from British India, but such absence will save limitation only as against the absentee partner and not as against those who were within jurisdiction. [P 240 C 2]

(c) Contract Act (9 of 1872), S. 241—Status of legal representative of deceased partner explained—He remains tenant-in-common if no further business is carried on—In respect of further business his position is of creditor.

The legal representative of a deceased partner does not continue to be a partner after the latter's death for purposes of winding up. He only becomes a lender in respect of any business that might be carried on by the surviving partners. If no business is carried on, he is a tenant-in-common with the surviving partners in respect of the assets of the business. [P 241 C 2]

(d) Contract Act (9 of 1872), Ss. 251 and 213—One partner can release himself from liability.

It is open to one of the partners of a firm to release a partnership liability. [P 241 C 1]

***(e) Contract Act (9 of 1872), S. 251 and 263—Death of one partner—Surviving partners can release claim—If not bona fide, other partners can recover their share—Right is personal and is not available to legal representative of deceased partner.**

After the death of one of the partners the surviving partners have power to release a claim. [P 241 C 2]

If the release is fraudulent, the other partners can avoid it and seek to recover their share of the released debt. The right however is personal to the partners, and the legal representative of a deceased partner is not entitled to it.

[P 241 C 2]

Patanjali Sastri for *A. Krishnasami Ayyar*—for Appellant.

S. Desika Chariar—for Respondents.

Judgment.—The suit was found by the Subordinate Judge to be barred by limitation. The suit loans were taken on 28th December 1903 and 20th January 1904, but the suit was not instituted till 3rd November 1909. Appellant's first contention may be briefly disposed of. His vakil argues that in accordance with a usage of the trading community to which the parties belong, there was an automatic renewal at the end of every three months, the accrued interest being added to the principal and the total being treated as a fresh loan. There are entries in defendants' accounts which might be consistent with such a usage, but no evidence whatever has been adduced to show its actual existence. No such contention appears to have been raised in the lower Court as far as can be seen, and in para. 14 of his judgment the Subordinate Judge says these quarterly entries were made according to custom merely with a view to record exactly the amount of liability. In the absence of evidence of the usage this plea must be rejected.

It is next urged that these entries in defendants' accounts should be treated as payments of interest within the meaning of S. 20, Lim. Act. This position is equally untenable. Entries in the debtor's account books cannot be treated as payments. *Vide Ichha Dhanji* v. *Natha* (1) Appellant relies on *Kariyappa* v. *Rachapa* (2) but the ruling in that case is clearly against him. There is nothing to show that similar entries were made in plaintiff's own books ; and the entries in the books of the debtor firm could in no circumstances be a complete answer to a suit brought by a creditor for recovery of the amount due to him. The entries are not signed and so cannot be treated as acknowledgments under S. 19, Lim. Act.

The last argument of Mr. Patanjali Sastri on the question of limitation is entitled to far more weight. He argues that as defendant 1 was not in British India for six years from 1903 to 1908, the plaintiff's cause of action was suspended during that period under S. 13, Lim. Act, not only against defendant 1 but also against defendants 6 and 8. Before disposing of this question of law, we must deal with a preliminary objection raised by the respondents to its consideration. It was argued on their behalf that this exemption from limitation was not specifically pleaded in the plaint, and that consequently the appellant is not entitled to be heard on it. We asked the learned vakils whether, in view of the fact that the question was considered at length by the Subordinate Judge, there are any grounds for holding that they were prejudiced by the procedure adopted by the lower Court. In answer, we were told that if this point had been mentioned in the plaint and raised in the issue, the defendants could have pleaded that under the law of Epoh, the suit was barred by limitation altogether. We are unable to understand why this plea should not have been put forward, even though the exemption under S. 13, Lim. Act, was not specifically raised in the plaint. Having regard to the fact that the plea of limitation can be disposed of upon the admission made by the defendant himself, and having also regard to the fact that the question was considered by the lower Court, we think we should not be justified in refusing te hear the appellant on this point. Before proceeding further we may say that the deposition of defendant 1 is clear and unambiguous that between 1903 (we shall take the end of 1903) and December 1908 he was not in British India. On this evidence there can be no doubt that if defendant 1 were the sole defendant, the suit will be in time.

The question argued by the learned vakil for the appellant has two aspects. One is, whether the plaintiff is entitled to claim a reduction of time as against all the defendants by the fact that one of them was absent from British India, and the other, whether the plaintiff is not entitled to deduct the time at least as against the particular defendant who was not resident in India. These questions are not covered by any Indian authority. Mr. Patanjali Sastri drew our attention to some English cases bearing upon the statute of Queen Anne. The language of that statute is not very different from the one we have to construe. In *Fannin*

1. (1889) 13 Bom 3 38.
2. 1900 24 Bom 493.

v. *Anderson* (3) Lord Denman, C. J., held that if one of the defendants were absent in a foreign country, the plaintiff was entitled to have the period of absence deducted in his favour as against the particular defendant and his co promisors. This was followed by Jervis, C. J., in *Towns* v. *Mead* (4). The other learned Judges who sat with him expressed no opinion on the question. These two cases were quoted with approval in *Roddam* v. *Morley* (5). Prima facie therefore the extreme contention of the learned vakil for the appellant would seem to derive support from these decisions; but, on examining them, we are of opinion that the plaintiff is not entitled to deduct the time of absence of defendant 1 as against the other defendants. Mr. Shephard in his Commentary on the Indian Limitation Act points out that, under the English Law, if a co-obligor who is within the jurisdiction is sued, it is open to him to demur to the trial of the action on the ground that the other co-obligors should also be proceeded with at the same trial. Reference may be made in this connexion to the well-known case of *King* v. *Hoare* (6). Having regard to S. 43, Contract Act, which declares that co-promisors are jointly and severally liable, such a plea will not be available in India. Secondly, it is stated in *Fannin* v. *Anderson* (3):

"The plaintiff cannot bring the absent defendants into Court by any act of his: and therefore if he be compelled to sue those who are within 6 years, without joining those who are absent, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent."

That again is not the rule of law which obtains in this country: see *Muhammad Askara Radhe Ram Singh* (7) and *Moolchand* v. *Alwar Chetty* (8). It is doubtful whether the principle mentioned by Lord Denman, C. J., is good law now even in England: see Bullen and Leake's Precedents of Pleadings, note A, at p. 614 and Leake on Contracts, p. 684 (Edn. 6). In this treatise the law is stated in these terms:

"A judgment recovered against one of the joint obligors of a bond merges a joint liability on the bond, and is a bar to an action against the others; but if the obligors are bound jointly and severally, the judgment against one, without satisfaction, is no bar to an action against another upon his several liability, whilst any part of the debt remains due."

A third ground upon which the English decisions proceed is pointed out in Darby and Bosanquet on Limitation, and that is, that the principle of the cases decided under the Statute of James which applies to one of several plaintiffs residing abroad should govern the construction of the Statute of Queen Anne as well. None of the above special grounds are applicable to India. Moreover, the language of S. 13, Lim. Act, does not lend itself to the extreme contention of the appellant. Although the singular "defendant" would include the plural "defendants" the contention would necessitate our reading into the section some words like these, namely:

"If there are more defendants than one and any one of them happens to be out of British India."

We see no reason for adopting such a construction. We must therefore hold that the absence of defendant 1 would not entitle the plaintiff to count the period of his absence in his favour as against defendants 6 and 8. On the other hand, we think that the alternative contention of the learned vakil for the appellant is well-founded. As we stated already under S. 43, Contract Act, the liability of of compromisors is joint and several. S. 249, Contract Act, enunciates the same principle as regards partners. Consequently the plaintiff could sue for the whole of the amount defendant 1 alone; and he would be entitled under S. 13. Lim. Act, to deduct the time during which the latter was absent from British India. The fact that in the suit thus brought, the plaintiff has impleaded defendants 6 and 8 is no ground for rejecting the claim as against defendant 1 also. No violence will be done to the language of S. 13, Lim. Act, by holding that as against the absentee defendant alone the plaintiff is entitled to the deduction of time during which he was away from British India. The fact that he could have sued his co-obligors who were within British India is not a ground for holding that the claim against defendant 1 is barred by limitation: see *Abdul Khadir* v. *Ahammad Shaiwa* (9). We must therefore hold that the appeal so far as defendants 6 and 8 are concerned fails and must be dismissed. The appsal fails as

3. (1845) 115 E R 693.
4. (1855) 139 E R 711.
5. (1856) 44 E R 622.
6. (1844) 153 E R 206.
7. (1900) 22 All 307.
8. (1915) 39 Mad 548=29 I C 303.
9. (1915) 38 Mad 419=30 I C 423.

against defendants 3, 4, 5, 7, 9 and 10 who are members of a joint family with defendants 6 and 8.

We must now proceed to hear the appeal against defendants 1 and 2 on the merits. (This appeal as against respondents 1 and 2 coming on for hearing the Court made the following)

Judgment. — On the 2nd question argued by Mr. A. Krishnasami Ayyar, the facts are these: The father of the plaintiff was a partner with defendants 3, 6 and 8 in the Epoh Firm, which we shall denominate as the creditor firm. Defendants 3, 6 and 8 were also partners with defendant 1 in the Singapore Firm which we shall call the debtor firm. The plaintiff's father died in 1903. During the course of the winding up of the creditor firm, defendants 3, 6 and 8 lent the debtor firm a certain sum of money. The present suit is to recover the plaintiff's share of that loan. The question whether the plaintiff can maintain a suit against a firm which consists of some of his own partners need not be decided, as we agree with the lower Court upon another point. By Ex. 1, the debtor firm entered into a deed of composition with the outside creditors of that firm. The main provisions of that document are that defendant 1 should pay a certain sum of money to pay off these outside creditors and that he should be released from liability to his partners for any moneys advanced by them. The arrangement come to appears to us to have been bona fide and reflects credit on the partners, in that they agreed to forgo their own rights with a view to pay off those who had lent moneys to the firm. We are unable to agree with Mr. A. Krishnasami Ayyar that by such an understanding, defendants 3, 6 and 8 secured any personal advantage to themselves. We agree that moral turpitude need not be brought home to them [see *Nocton* v. *Ashburton* (*Lord*) (10)], but we think that the arrangement was a business like one and was entered into for the purpose of securing the best interests of the debtor firm. The question, under these circumstances, is whether the release of defendant 1 is impeachable by the plaintiff. That one partner can release a partnership liability is well established: see Lindley p. 180. That after dissolution by the death of one of the partners, the surviving partners still have the right of releasing a claim is clear from S. 263, Contract Act: vide also *Motilal Bechardass* v. *Ghellabhai Hariram* (11).

Mr. A. Krishnasami Ayyar put forward the ingenious argument that after the death of one of the partners, his legal representative continues to be a partner for the purpose of winding up. We are unable to accede to this proposition. Under S. 241, the legal representative of a deceased partner will become a lender in respect of any business that might have been carried on by the surviving partners. If no business is carried on, then the legal representative will be a tenant-in-common with the surviving partners, in respect of the assets of the business: vide Story on Partnership, S. 346. That the principle of S. 45, Contract Act, is applicable to partners was decided in *Motilal Bechardass* v. *Ghellabhai Hariram* (11) and we agree with this proposition. The argument that by S. 263, Contract Act, the legal representative of a deceased partner is by implication a partner is opposed to the language of the section. Cl. 2, S. 29. English Partnership Act, was relied on. That only shows that if during the winding up, the partner makes a secret profit, he is accountable to the legal representatives of the deceased partner for it. That section is no authority for the proposition contended for by the learned vakil. *Piercy* v. *Fynney* (12), *Veerasami Naicker* v. *Ibramsa Rowther* (13) and *Baikunta Nath* v. *Hara Lal* (14) lay down that if a release by one of the partners is fraudulent, the other partners can avoid it and seek to recover their share of the released debt. The legal representative is not entitled to such a right which is personal to the partners. We are therefore of opinion that the release of defendant 1 is binding ou the plaintiff. If he has been damnified by the conduct of defendants 3, 6 and 8, his remedy is to sue them for damages. As we have held that the claim against defendants 3, 6 and 8 is barred by limitation, this matter need not be pursued any further.

10. (1914) A C 932.

11. (1893) 17 Bom 6.
12. (1871) 12 Eq 69.
13. (1909) 1 I C 200.
14. (1911) 9 I C 116.

The decision of the Court below is right and we dismiss the appeal with the costs of defendants 1 and 2.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 242

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

Palaniammal — Defendant — Appellant.

v.

Muthuvenkatachala Maniagarar and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 216 of 1909, Decided on 29th August 1917 against preliminary decree of Dist. Judge, Madura, in Original Suit No. 42 of 1908.

(a) Hindu Law—Partition—Filing of plaint—Effect of—Mere expression of intention to separate is not irrevocable.

The rule that the filing of a plaint in a suit for partition is sufficient to effect a partition should not be understood as meaning that the effect of filing such a plaint is necessarily final. It is open to the coparcener who has filed such a plaint to abandon his intention of severing himself from the family before the suit has proceeded to a decree and to elect to continue in a state of jointness. A mere expression of an intention to separate is not irrevocable. 33 *I. C.* 858 (*F B*); 18 *I. C.* 30 (*P. C.*). *A. I R.* 1916 *P. C.* 104 and *A. I. R.* 1917 *P. C.* 39 (*P.C.*) *Cons.* [P 243 C 1]

(b) Hindu Law—Partition—Severance by one member—Other members may remain joint and continue as undivided family.

When one coparcener severs himself from the joint family, the other coparceners may remain united inter se and continue as an undivided family in its normal state and not as members who, after partition, have become re-united. 30 *Cal.* 231 (*P. C.*); 30 *Cal.* 725; (*P. C.*), 31 *Mad.* 482 and 35 *I. C.* 52, *Dist.* [P 243 C 1,2]

(c) Hindu Law—Partition, by decree of Court — Effect on remaining coparceners must be determined by terms of decree or by scope of suit.

Where a partition takes place under a decree of Court whereby one member claims his share and obtains it, the effect of the decree on the remaining coparceners must be determined by the terms of the decree, or, where it is ambiguous, by the scope of the suit. If the suit is one for general partition and the decree declares the shares of all the members in the items of family property, there will be a severance of status so far as the members are concerned and if the others, in spite of the decree, continue to remain joint, it can only be under an agreement, express or implied, to re-unite. But where, from the scope of the plaint or the pleadings, all that appears is that one member of an undivided family wanted to cut himself off from the rest after receiving his share and the other members neither asked nor evinced any desire for a partition inter se, the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants and the status of the others is unaffected by the decree in favour of one member. In such cases, there is no necessity to import the doctrine of re-union for the purpose of considering the status of those who never intended to separate.

One *P.*, the ancestor of the plaintiff, filed a suit in the Tinnevelly Zillah Court for partition of a mittah on the ground that the original propositus *M.* left a will dividing the estate between his sons. The Zillah Judge found that the division made by *M.* was invalid, but, proceeding to deal with the case under Hindu law, declared the shares of the parties according to pathnibhagam, i. e., shares according to wives. On appeal, the Sudder Adalat Court held that the will by *M.* was invalid and that the estate was partible, but that the decree of the Zillah Judge directing division according to pathnibhagam was wrong. It therefore amended the decree by declaring that the parties were entitled to shares in the manner laid down by the Hindu law of inheritance, but declined to direct division by metes and bounds as the plaintiff has sued only on the basis of a will. It however reserved the right of the heirs of the parties to take action as they might be advised to get surrrender of their respective shares. After the decree of the Zillah Court and during the pendency of the appeal to the Sudder Court, the first plaintiff, who was the second son of *M.*, executed a razinamah in favour of the defendant, who was his eldest brother, whereby it was recited that the partition was not pressed and that, in view of keeping the estate as impartible, the eldest son was to continue to enjoy the zemin and respondent 1 was to get Rs. 400 per mensem payable out of the zamindari income and was also to get certain lands:

Held: (1) that neither the plaint in the suit which was not fought out to a finish, nor the decree of the Sadar Court which only stated that the action based on the will was misconceived and left the parties to litigate their rights in a separate suit, effected a division in status of the joint family: [P 243 C 2 P 249 C 2]

(2) that the razinamah only declared the mode of enjoyment of the property and was not intended to sever the status of the family. [P 244 C 2 P 250 C 1]

S. Srinivasa Aiyangar — for Appellant.

T. R. Ramchandra Aiyar, *B. Sitarama Rao*, *S. Muthia Mudaliar*, *S. R. Muthuswami Aiyar* and *T. Rangachariar*—for Respondents.

Wallis, C. J.—This appeal appears to me to be quite unarguable on the question of the compromise, and I confine myself to the question whether the plaintiffs are entitled to partition of the suit lands as joint family property. The view taken in this Presidency prior to the Full Bench decision in *Soundararajam* v. *Arunachalam Chetty* (1) was that, while every coparcener had a right to partition, actual severance was only effected either by agreement of the co-parceners or by a preliminary decree in a suit for partition.

1. (1916) 39 Mad 136=33 I C 858 (F B).

The Full Bench felt bound to abandon that view in deference to the observations of their Lordships in *Surja Narain* v. *Iqbal Narain* (2) and that they interpreted that decision correctly appears from the subsequent decision of their Lordships in *Mt. Girja Bai* v. *Sadashiv Dhundiraj* (3), which must be taken as finally settling the question, *Kawal Nain* v. *Budh Singh* (4). In *Mt. Girja Bai* v. *Sadashv Dhundiraj* (3) the cases are said:

" to establish clearly that separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the de facto division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the other, without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share, which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court."

There are however two observations which I wish to make on this with reference to the facts of the present case. As stated earlier in the judgment:

" separation which means the severance of the status of jointness is a matter of individual volition."

and it has been ruled by their Lordships in accordance with these principles that the filing of the plaint in a suit for partition is sufficient to effect a partition. I do not understand this ruling to mean the effect of filing such a plaint is necessarily final. Treating the matter as one of individual volition, it seems to me that it is open to a coparcener who has filed a plaint for a partition to abandon that intention before the suit has proceeded to a decree and to elect to continue in a state of jointness. The reason for so holding is all the stronger in this part of India, where the filing of a plaint for partition was not understood as of itself effecting a severance. Secondly, as to the effect of severance by one co-parcener or the other co-parceners, it is well settled that, when one co-parcener severs himself from the joint family, the other co-parceners may remain united inter se, as was recognised by their Lordships in *Ram Pershad Singh* v. *Lakhpati Koer* (5) and *Balabux* v. *Rukhmabai* (6). The observation in the latter case that there is

" no presumption, when the one coparcener separates from the others, that the latter remain united,"

was a general one, and cannot, in my opinion, be read as affecting the presumption that the other coparceners remain united, at any rate in this part of India where all that is shown is that one co-parcener has severed himself and had his share allotted to him. In this state of things it is usual in this part of India for the other coparceners to go on living as before, and I entirely agree with what my learned brother with his greater experience of the habits and customs of his countrymen has said upon the subject: see also *Ranganatha Rao* v. *Narayanasami Naicker* (7) and *Rangasami Naidu* v. *Sundararajulu Naidu* (8).

These being the general principles, it only remains to apply them to the present case. The common ancestor purchased a mitta in the early part of the last century, and in 1835 one of the younger sons sued the eldest son for partition, and another of the younger sons Shanmuga Kumara Maniagar was one of the defendants in that suit. When his son sued for partition in 1849, it was objected that his father had admitted in the suit of 1835 that the zemin was impartible, but the civil Court held that the plaintiff's father had not given up his claim for partition in that suit, but only expressed his willingness at the time to the estate being managed by the eldest brother as head of the family, Ex. E. That is all we know of the suit of 1835, and it does not seem sufficient to warrant us in holding that the filing of the plaint in that case operated as a division in status of all the co-parceners.

Then we come to the suit of 1843, which was a suit for partition and allotment of the share taken by the plaintiff under a will of the first zemindar. The Civil Judge found that the will was not operative, as the property was joint family property and that the division in the will was beyond the powers of the

2. (1913) 35 All 80=18 I C 30=16 O C 129=40 I A 40 (P C).
3. A I R 1916 P C 104=37 I C 321=43 Cal 1031=43 I A 151 (P C).
4. A I R 1917 P C 39=40 I C 286=39 All 496=44 I A 159 (P C).
5. (1903) 30 Cal 231=30 I A 1 (P C).
6. (1903) 30 Cal 725=30 I A 130 (P C).
7. (1908) 31 Mad 482.
8. (1916) 35 I C 52.

testator, and passed a decree for the partition of the suit property dividing one-half among the sons of the senior wife and allotting the other half to the son of the junior wife, according to what he erroneously believed to be the rule of Hindu law. Here again I do not think the filing of a suit for partition by the ancestor of the plaintiffs' branch can be said of itself to have effected a severance, as when the case was under appeal to the Sudder Adalat the plaintiffs' ancestor entered into a razinamah, the effect of which will be considered later, and asked the Court not to proceed with the partition, and the Court acted on his application and inserted in the judgment what appears to be a declaration that the family was to continue joint.

While the appeal was pending, the appellant, who was the eldest son of the deceased and senior coparcener, induced the widow of the third son on behalf of herself and her minor children to enter into a razinamah Ex. B, dated 1st June 1846, by which she is alleged to have released their claim to a share in consideration of his undertaking to grant them a fixed maintenance, and on 29th November 1847 he obtained a similar release Ex. 1 from the second son, who was plaintiff 1 in the suit and through whom the present plaintiffs claim. Subsequently to the decree of the Sudder Adalat on 12th December 1848 he obtained a release Ex. B from his step-brother, the son of the junior wife of the deceased who had not been made a party to the suit of 1843. In 1849 one of the coparceners, who had been plaintiff 2 in the suit of 1843, brought a suit for partition against the eldest son and senior coparcener and obtained his share, the Court holding that he was not debarred from enforcing his claim by the action of his father during the suit of 1835, with which I have already dealt. The result of all these proceedings was that the eldest son of the purchaser and his descendants in the male line enjoyed all the properties left after the partition in 1849 on the strength of the releases Exs. 3, 1 and B, until the death of the last male descendant in 1896 raised the question as to who was his right heir, a question which depends on the question whether or not he was divided at the time of his death.

As regards the plaintiff's claim the main question appears to me to be whether their ancestor parted with all the interest of his branch in what till then was joint family property in favour of the senior coparcener by Ex. 1. If he did, I do not think that he acquired any rights under the decree of the Sudder Adalat in 1849, which does not appear to me to have been intended to affect the operation of the razinamah Ex. 1 to which it refers.

If he did not and continued a coparcener, I do not think the filing of the suit of 1849 for partition against the senior coparcener by another coparcener to which he was not a party, and the fact that that coparcener obtained a decree for share, effected a division in status between the senior coparcener and the plaintiffs' branch. As I have already said, a severance by one coparcener does not effect a severance of the other coparceners inter se when they all go on in the same way. The real question then seems to me to be the same as in the Belgaum case in *Sri Raja Viravara Thodhramal Rajya Lakh-hmi Devi Garu* v. *Sri Raja Viravara Thodhramal Surya Narayana Dhatrazu Bahadur Garu* (9), whether by Ex. I there was an effectual partition. In that case the junior son of the first zamindar on behalf of himself and his heirs executed in favour of the elder brother and his heirs two pharikut sunnads, or partition deeds, by one of which he undertook on behalf of himself and his heirs not to make any further claim on the estate in consideration of the village allotted to him. Their Lordships affirming the judgments of the District Court and this Court, to which we have referred, held that this deed did not preclude the descendants of the younger brother from taking in preference to defendant 1, who was the widow of the last male descendant of the elder brother. They did not find any sufficient evidence in the arrangement made by these documents of an intention to take the estate out of the category of joint or common family property, so as to make it descendible otherwise than according to the rules of law applicable to such property. The parties in that case appear to have dealt with the estate on the footing that it was impartible although it was not so, and their Lordships observed that the junior brother accepted

9. (1897) 20 Mad 256=24 I A 118 (P C).

the appropriated village for maintenance in satisfaction of such rights as he conceived he was entitled to.

The facts of the present case differ in many respects. The first zamindar had seven sons, two of whom died without issue and may be disregarded. When Exs 3 and 1 were executed, a preliminary decree for partition, Ex. C, had been passed in the suit on the alleged will, and was under appeal by defendant 1, the eldest brother. If that decree had stood, there can, I think, be little doubt that it would have effected or recognised a division in status. What was stipulated by Ex. 3 between the zamindar and the representatives of the third brother was that the zamindar and his heirs were to pay an annuity of Rs. 400 for ever, as well as surrender to them certain lands, etc., that the terms might be enforced in execution, and that the eldest brother and his heirs should be entitled to the gains and be liable for the losses of their branch. Ex. 1, which was executed subsequently between the eldest brother and the second brother, purports to be on the same lines as Ex. 3 and is in similar terms, but contains a recital that the settlement was come to in consideration of the fact that

> "if the aforesaid zamindari is partitioned, the status of a zamindari which would ever be a source of protection to the family will be endangered"

and with a view to prevent it. It concludes with the stipulation that the second brother should not proceed with the partition suit and that the zamindar should be entitled and liable to all the gains and losses of his share. Accordingly the second brother who was respondent 1 filed his razinamah and said he did not want a partition and the appellate decree did not award one. In this state of things I think the present question depends upon what is the right construction of Ex. 1. Now Ex. 1 was only an agreement between the zamindar, the senior coparcener, and one of the junior coparceners. It did not bind the other coparceners and did not prevent another coparcener from filing the suit of 1849 for partition against the zamindar. On a careful consideration of the question, the conclusion, to which I have come, is that the effect of Ex. 1 was that the senior coparcener and his heirs were to be left in possession of the estate as zamindars subject to the terms of the instrument, but I do not think it evidences an intention on the part of the junior coparcener who executed it to cut himself and his branch off from the joint family, so that in the event of failure of the direct heirs of the senior coparcener, his share should pass by survivorship to the other coparceners who were not then separated to the exclusion of the executant of Exs. 1 and his heirs. On the whole I, think there is even less reason than in *Ram Autar* v. *Mahammad Mumtaz Ali* (10) for presuming an intention to take the estate out of the category of joint or common family property.

Assuming that Ex. 1 did not effect a severance of the second brother's branch from the joint family, the question is whether it is any bar to a suit for partition by the plaintiffs who are members of that branch, or whether defendants 2 and 3 who are also members of that branch are entitled to resist partition as the nearest dayadis of the last male of the senior branch and so heirs to his separate or self acquired property. The District Judge has held that Ex. 1 if regarded as an agreement not to partition is illegal and void. It is unnecessary to consider how far Ex. 1 regarded as an agreement not to partition could have been enforced between the parties to it. It is I think, clear that after the failure of the senior coparcener's branch, it cannot operate to prevent the plaintiffs from suing the other members of their branch including defendants 2 and 3 and the rest of the joint family for partition, *Rajender Dutt* v. *Sham Chund Mitter* (11): *Ramalinga Khanapure* v. *Virupakshi Khanapure* (12) and *Radhanath Mukerjee* v. *Tarrucknath Mukerjee* (13). This is the main question in the case. In this and other respects, I agree in the conclusion arrived in the judgment prepared by my learned brother and in the order proposed by him.

Kumaraswami Sastri, J.—This appeal arises out of a suit for partition of an estate known as the Vadimitta Estate. It originally belonged to one Perayur Muthukumarasami Maniagar, who died several years ago leaving six sons by his first wife and one by his second. The

10. (1897) 24 Cal 853=24 I A 107 (P C).
11. (1881) 6 Cal 106.
12. (1883) 7 Bom 538.
13. (1899) 3 C W N 126.

case for the plaintiffs is that the descendants of the various branches continued to be members of an undivided family, that the mitta is partible property and that they as the descendants of the second son of the propositus are entitled to 1/12th share in the estate. There is no dispute about the relationship of various parties to the suit as set out in the pedigree annexed to the plaint. The property admittedly continued to be in the possession and enjoyment of the descendants of the first son of the propositus. The male descendants of that branch became extinct with Ponnusami Maniagar who died a minor on 16th October 1896, leaving no issue but only a sister Palani Ammal who is defendant 21 in this suit. When Ponnusami Maniagar died, the mitta was under the management of the Court of Wards and the Collector, after the death of Ponnusami Maniagar, instituted an interpleader suit as there were various rival claimants to the estate. To that suit the present plaintiffs were not parties but their father was defendant 8. The suit was compromised and he got a share in the estate. The plaintiffs impugn the compromise as being in fraud of their rights and as having been entered into by their father under coercion and undue influence. They also allege that their father was a drunkard and a man of dissolute habits and was not protecting them, and that the compromise was manifestly to their disadvantage as a large portion of the estate was excluded from the partition. The case for the appellant is that the descendants of the various branches became divided several years ago, that the estate was in the enjoyment of Ponnusami Maniagar the last male holder as divided property, that the plaintiffs, who are the sons of defendant 1 in the suit, being more remotely related to the deceased male holder than their father have no interest in the property and that assuming they have any interest, the compromise entered into in the interpleader suit is valid and binding on them as it was entered into by their father bona fide and for their benefit.

The District Judge held that the plaintiffs were members of an undivided family with the deceased Ponnusami, that they were entitled to a share in the estate and that the compromise entered into by their father was not binding on them. Two questions arise for determination in this appeal. The first is whether the mitta was held as divided property by Ponnusami Maniagar in which case the plaintiffs would admittedly have no claim, their father being a nearer dayadi than themselves and, secondly, whether the compromise entered into by their father is valid and binding upon them. So far as the division or non-division is concerned, there has been no formal partition deed between the various members of the family, and it is not alleged that the estate was at any time divided by metes and bounds. Reliance has been placed by the learned Advocate-General upon legal proceedings and documents (Exs. B, D, E, F, 1, 2 and 3) as evidencing a divided status, and it is necessary to consider the various decrees and documents referred to in order to determine whether they in fact effected a division in status between the several sons of the propositus.

Perayur Muthukumarasami Maniagar, the propositus, died leaving a will wherein he purported to give the mitta to his sons by his two wives in unequal shares. A suit was filed in the Zillah Court of Tinnevelly by Thambusami Maniagar the ancestor of the present plaintiffs, Kumara Muthayasami Maniagar, the fourth son of Muthukumarasami Maniagar, the widow of Gopalasami Maniagar, the third son, as guardian of her minor children and Mannarsami Maniagar, the grandson of Muthukumarasami by his son Shanmuga Kumaran Maniagar, against Muthu Venkatachalasami Maniagar, the eldest son of Muthukumarasami Maniagar. The pleadings are not filed but it appears from Ex. A (the decree of the Zillah Court of Tinnevelly) that the plaintiffs claimed a division of the estate on the ground that Muthukumarasami Maniagar left a will dividing the estate between his sons. The suit was resisted by Muthuvenkatachalasami Maniager, the eldest son, on the ground inter alia that the mitta was not divisible and that the will executed by their father was invalid under Hindu law. The Zillah Judge found that the estate was purchased by the father of plaintiff 1 and defendant and that it was partible property, but was of opinion that the division made by the father was invalid. He proceeded to deal with the case under the Hindu law as he understood it, declaring the rights of the parties to the estate according to what is called pathnibhagam (shares according to wives), the

six sons by the first wife being declared entitled to one-half and the only son by the second wife to the other half. The decree also dealt with the personal property left on similar lines. It will thus be seen that, although the plaintiffs wanted their share from the defendant, all that was done by the Zillah Judge was to declare that the plaintiffs and defendants were entitled to half the mitta jointly and that the son by the second wife who was not a party to the suit was entitled to the other half. An appeal was filed against this decree to the Suddar Adalat Court and Ex. D is the decree of that Court. The Sudder Adalat Court held that the will alleged to have been executed by the father of the parties was invalid under Hindu law, that the estate was partible but that the principle of the division effected by the Zillah Judge was wrong, the estate being divisible not according to pathnibhagam but between the several sons equally, irrespective of whether they were the sons by the first or second wife. In para. 35 of the judgment, the Suddar Court resolved to amend that portion of the decree of the lower Court which related to the division of the estate according to pathnibhagam and:

"to adjudge that the heirs to the estate in dispute are entitled to share in the same in the manner laid down by the Hindu Law of Inheritance."

In para. No. 36 they state that:

"the suit having been originally brought to obtain a share in the estate under a will which has been rejected, the Court of Suddar Adalat do not consider that they are called upon to direct that a sub-division of the estate be now made in accordance with the law of inheritance, no such question being before the Court."

In para. 37 they state:

"it is therefore left for the heirs, or for such of them as may be dissatisfied with the management of the joint estate by the head of the family, to adopt such a course of proceeding as they may deem fit to obtain the surrender to them of their respective portion or portions of the estate."

After the decree of the Zillah Court and during the pendency of the appeal to the Suddar Court, plaintiff 1 in that suit who was the second son of Muthukumarasami Maniagar and the great-grandfather of the present plaintiffs executed a deed (Ex. 1) in favour of the defendant 1 in that suit, who was his eldest brother. This document was filed in the Suddar Court and paras. 21 and 22 of the judgment (Ex. D) refer to it. In para. 21 it is said that a razinama had been filed by respondent 1 stating that he no longer wishes to press the appellant for a partition of the estate, and in para. 22 it is stated that the only respondent left to continue the action is Mannarsami Maniagar, the son of Shanmuga Kumaran Maniagar who was the fifth son of the propositus. Ex. 1, which is dated 20th November 1847 purports to be a razinama presented by the great grandfather of the present plaintiffs who was respondent 1, and his eldest brother who was the appellant in the appeal to the Suddar Court. It recites that the eldest son Muthuvenkatachalasami Maniagar continued to enjoy the zemin according to the hereditary practice of zamindars, that the other respondents to the appeal were entitled to maintenance, that the plaintiffs in the suit, considering that the rate of maintenance given to them was insufficient, filed a suit for partition which resulted in a partition being directed by the civil Court and that the parties to Ex. 1 effected a compromise of their disputes. Para. 2 of the razinama states that in consideration of the fact that a partition of the zamindari, which would, if left intact, ever be a source of protection to the family, will endanger the status of the zamindari and with a view to prevent a division of the zamindari and to keep it as an impartible estate, respondent .1 to the appeal was to get Rs. 400 per annum payable to him out of the zamindari income by the appellant and also certain lands to be cultivated by him and also certain other small benefits which are not material. The document winds up as follows:

"As respondent 1 and the appellant amongst us have executed between them oodambadikkai kararnamah on stamp papers to the above effect so that respondent 1 Thambyaswami Maniagar may not take any further steps in the partition suit and that the appellant and his heirs should be entitled to the gains and liable for the losses of respondent's pangu (share), it is requested that the Court may be pleased to order the razinama to be filed in the above suit and stop the trial on behalf of respondent 1."

On 1st June 1846 a razinama (Ex. 3) was entered into between Muthuvenkatachalasami Maniagar and Avudaithangammal (widow of Gopalasami Maniagar the third son of Muthukumaraswami Maniagar) acting for herself and on behalf of her minor children. It recites that a suit was filed because the defendant did not pay them adequate sum for their maintenance, that the defendant after the passing of the decree in that suit was at

tempting to appeal to the Suddar Court and that the parties in the presence of the Court have agreed that the defendant (who is called the zamindar) should pay for the maintenance of the third branch of the family, which consisted of the two sons of Gopalasami Maniagar and the widow Rs. 400 every year from the income of the zamindari, that certain lands were to be given to them and that the sum of Rs. 400 should continue to be paid by the said zamindar and his heirs to the third branch and their descendants. From the endorsement of the Civil Judge it appears that Ex. 3 was filed in Court on 8th June 1846, which is about three months after the decree (Ex. A) passed by the civil Judge in the suit. On 12th December 1848, Ex. B, which purports to be a razinama agreement, was executed by Muthuvenkatachalasami Maniagar the eldest son of the propositus by his first wife to Sundarabala Kumarsami Maniaga the son of the propositus by his seccnd wife. It recites that there were misunderstanding between them and that they entered into that agreement in settlement of all the disputes. It states that the executant and his successors-in-title should be entitled to the pattam (succession) and to all rights in the zamindari (mitta) that Rs. 1,000 every year should be paid to Sundarbala Kumarasami Maniagar and his successor for maintenance and that some lands should be given to him for cultivation. The amount of maintenance is charged on certain villages specified in the agreement. The document winds up as follows:

"that excepting this you have no right either heretotore or hereafter to any property moveable or immovable; that you yourself shall discharge the debts contracted by you; that you shall have nothing to do with the decision of the Tinnevelly District Court in the suit brought by your younger brothers against us; that you too are entitled to a share; that you shall have nothing to do with whatever decision that may perhaps be passed about your share by the Suddar Court in Appeal No. 20 of 1846 preferred by us against our younger brothers; and that hereafter there shall be no dayadi suit about anything between you and us."

It appears from this agreement that a counterpart was executed by Sundarbala Kumarasami Maniagar in favour of his brother. In 1849 a suit was filed on behalf of Mannarsami Maniagar, the eldest son of Shanmuga Kumaran Maniagar, for a fifth share in the Vadimitta Estate. It will be remembered that in the decree of the Suddar Court he was said to be the only respondent who was left to continue the action.

It was alleged that by the decree of the Suddar Court the heirs were referred to a regular suit if they were dissatisfied with the management of the property by the head of the family and wanted a partition of the estate and that the plaintiff was therefore entitled to a division as he was dissatisfied. The plaintiff stated therein that other four persons entitled to an equal share in the property were the eldest son of the deceased propositus, his second son Thambiasami Maniagar (great-grandfather of the present plaintiffs), Sundarabala Kumarasami Maniagar son of the propositus by his second wife and Muthukumarasami Maniagar the grandson of the propositus. The only defendant to the suit was Muthu Venkatachalasami Maniagar the eldest son of the deceased propositus. He defended the suit on the ground that the mitta was not divisible, that razinamas had been entered into by certain other heirs of the deceased relinquishing their claim for a partition and consenting to receive maintenance, that the plaintiff's father admitted in Suit No. 8 of 1835 that the mitta ought to be enjoyed according to primogeniture, that the parties renounced their claim for a division of the estate and that the plaintiffs had two step-brothers who ought to be made parties to the suit. The Zillah Court held that the decree of the Suddar Adalat Court was conclusive as regards the estate being partible, that the plaintiff's father did not give up his claim for partition in Suit No. 8 of 1835 but only expressed his willingness at the time to the estate being managed by the defendant as the head of the family and that it was not necessary to consider the claims of the plaintiffs' step-brothers as they would, if at all, be entitled to a partition of the share allotted to the plaintiffs. The Judge awarded one-fifth share of the mitta to plaintiff 1 subject to the claims which his step-brothers might establish. An appeal was filed by the defendant to the Suddar Court and the decree of that Court is marked as Ex. F. On appeal objection was taken by the appellant that two of his brothers who were alive ought to have been made parties to the suit and that the suit was therefore bad for non-joinder. With regard to that plea, the Suddar Court

in dismissing the appeal observed as follows:

"Neither is the presence of the appellant's brothers in the suit requi-ite, seeing that appellant as head of the family holds the property in issue and the shares of his brothers in the computation of that claimed by the appellant have been allowed for."

After the death of the decree-holder, one of his widows sold the interest of her husband, under the decree for partition which he had obtained, to Muthukumarasami Maniagar of the first branch of the family by Ex. C, dated 31st October 1870. The document recites that Muthukumarasami Maniagar was zamindar of four shares, that her (executant's) husband died on 5th September of that year indebted to the extent of Rs. 8,000 and that the widows were not able to discharge the debt. It will thus be seen that by various agreements or transfers the first branch of the family continued to be in possession and enjoyment of the zemin without any actual partition being effected. In 1873 Muthukumarasami Maniagar mortgaged the zamindari to one Alagappa Chetti for Rs. 6,000 under the document Ex. 2, dated 17th September. The purpose of the mortgage does not appear and this document is not of much use as there is no recital as to the property being divided or undivided. These are all the documents relied upon to show that the first branch of the family was divided in status, although there was no actual partition at any time. So far as the seventh branch of the family is concerned, namely, the branch descended from the second wife of the propositus, the District Judge has held that Ex. B was a complete severance of interest between that branch and the others and having regard to the express terms of Ex. B which I have already set out, the District Judge is correct. Nothing can be clearer than the recitals in Ex. B that the parties to it should have no kind of common interest subsequent to its date and that the son by the second wife had transferred his share absolutely in consideration of a fixed payment and certain lands allotted to him. As regards the second branch the only documents that could affect the rights of the parties are Ex. I, D, E and F and the question is whether these documents show unequivocally that the parties intended to be separated in status.

It is argued by the learned Advocate-General that the effect of the suit filed in the Zillah Court by the great-grandfather of the plaintiffs was to create a severance in status, whatever must have been the ultimate decision in that suit, and that even if there was any doubt as to the effect of the decree Ex. 1 is an out and out assignment of the share of the great-grandfather which left to that branch no other rights but to claim the maintenance allowed to the plaintiff and his successors. It is contended for the respondents that the suit in the Zillah Court was not one for partition of an undivided estate but only a suit to get the shares given under the will of their father that there was no question of coparcenary rights in the litigation, that the effect of the decree of the Suddar Court was to dismiss the suit as filed and that the declaration in para. 37 of the decree of the Suddar Court (Ex. D), which leaves the family undivided and puts the first branch of the family in the position of managing members of the family, was expressly made to prevent any doubts that might otherwise arise. As regards Ex. I, it is contended that it was only an arrangement for a better enjoyment of the property, the parties being under the impression that they could by agreement render the estate impartible and that it would be advantageous to them to leave the property undivided and to get only maintenance. It is also argued that it was superseded by the decree passed subsequently by the Suddar Court (Ex. D) or that in any event they must be read together.

I am of opinion that there has been no division in status between the various members of the family. In considering the decree Ex. D and the effect of the various recitals in the documents and the intention of the parties who entered into the various transactions so far as their status was concerned, it should be borne in mind that till the recent decision of the Privy Council in *Mt. Girja Bai* v. *Sadashiv Dhundiraj* (3), the view current in the Madras Presidency was that to effect a division of status between the members of a joint family, a mere unilateral declaration or the filing of a suit for partition was not sufficient and that there should be either the consent of all the coparceners or a decree of Court either preliminary or final, putting an end to the coparcenary. I need only refer to the judgment of Bhashyam Aiyangar, J.,

in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (14), *Subbaraya Mudali* v. *Manika Mudali* (15). Even assuming that a unilateral declaration was then thought to be sufficient, the question is whether the documents above referred to by me show that the great grandfather of the present plaintiffs, during the course of the proceedings in the Zillah Court in 1846 and Suddar Court in 1849 or when he executed Ex. I in 1847, unequivocally and unmistakably manifested his intention to separate himself from the elder branch. As regards Ex. A, the decree of the Zillah Court in the suit filed by the plaintiffs' great-grandfather, the claim was for a share of the estate according to the directions in the will of the propositus. It is no doubt true that the foundation of the claim would be immaterial so long as the effect of the decree in the suit is to sever the status, at least so far as the property sought to be divided is concerned.

The fact that no decree was ultimately passed would also be immaterial, if it appears that the person desiring a partition evidences no intention during the course of the suit of abandoning his intention of cutting himself off from his coparceners. The plaintiffs' great-grandfather however did not continue the fight to a finish but during its pendency expressed (according to the recitals and terms of the decree) in a clear manner that he did not want a partition and that he preferred to continue joint as before. Assuming that the mere filing of a plaint is sufficient to sever the status of the coparcener, it seems to me that till a decree is passed in that suit it is open to the plaintiff to change his mind and to withdraw the suit so as to leave him in the same position as if no suit had been filed. I can find nothing either in Hindu law or in the decided cases to countenance the view that a mere expression of an intention to separate is irrevocable. The decree of the Suddar Court, in my opinion, left the parties just where they were before the filing of the suit, the view of the Suddar Court being that the whole action was misconceived, that the will upon which the claim was based was invalid and that the parties should, if they wanted anything, take separate proceedings. Paras. 36 and 37 of the decree, to my mind make this perfectly clear. In para. 36 the Suddar Court observe:

> "this suit having been originally brought to obtain a share in the estate under a will which has been rejected, the Court of Suddar Adalat do not consider that they are called upon to direct that a sub-division of the estate be now made in accordance with the law of inheritance, no such question being before Court:"

and to emphasize their view they state in para. 37:

> "it is therefore left for the heirs or for such of them as may be dissatisfied with the management of the joint estate by the head of the family to adopt such a course of proceeding as they may see fit to obtain the surrender to them of their respective portion or portions of the estate."

The effect of this paragraph is to leave the estate joint as before, to treat the defendant as the head of the joint family and to leave the parties, if they wanted a separation, to file a regular suit. This view is also supported by the fact that the Suddar Court in Ex. F, in disposing of the plea of non-joinder of the brothers of the defendant, held that they were unnecessary parties, as the appellant who was the head of the first branch held the property as manager of the joint family consisting of himself and his brothers. It is difficult to see how the plea of non-joinder could have been got over if, as a matter of fact, defendant 1 was a divided member and his brothers had specified and divided shares in the estate given to them by the decree of the Suddar Court (Ex. D), it being clear that in a suit by a cosharer for a partiti on by metes and bounds all the other cosharers divided in status and owning shares not actually divided are necessary parties. Turning to Ex. I, it is by no means a clear and unambiguous document. I am of opinion that having regard to the surrounding circumstances, it can only be treated as an arrangement as to the mode of enjoyment of the property and not a document which effects a partition or separation in status. It should be remembered that defendant 1 in the Zillah Court suit had been contending for several years previously that the estate was in the nature of an impartible estate to be enjoyed according to primogeniture and that the other members were only entitled to maintenance. That this view was put forward so early as 1835 appears from the judgment of the Civil Judge (Ex. E). It appears that in 1835 a suit for a partition of the mitta was filed by one of the members, that objection was taken that

14. (1902) 25 Mad 149.
15. (1896) 19 Mad 345.

it was impartible and that a razinama was then entered into whereby the person claiming the partition was given maintenance. Although it was argued that the effect of it was to deprive the ancestor of the plaintiff in the Zillah Court suit of his share, the Court held that it was only an arrangement as regards division.

The effect of that arrangement in the opinion of the District Judge was only an expression of his willingness at that time to allow the mitta to be managed by the defendant as head of the family. Turning again to Ex. I, we find that although the Civil Judge had decreed that the estate was partible, and the decree was pending in the appellate Court, the document recites that according to the hereditary parctice of zamindars, Muthvenkatachalaswami, Maniagar of the first branch, was to continue to enjoy the zamin, that the executant and the other dayadies were only entitled to maintenance and that the suit was brought because sufficient maintenance was not paid. Para. 2 recites that the parties considered

"that if the zamin is partitioned, the status of a zemindari, which would ever be a source of protection to the family, would be endangered",

and that the razinama was effected to prevent the danger apprehended. The amount payable under this document is expressly said to be maintenance. and there can be little doubt that the frame of the whole document proceeded on the footing that the estate was deemed to be impartible and that maintenance should be awarded to the various persons who, if the estate were partible, would be entitled to a share in the estate. This document is similar to the document which their Lordships of the Privy Council had to consider in *Sri Raja Viravara Thodharamal Rajya Lakhshmi Devi Garu* v. *Sri Raja Viravara Thodharamal Surya Narayana Dhatrazu Bahadur Garu* (9), and their observations in dealing with the two documents in that appeal, to the effect that the terms evidenced nothing more in substance than an arrangement for the mode of enjoyment of the property and were quite consistent with the legal character of the property as it stood on the date of the document, will, I think, equally apply to the present case. Their Lordships were dealing with a partible estate, which one of the parties wanted to treat as an impartible estate. In the present case, although the decree of the Zillah Court declared that the estate was partible, the parties to Ex. 1 wanted to give the go-by to that declaration and to impress impartibility on the zamin.

The fact that the parties could not legally do so is immaterial, as we have to consider the document in the light of what the parties intended to do. If the parties treated the estate as impartible and entered into that arrangement, I think the document should be considered with due regard to the basis on which they acted and the object they had in view. That there was no intention to create a divided status between them appears from the fact that Ex. 1 expressly makes a sum payable under it for maintenance by the "zamindar" in possession of the estate to his brothers and that there are no words in Ex. 1 similar to the concluding portion of the recital in Ex. B and nothing to indicate clearly that the parties intended to sever their status as coparceners. It is also significant that, although Ex. 1 was filed in the Suddar Court, no claim was made by the then senior member in whose favour it was executed, that by virtue of Ex. 1 he had acquired the share which the plaintiffs' great grandfather would have been entitled to under Hindu law. The document was evidently treated as a maintenance deed and not one conveying a share of the estate. Similarly in the proceedings (Ex. F.) it was not alleged by the "zamindar" that owing to Exs. 1 and 3 he had become solely entitled to the shares of those two coparceners. The concluding sentence in Ex. 1 that the eldest brother and his heirs should be entitled to the gains and be liable for the losses of his brothers' pangu (share) might, if it stood alone, suggest that the brother in lieu of a fixed maintenance gave up all rights to a share, but it must be read in the light of the recitals in the previous portion of the document, and I think all that the words mean is that the amount of maintenance payable to the executant should neither be increased nor decreased by reason of the income of the estate either increasing or diminishing. Having regard to the above facts, I do not think any argument can be founded on the fact that the members of the first branch continued in exclusive pos-

session as the very object of Ex. 1 was to enable them to do so. Difficulties only arose when that branch became extinct.

It has been argued that whatever the effect of the proceedings in the Suddar Court which ended in the decree (Ex. D) may be there was a clear decree for partition in favour of one of the grandsons of the propositus in the proceeding in the suit which led to the decree (Ex. E) being passed by the Zillah Judge, and that at least from the date of that decree all the coparceners should be treated as members of a divided family as the severance of one member from the joint family effects a severance between all the other members inter se. The question as to how far the separation of one member necessarily involves the separation of the rest is not free from difficulty. It very often happens that in undivided families in Southern India, consisting of several members, one of them (who is often a spendthrift) either separates himself from the family after receiving his share or is cut off from the family by the other members after giving him his share. The other members of the family go on just as before and nobody ever dreams that there has been a division of status as between those who continue in the family. The observation of Bashyam Aiyangar, J., (who as the leading vakil in Southern India for several years had an intimate knowledge of the details of the joint family system) that

"according to usage and custom (in this Presidency) the remaining members of an undivided family from which one or more alone have become divided, continue as an undivided family in its normal state,"

is obvious to anybody who has any knowledge of the joint family in Southern India. The legal effect of separation of one member of the family on the status of the rest was considered by Bhashyam Aiyangar, J., in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (14), and the following observations show the state of the law in this Presidency prior to the decision of the Privy Council in *Balabux* v. *Rukhmabai* (6):

"So far as this Presidency is concerned, though there is no reported decision bearing directly on the point, *Peddayya* v. *Rimalingim* (16), the principle generally recognized and acted upon is that though there can be no compulsory partial partition either in respect of the joint property belonging to the family, or in respect of the persons constituting the undivided family, yet by mutual agreement of parties the partition can be partial either in respect of the property or of the persons constituting the family. And according to usage and custom the remaining members of an undivided family, from which one or more alone have become divided, continue as an undivided family in its normal state and not as members who after partition have become reunited."

The question is how far the law as laid down in the above passage has been modified by the decisions of the Privy Council in *Ram Pershad Singh* v. *Lakhpati Koer* (5) and *Balabux* v. *Rukhmabai* (6). The question raised in the former case was whether the separation of one member ipso facto effects a separation between all the others, and all that was decided in this case was that there is no presumption, where one member takes his share and separates himself, that the other members remain joint and that the question as regards the other members is one of fact to be decided from their conduct. In *Balabux* v. *Ruhkmabai* (6) their Lordships of the Privy Council were of opinion that in cases where the shares of all coparceners are fixed and determined with a view of ascertaining the share of the outgoing coparcener, the separation of one coparcener is a virtual separation of all, and that if the other members set up that they are joint they must prove reunion. The effect of the decision of he Privy Council in *Balabux* v. *Rukhmabai* (6) was considered in *Ranganatha Rao* v. *Narayanaswami Naicker* (7), where it was held that there is no presumption of a general division among all the members of a coparcenery from the fact that one of its members has separated, and in *Rangaswmi Naidu* v. *Sundararajulu Naidu* (8), where it was held that there was no presumption that the separation of one member by itself effected a separation of the rest. The observations of Srinivasa Aiyangar, J., at p. 472 (*of* 31 *M. L. J.*) set out the position of the coparceners in such cases. In *Durga Dei* v. *Balmakund* (17) it was held that where an award in effecting a partition allotted a share to an uncle and the remaining shares to his two nephews, the presumption was that they took it as joint property as there was no indication in the award that they should take the half in separate shares.

It seems to me that where a partition takes place under a decree of Court

16. (1888) 11 Mad 406.

17. (1907) 29 All 93.

whereby one member claims his share and obtains it, the effect of the decree on the remaining coparceners must be determined by the terms of the decree, or, where it is ambiguous, by the scope of the suit. If the suit is one for general partition (in which case it is necessary to determine the shares of all the members and to grant reliefs to all of them) and the decree declares the shares of all the members in the items of family property, there will be a severance of status, so far as the members are concerned, and if the others, in spite of the decree, continue to remain joint, it can only be under an agreement, express or implied to re-unite. But where from the scope of plaint or pleadings all that appears is that one member of an undivided family wanted to cut himself off from the rest after receiving his share and the other members neither asked nor evinced any desire for a partition inter se, the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants (as it is not possible to arrive at the share of one coparcener without knowing how many coparceners there are and their shares and the status of the others is unaffected by the decree in favour of one member. In such cases there seems to me to be no necessity to import the doctrine of re-union for the purpose of considering the status of those who never intended to separate. It is unnecessary to import the fiction of re-union after having had recourse to another fiction of separation because, as pointed out by Bhashyam Aiyangar, J., the re united shares of re-united brothers and after-acquired joint properties are not on the same footing as the joint family property of a normal undivided family: see *Ramasami* v. *Venkatesam* (18) and the observations of Srinivasa Aiyangar, J., in *Rangasami Naidu* v. *Sundararajulu Naidu* (8). Moreover, under the Mitakshara it is only certain specified relations that can re-unite. I think it is hard upon the remaining coparceners who never intended to separate to alter their position by importing the doctrine of re-union and prejudice their position materially simply because one member of the family chooses to separate himself from the family by receiving his share.

Turning to the facts of the present case it appears to me that Exs. E and F do not effect a general partition or declare the rights of the other coparceners inter se. The suit was by one of the coparceners for his fifth share and what is significant is that in the suit for partition the only defendant was the only member of the eldest branch, and one who was described in the decree of the Suddar Court (Ex. D) as the head of the family and the manager of the joint estate. The proceedings went on on the footing that he represented his coparceners. The decree of the original Court did not declare the shares of the others inter se but simply gave the plaintiff his one-fifth share. The Suddar Court affirmed the decree of the Civil Judge and in doing so treated the defendant as representing the other coparceners. Under these circumstances I do not think the present case falls within the decisions in *Ram Pershad Singh* v. *Lakhpati Koer* (5) and *Balalux* v. *Rukhmabai* (6). I am therefore of opinion that the great-grandfather of the plaintiffs did not become divided in status from his elder brother and the decision of the District Judge on this point is correct. I shall now deal with the next point as to the binding nature of compromise entered into by the plaintiffs' father.

The District Judge has considered the evidence and the probabilities in paras. 24 to 58 of his judgment. He has gone into the matter with great care and has fully set out the circumstances, which show beyond doubt that there has been bribery and corruption so far as two out of the three arbitrators are concerned and an utter disregard of the present plaintiffs' interests, advantage being taken of the incapacity of their father who is a drunkard and debauchee and was in needy circumsances. I have no hesitation in holding that the view taken by the District Judge is correct.

The award and compromise were in an interpleader suit filed by the Collector on the death of the last descendant of the eldest branch while the estate was under the management of the Court of Wards. All the persons who claimed an interest in the estate were made parties to this suit. The sister of the last surviving member of the first branch was defendant 11 in the inter pleader suit and she set up that her son was adopted by the deceased Ponnusami Maniagar. The father of the present plaintiffs was defendant 8

18. (1893) 16 Mad 440.

in that suit and his two uncles were defendant 2 and 3. After written statements were filed and before the case was heard, the parties agreed to refer the matter in dispute to the arbitration of three persons. One of them was the zamindar of Perayur (defendant 22), who admittedly was deeply in debt, the other a money-lender Nattukottai Chetti, defendant 23, and the third was one Ganapathi Aiyar, a Manager of the Estate of a minor whose guardian was the zamindar. The zamindar of Perayur had admittedly entered into an agreement (Ex. G) with the uncles of the father of the plaintiffs in the present suit (who were defendants 2 and 3 in the interpleader suit), whereby he was to finance the litigation on their behalf and to receive the village of Alagapuri and other benefits referred to in the agreement in addition to the amount spent by him for financing the suit. It is not disputed that after the compromise decree passed in pursuance of the award which he gave as one of the arbitrators, he got an assignment of this village and a promissory note for Rs. 13,000 which was to be paid out of the sum of Rs. 13,000 which was in Court as mesne profits. It is clearly proved by Ex. G that he was deeply interested in the success of defendants 2 and 3 in that suit.

If they did not succeed in their contention, he would lose the moneys he spent for financing the suit and also the valuable village and lands agreed to be given to him. After the award was passed he actually got the village of Alagapuri and other lands by the deed of gift (Ex. P) executed by defendants 2 and 3 and got a sale deed in his favour of the whole of defendant 2's share under the award he gave by the sale deed (Ex.U). The other arbitrator Karuppan Chetty admittedly got an agreement from defendant 11 in the interpleader suit who is defendant 21, in the present suitt to act as her sgent in the litigation and finance her and subsequently got an agreement (Ex. JJ) from defendant 1 agreeing to finance him. After the award defendant 6, who got a share in this compromise brought about with the help of the arbitrators, executed Ex. Q, a mortgage for Rs. 24,000 on the same date as Ex. P, which the District Judge rightly thinks was probably a bribe to him. It appears from the recitals in Ex. P that he had also agreed to finance defendant 6. It is also proved that the husband of the sister of the last male holder executed a promissory note for Rs. 5,000 (Ex. DD) to one Narayanasami Chetti a few days before the reference to arbitration, the money payable being really intended to go to the two arbitrators. So far as the award is concerned, it was not seriously pressed before us by the learned Advocate-General as one which any Court could act upon. It is abundantly clear from the evidence that while a show was being made of deciding matters referred to them by the arbitrators, there were contemporaneous attempts in which at least two of the arbitrators took a prominent part, by which they wanted to bring about a settlement between some of the parties to the suit behind the back of and prejudicial to defendant 1 (the father of the plaintiffs) and that even before the award was given the arrangement evidenced by Ex. J had been brought about with the help of the arbitrators.

According to the arrangement Ex. J which is dated 12th November 1900, the father of the plaintiffs was entirely cut out and the estate was divided between defendants 2 and 3 in the present suit (who were defendants 2 and 3 in the interpleader suit), defendant 6 (grandson of the third son of the propositus), defendant 9 (grandson of defendant 7) and defendant 21 (the sister of the last holder). It is not pretended that defendant 21, who is the sister of Ponnusami Maniagar had any right under the Hindu law to any share. She set up an adoption of her son but no attempt was made to prove the adoption at any time and the arbitrators found that the adoption was invalid. Though the award declared that defendants 2 and 3 were the persons entitled to the zamindari and that in consequence of an arrangement between them defendant 2, who got an assignment from defendant 3, was solely entitled, it is significant that in the arrangement (Ex. J) which was handed to the arbitrators before they gave their award and which I have no doubt was brought about through the active mediation of at least two of the arbitrators, defendant 2 who was entitled to the whole estate agreed to share it with the present defendants 3, 6, 9 and 21. It is impossible to believe that defendant 2, who on 11th November got the entire estate under the award, would the next day have agreed to give

up three-fourths of it to those whom the award declared to be not entitled to anything and I have little hesitation in holding that the award and the settlement (Ex. J) were parts of one design whereby under a show of bona fide litigation and compromise the arbitrators really wanted to help the parties in whom two of the arbitrators were deeply interested at the expense of others. As there were minors in the interpleader suit, there would have been difficulty in getting the Court to sanction the compromise, unless it was clearly shown to be for the benefit of the minors ; but under the guise of a reference to arbitration and an award passed in favour of one of the parties who was a major and under an arrangement whereby the party benefited was generous enough to share it with those who had no interest, everything would have appeared bona fide. I have no hesitation in agreeing with the District Judge that the whole thing was a fraudulent scheme to bring into existence an award which would on its face preclude the Court from going into the merits of the case and to supplement it by an arrangement which divided the spoils—the two arbitrators getting a good share and those in whom they were interested dividing the rest. If the matter stood here there would have been little difficulty in the plaintiffs' way ; but it is sought to make them bound by the compromise in these proceedings, because their father subsequently entered into another compromise whereby on the basis of the award and previous compromise he received a small share in the estate out of the share given to defendant 2. It is therefore necessary to see how far the father's action can bind the sons. So far as the plaintiff's father is concerned he is shown to be a drunkard and debauchee who took no interest in his sons. Far from being in a position to protect the interests of his children he was hardly able to protect his own interests. He was a minor at the date of the interpleader suit which was filed in 1899 (C. S. No. 63 of 1899). As the compromise to which he was a party was entered into on 30th November 1900, he must have just emerged out of minority.

He evidently began his career of vice early in life. He took no steps to appear before the arbitrators and adduce any evidence in support of his case. He left the conduct of the business first to one agent Umayurbagam Pillai under a power of attorney (Ex. HH) and subsequently to another agent Remaswami Ayyar under Ex. JJ. The District Judge finds that both these agents played him false and colluded with those whose interests were adverse to his and the evidence and probabilities strongly support this view. The result of the incaparcity of defendant 1 and the fraud of his agents was that an award obtained by some of the parties to the suit by fraud and corruption and a comromise (Ex. J) entered into even before the award was passed) with the help at least of two of the arbitrators were filed in Court which completely cut out defendant 1. He then filed the petition (Ex. GG) through a vakil praying that the award should not be enforced as the arbitrators were guilty of misconduct and had entered into agreements with two of the persons interested in the litigation. His brother-in-law states that defendant 1 filed the objection to the award after consulting him and that after it was filed, he (defendant 1's brother-in-law) had to go to Madras and that during his absence defendant 1 was cajoled into withdrawing the objection and consenting to a compromise. The probabilities support the evidence on the point. On the day when his objections came on for trial, he put in another application through another vakil (Ex. 22), stating that he had effected a compromise with defendants 2 and 3 agreeing to receive "some properties" and that his objections need not be considered. The arrangement which he says he entered into is embodied in Ex. K dated 30th November 1900. The result of this arrangement was that the village of Alagapuri which was of considerable value and an important item of property a sum of Rs. 13,000, the property given to defendants 6 and 9 and the property given to defendant 2, who on the face of the award had no interest were excluded from the partition and the plaintiffs' father got a twelfth share.

A compromise whereby a considerable portion of joint family property has been excluded from partition and given to persons who have no legal claim whatever, cannot, in my opinion, be binding upon the minors simply because their father was a party to it. It has been held by the Privy Council in *Ramkishore Kedar-*

nath v. *Jainarayan Ramrachpal* (19) that although a partition entered into by a father may in certain circumstances bind his minor sons, yet it may be impeached if on partition a share is given to an absolute stranger unless it can be supported as a bona fide compromise of a disputed claim. It is alleged that what was given to defendant 21 was really given to the alleged adopted son but it is clear that, although an adoption was alleged, no attempt was made at any stage of the proceedings to adduce any evidence in support of the adoption and I find it difficult to see how there was any bona fide dispute as regards any adoption. In the first compromise (Ex. J) the share allotted to defendant 21 is not alleged to be a share given to her as the adoptive mother or in compromise of any claim put forward by the adopted son, but it is said to be given to her on account of her relationship with the last holder even though such relationship would not in law entitle her to any portion of the estate.

The agreement to give up one-fourth of the estate to one who had no right to it under the Hindu law could not therefore bind the sons of defendant 1, even assuming that defendant 1 entered into the compromise with his eyes open. It is, no doubt, true that Courts will be slow to upset family arrangements if the arrangement was a bona fide one, but where we find, as in this case, the father of the minors to be a drunkard and debauchee incapable of protecting his own interests and in the hands of agents who in fraud of their principal were acting in the interests of persons who were hostile to him and where a very large portion of joint family property was given to persons who had absolutely no claim, one of them receiving a village as a bribe and the other a fourth share in the estate, Courts will be slow in characterising the arrangement as a bona fide compromise which would bind the minors. It is significant that although defendant 1 had a respectable vakil, the arrangement evidenced by Ex. K was entered into without any consultation with him and without taking any legal opinion as to the legal rights of the parties. Stress has been laid on the fact that the compromise was signed by the vakil but all that his evidence shows is that he was simply asked to put in the compromise petition: He seems to have been kept in the dark as to the various arrangements which the arbitrators had entered into for benefiting themselves. The objection to the award was not filed by him but by another vakil Mr. Rangachari, and all that he appears to have done is to have been present in Court when defendant 8 appeared and stated that he wanted to withdraw the application objecting to the award. The presence of the vakil in Court or the fact that he signed the petition withdrawning the objection (the petition being required by the rules to be signed by the pleader) does not advance the case very much. I am of opinion that the award and the compromise entered into do not bind the plaintiffs and dismiss this appeal with costs of respondents 1 and 2 and 5 to 7.

S.N./R.K. *Appeal dismissed.*

19. (1913) 40 Cal 966=20 I C 958=40 I A 213 (P C).

A. I. R. 1918 Madras 256

ABDUR RAHIM AND OLDFIELD, JJ.

Gouwri—Plaintiff—Appellant

v.

Narain Muchinthaya and *another*—Defendants—Respondents.

Appeal No. 43 of 1917, Decided on 23rd November 1917, against decree of Dist. Judge, South Kanara, in Original Suit No. 5 of 1916.

(a) Mesne Profits—Legatee — Legatee is entitled from death of testator—Succession Act (1865), S. 296.

A legatee under a will to whom specific property has been devised is entitled to mesne profits thereon from the date of the testator's death. [P 257 C 1]

(b) Will—Executor—Duty—Executor is not to be held liable for interest on sums not paid without delay—Probate and Administration Act (5 of 1881), S. 120.

The Court will however not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income not paid by him: *Blogg* v. *Johnson*, (1867) 2 *Ch.* 225, *Foll.* [P 257 C 2]

H. Balakrishna Row and *Ramanath Sujir*—for Appellant.

B. Sitaram Row—for Respondents.

Judgment.—The first question that we have to decide in this appeal is whether the plaintiff is entitled to mesne profits from the date of the death of the testator, under whose will she is entitled to the property in question. The will Ex. A, bequeaths the item of the property with which we are concerned in the case to the plaintiff, his daughter, who, at the

time of the will, was only two years old. The testator bequeathed the other properties, moveable and immovable, to the defendants, who were distant cousins of his. The bequest to the plaintiff is absolute and the will provides that the defendants are to bring about the marriage of the plaintiff with a boy named in the will and that they are to deliver possession of the property given to her on such marriage. The property became the plaintiff's on the death of the testator; prima facie she is entitled to all the income from that date. There is nothing in the terms of the will by which her right to the income of the property bequeathed to her is limited as accruing from any other date. The District Judge was however of opinion that she was not entitled to mesne profits. He seemed to think that the defendants were not to render an account of the proceeds because the will does not specifically provide for it. On the other hand, what he ought to have held, in the absence of any specific provision in the will showing that the legatee is not entitled to the income from the date from which the bequest came into operation, was that she would be entitled to the income from that date. S. 128, Probate and Administration Act, is clear on the point. It lays down:

"The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death".

Evidently this provision of the law was not brought to the notice of the District Judge. We must reverse his finding on issue 1. Then the defendants claimed that the expenses of the plaintiff's marriage incurred by them must be allowed. We think this is a valid contention. In the will the defendants are asked to marry the plaintiff to a boy named Subroya Kanuraya, but it does not say that they are to find the expenses of that marriage from their own pockets. If that was the intention of the testator he would have said so in so many words, as we find that he charges the defendants with the expenses necessary for certain ceremonies specified in the will, among which the marriage of the plaintiff is not included. The learned vakils for the appellant and respondents have agreed to Rs. 200 being fixed for expenses on account of plaintiff's marriage. There is a finding of the District Judge that the plaintiff is entitled to interest on the arrears of mesne profits from the date of her marriage. But the law on that point seems to be what is laid down in *Blogg* v. *Johnson* (1) in these terms:

"The Court will not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income unpaid by him".

There the cases are discussed and this rule of law is so stated. The same statement of the law is to be found in Simpson on 'The Law of Infants' at p. 261. There is no authority that has been referred to which goes the other way. There are no Indian cases on the point. But the rule laid down in *Blogg* v. *Johnson* (1) seems to be reasonable and we do not find any grounds for not adopting it. The decree of the District Judge will be modified and mesne profits will be embodied in it from the date of the testator's death on 6th February 1899 and interest on the mesne profits will be allowed from December 1907. From this amount a sum of Rs. 200 will be deducted on account of the marriage expenses incurred by the defendants. The decree will provide for proportionate costs.

S.N./R.K. *Appeal allowed.*

1. (1867) 2 Ch 225.

A. I. R. 1918 Madras 257

OLDFIELD AND BAKEWELL, JJ.

Venkataswami Naidu — Petitioner—Appellant.

v.

Shanmugam Pillai—Respondent.

Letters Patent Appeal No. 70 of 1916, Decided on 10th January 1917, against judgment of Seshagiri Aiyar, J., in Civ. Revn. Petn. No. 115 of 1915.

(a) Civil P. C. (1908), O. 43. R 1 (d)—"Rejecting application" signifies immediate rejection.

The expression 'rejecting an application' in O 43, R. 1 (d), signifies an immediate rejection and not a conditional or prospective rejection.

[P 258 C 1]

(b) Civil P. C. (1908), O. 9, R. 13—Ex-parte decree set aside on condition of defendant furnishing security — Court should adjourn case for furnishing security.

Where an ex parte decree is set aside on condition of the defendant furnishing security, it is the duty of the Court to adjourn the case in order to take security and to pass final orders only after the party has tendered or failed to furnish sufficient security : *A. I. R.* 1914 *All.* 55, *Appr.* : 5 *M. L. J.* 28 and 20 *Mad.* 442, *Dist.*

[P 258 C 1]

K. Rajah Iyer—for Appellant.

K. S. Jayarama Iyer— Respondent.

Judgment.—We are of opinion that the expression "rejecting an application" in O. 43, R. 1 (d), signifies an immediate rejection and not a conditional or prospective rejection. The latter interpretation would lead to the dilemma pointed out under similar circumstances in *Nannhu Mal* v. *Gulabo* (1). We respectfully agree with the principle laid down in the judgment of the Allahabad High Court in *Jagarnath Sahi* v. *Kamta Prashad* (2). We think that it was the duty of the District Munsif to adjourn the case in order to take security and only to pass final orders after the party had tendered or failed to furnish sufficient security, and that the order made may be construed as contemplating further proceedings on the application. The decisions of this Court under the Succession Certificate Act (7 of 1889), *Venkataswami Naik* v. *Chinna Narayana Naik* (3) and *Ariya Pillai* v. *Thangammal* (4), were prior to the present Rules of Practice of 1905. The Letters Patent Appeal is allowed and the case is remanded to the District Munsif in order that a final order may be passed, and in so doing he will provide for the costs of the petitioner in the District Court and here.

S.N./R.K. *Appeal allowed.*

1. (1904) 26 All 173.
2. A I R 1914 All 55=23 I C 138=36 All 77.
3. (1895) 5 M L J 28.
4. (1897) 20 Mad 442.

✻ A. I. R. 1918 Madras 258

SADASIVA AIYAR AND PHILLIPS, JJ.

Vellayappa Moothan—Plaintiff—Appellant.

v.

Krishna Moothan and *others*—Defendants—Respondents.

Second Appeal No. 278 of 1916, Decided on 24th August 1917.

✻ **(a) Limitation Act (9 of 1908), Arts. 120 and 107—Hindu family partnership—Suit for advance made by some members out of partnership funds is governed by Art. 120—Such claim if barred cannot be set as even equitable set off in partition suit—Plaintiffs managing members—Art. 107 applies—Hindu Law, joint family—Civil P. C. O. 8, R. 6.**

A suit by some of the members of a joint Hindu family who constitute a partnership against the family for advance made to it out of the partship funds is governed by Art. 120, Lim. Act. [P 260 C 2]

The claim cannot be enforced in an action for partition after it has become barred either by way of equitable set-off or as an item in the account of dealings between the family and the partnership or by treating the liability of the family as assets or property to be brought into hotchpot at the time of division: 25 *Bom* 606; 26 *Bom* 739; 20 *Cal* 18; 8 *M L J* 271; 21 *I C* 716; 5 *Bom* 589; 11 *Mad* 246; and 17 *Bom* 271; *Expl.* and *Dist.* [P 261 C 2]

Where the members of the partnership who sue are themselves the managing members of the family, Art. 107, Lim. Act, would apply. [P 260 C 2]

(b) Civil P. C (5 of 1908), O. 30, R. 9—Same person can be plaintiff and defendant in different capacities — Common law rule of procedure does not apply in India—Practice, Parties.

The rule of procedure observed by the common law Courts in England that the same individual even in different capacities, cannot be both a plaintiff and a defendant is not applicable to India as O. 30, R. 9, really contemplates suits between the same individuals in different capacities. [P 262 C 1]

(c) Civil P. C. (5 of 1908), O. 30, R. 9,—Suit between firms having common partners—Proper prayer is for taking accounts of both firms.

A suit lies by one firm against another firm notwithstanding that the firms have common partners. The proper prayer in such a suit ought to be for the taking of the accounts of both partnerships, if necessary for adjusting the rights of the partners, and for the grant of just and equitable reliefs which arise on the facts. [P 260 C 1]

✻ **(d) Civil P. C. (5 of 1908), O. 30, R. 9—Claim by firm against Hindu joint family is not one between two firms merely because some members are partners—Those partners have immediate cause of action against family and can sue other members.**

Per *Sadasiva Aiyar, J.*:—A Hindu joint family cannot be treated as of the nature of a partnership firm and a claim of some of the members who are members of a separate partnership firm against the joint family cannot be treated as the claim of one partnership against another partnership firm. The partnership, by lending to the joint family possesses an immediate cause of action against the latter and it can sue the other members of the family alone as defendants praying for proper equitable reliefs. [P 260 C 1, 2]

✻ **(e) Civil P. C. (5 of 1908), O. 8, R. 6—Set off is only claimable by defendant.**

Per *Phillips, J.*—Relief by way of set-off is, strictly speaking, confined to defendant and a plaintiff who invokes the aid of the Court against a defendant is not entitled to any equity as against him. [P 262 C 2]

P. S. Narayanasami Ayyar for *C. V. Ananthakrisna Ayyar*—for Appellant.

C. Madhavan Nair—for Respondents.

Sadasiva Aiyar, J.—The plaintiff is the appellant here and the suit was a suit for partition. The genealogical tree is as follows:

Ponnappa

Plaintiff.	Defendant 1.	Defendant 4.	Navutti (died 1913)
			Defendants 2 and 3.

There was a prior suit (Original Suit No. 27 of 1906), brought by defendant 4.

which was decreed, but that decree was not executed as, by private engagement, his claims were satisfied. Hence the plaintiff sues for 1/3rd share in the properties left (after so satisfying defendant 4's claim), defendant 1 being entitled to another 1/3rd share and defendants 2 and 3 being entitled to remaining 1/3rd share. The litigation was, however, complicated by the plaintiff claiming (among others) one further relief which arises out of the following facts: The plaintiff, defendant 1, and defendants 2 and 3 alone carried on a partnership trade for their separate benefit. This trade was carried on even during the lifetime of the plaintiff's father Ponnappa and of defendants 2 and 3's father Navutti. Ponnappa died about August 1906. For his funeral expenses, the partnership consisting of the plaintiff, defendant 1 and defendants 2 and 3 spent moneys belonging separately to the partnership. When the partnership dissolved in 1911, the amount alleged on the above account to be due to the partnership by the joint family estate fell to the share of the plaintiff among the partners. The plaintiff claims in this suit to recover, from defendant 1 and defendants 2 and 3, 2/3rds of this amount which forms item 1, Sch. D, to the plaint, the remaining 1/3rd being due to himself (as the assignee from the firm) by himself (as one of the three shares of the joint family).

The value of this relief, that is, for the recovery of 2/3rds of the debt due by the joint family to the partnership business, is Rs. 567-12-7. The lower Courts disallowed the plaintiff's claim for this relief as also for a minor relief valued at Rs. 68-5-4, relating to items 2 to 4, Sch. B-1. This second appeal relates to these two matters, but there is nothing in the appeal so far as it relates to items 2 to 4, Sch. B-1. The second appeal is therefore at once dismissed so far as it relates to that matter. The ground on which the lower Courts disallowed the plaintiff's claim to recover 2/3rds of the amounts spent out of the partnership funds for the necessities of the joint family is that the amount was spent so long ago as in 1906, and the claim for its recovery was barred by limitation, the suit having been brought in 1913. Mr. Narayanasami Ayyar for the appellant before us contended (a) that the claim was not barred by limitation because the cause of action arose only at the dissolution of the partnership in 1911, (b) that, though his claim to recover the shares of defendant 1 and of defendants 2 and 3 in the money spent may be barred, the plaintiff was entitled, in effecting a partition of the joint family properties, to have allotted to him properties exceeding the value of the shares allotted to the other 1/3 share by the amount due to the partnership by such sharers. As regards contention (a), I do not see how the date of the dissolution of the partnership can give a cause of action against the joint family which cause did not exist before. The right of the members of the partnerehip firm in the moneys taken out of the firm had nothing to do with the rights and liabilities of the joint Hindu family, of which the members did not solely consist of the partners of the firm but included others. Mr. Narayanasami Ayyar argued on the basis of the two decisions in *Rustomji* v. *Sheth Purshotamdas* (1) and *Kashinath Kedari* v. *Ganesh* (2) that the partnership, consisting of the plaintiff, defendant 1 and defendants 2 and 3 (four in number), could not have brought a suit against the joint family consisting of the plaintiff, defendant 1, the father of defendants 2 and 3, defendants 2 and 3 and defendant 4 (six in number), because the plaintiffs' four names would also have to appear as the names of four of the six defendants in such a suit and that, therefore the only course for the members of the partnership was to have treated the loan as an item to be taken into account in their favour against the other coparceners of the joint family when the joint family members separated from one another. In the first place, these two decisions were given in 1901 and 1902 under the old Civil Procedure Code. Jenkins, C. J., says at page 612 [*Rustomji* v. *Sheth Purshotamdas* (1)]:

> "This is in accordance with the doctrine that where an individual is a common partner in twe houses of trade, no action can be brought by ono house against the other house upon any transaction between them while such an individual is a common partner. In illustration of this, we may refer to *Bosanquet* v. *Wray* (3)."

This doctrine is founded on the elementary rule of procedure too often disregarded in this country that the same individual, even in different capacities, cannot

1. (1901) 25 Bom 606.
2. (1902) 26 Bom 739.
3. (1815) 128 E. R. 1167.

be both a plaintiff and a defendant to one and the same action. But the learned Judge proceeded to say:

"While, however, at Common Law this rule led to the result we have indicated, the Courts of Equity surmounted this difficulty. Though they observed strictly the rule that a man cannot be both plaintiff and defendant, they did not allow it to stand in the way of doing justice between the parties for provided all interested were before the Court either as plaintiffs or as defendants, they adjusted and determined their rights. This is aptly exemplified in *Luke* v. *South Kensington Hotel Co.* (4)."

I think that the reasoning in the above decision does not lead to the result that no suit at all could be brought in which a decision could be arrived at as regards the claim by a firm consisting of *A* and *B* as partners against a firm consisting of *A* and *C* as partners even under the old Procedure Code. All that seems to have been decided was a matter of procedure that *A* should not figure both as plaintiff and defendant and that the suit should be so framed as regards parties that this irregularity does not occur, while further taking care that all the three partners *A*, *B* and *C* in both firms are made parties to the suit. The proper prayer in such a suit ought to be for the taking of the accounts of both the partnerships, if necessary for adjusting the rights of the partners, and for the grant of just and equitable reliefs which arise on the facts. Further I do not think it is allowable to treat a Hindu joint family as of the nature of a partnership firm (the shares and the numbers of the members interested in the family properties not depending upon contractual relations but upon the rules of Hindu Law) or to treat the claim of a few of the members (who are members of a separate partnership firm) against the joint family as the claim of one partnership against another partnership firm. Even if this could be done, a partnership by lending to the joint family does possess an immediate cause of action and though the former rule of procedure might not have enabled it to bring a suit in the form of an ordinary suit for the recovery of the entire amount of the loan (with the members of the firm ranged as plaintiffs and the same members and the other members of the joint family as defendants), there was nothing to prevent the members of the partnership firm from utilising that cause of action to bring a suit ranging the other members of the family alone as defendants and praying for proper equitable reliefs. Even if any of the Arts. 57, 61, 62 and 115, Sch. 1, Lim. Act, does not apply to such a suit, the residuary Art. 120 would apply to it and the firm should have brought the suit within six years. No such suit within six years of 1906 was brought and hence the claim based on the loan of 1906 seems to have been clearly barred in 1913.

Again if all three members of the firm are treated as managing members of the family, Art. 107, Lim. Act, would apply. That Article is as follows:

"By the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate."

This shows that a managing member is entitled to sue for contribution in respect of a payment made by him and is not bound to sue for or wait till partition to get his claim against the joint family adjusted. In the cases in *Aghore Nath Mukhopadhya* v. *Grish Chunder Mukhopadhya* (5) and *Tirupatiraju* v. *Rajagopala Krishnama Razu* (6) the suit was brought after division in the family for contribution in respect of the moneys recovered by a creditor from the person who was joint family manager. Again, the new Civil Procedure Code of 1908 (which came into force on 1st January 1909) by O. 30, R. 9, allows a suit by one firm against another notwithstanding that the firms have common partners. Hence, the plaintiff could have brought his suit against the joint family even as an ordinary debt claim (and not for contribution or other equitable relief) on 1st January 1909 and this suit brought in 1913 is barred on this ground also.

Reliance was placed by Mr. Narayanasami Ayyar on the decision in *Ramdhari Singh* v. *Parmanund Singh* (7) and on a passage in Mayne's Hindu Law, S. 470, for his contention that the plaintiff's claim is not barred by limitation. In the case in *Ramdhari Singh* v. *Parmanund Singh* (7) the plaintiff and the defendants were joint heirs of one R. S. Singh. The plaintiff was entitled to 1/6th share in the estate of R. S. Singh, the defendants being entitled to 5/6th share. A sum of Rs. 7,000 odd belonging to the estate was in deposit in a Court. The plaintiff sued for the recovery of 1/6th of that

4. (1879) 11 Ch. 121.

5. (1893) 20 Cal 18.
6. (1898) 8 M. L. J. 271.
7. (1913) 21 I C. 716.

amount (nearly Rs. 1,300). Defendants (among other defences) claimed to set off plaintiff's 1/6th share of the expenses incurred by the defendants on the sradh ceremony of one of R. S. Singh's widows. The learned Judges in their judgment at p 1187 (of 19 *C.W.N.*) make the following observations on the defendants' claim of set off :

"There remains the second item, the expenses of sradh. The learned Judge in one part of his judgment seems to have held that there was no agreement on the part of the plaintiff to pay a share of such expenses, but in another place he says as follows: 'The plaintiff alleges that the amount of cash found was over Rs. 4,000 and certain amounts were allotted for sradh and other expenses and only the balance divided. The defendants allege that all that was found was divided and they undertook the sradh expenses on the plaintiff agreeing they should recoup themselves from the moneys in deposit, etc., now in suit. All these questions have to be gone into and many others.' It seems to us therefore, that the learned Judge has not come to any positive finding upon the alleged agreement on the part of the plaintiff to pay a share of the sradh expenses. *Besides apart from any agreement, the plaintiff is liable to contribute his share of the sradh expenses.* The amount however which may be found on inquiry into the above matter, cannot be called an ascertained sum. But the sum need not be ascertained in an equitable set-off. . . . . We think it inequitable to give a decree to the plaintiff for his share of the assets realized, and drive the defendants to claim against the plaintiff the amount which might have been spent on account of the sradh under an agreement with the plaintiff, or the reasonable expenses of the sradh apart from any agreement, more specially when a fresh suit may be barred by limitatation, and when the defendants have paid court-fee upon the whole amount claimed by them."

So far as I could see, the learned Judges admit that the claim of the defendants for contribution if made in a suit by the defendants against plaintiff might be barred by limitation and all that they hold is that as defendants they are entitled to claim a set off of the contribution due to them by the plaintiff in respect of the sradh expenses. The passage in Mayne's Hindu Law (see p. 654, Edn. 8) is as follows:

"But, of course, advances made to any member for a special private purpose, for which he would have no right to call upon the family purse or to discharge his own personal debts, contracted without the authority of the other members, or alienations of the family properties made by an individual for his own benefit would be properly debited against him in estimating his share."

This passage does not directly relate to the question now under consideration. It relates to the converse case, where a member of a joint Hindu family as an individual member gets an advance of money from the joint family funds for his individual separate benefit, the case before us being one where some members have themselves made an advance to the joint family. In the former case, the money advanced might be treated as joint family funds in the hands of the person to whom the advance was given which therefore ought to be brought into hotchpot at division. No question of limitation would then arise as regards such property. In the converse case before us the joint family's liability to an individual member or individual members cannot be treated as assets or property to be brought into hotchpot at division, I must further remark. as regards the passage in Mayne's Hindu Law, that the authorities quoted in support of the proposition of law laid down in that passage, viz., the decisions in *Konerrav* v. *Gurrav* (8), *Ramanna* v. *Venkata* (9) and *Damodardas Maneklal* v. *Uttamram Maneklal* (10), cannot be said to fully support the said proposition laid down so broadly. I think, that, if the advance was made, say, by a father to one of his sons out of the joint family income in the father's hands without any intention to make the son liable to account for the advance at division and without any agreement to that effect between the father and the son it may be an act of partiality on the part of the father, but I do not think that, after three years, the joint family or any of the other sons can call the favoured son to account for the advance.

Mr. Narayanasami Ayyar relied also on certain passages in Freeman on Co Tenancy, Ss. 505 and 512, and contended that, in suits for partition between the cosharers, Courts of Equity have got unlimited powers to do justice between the cosharers. I was at first impressed with this argument, but after the best consideration which I have been able to give to it, I do not think that, where a statute law (in this case Art. 107, Lim. Act) expressly treats a debt due even to the manager of the joint Hindu family as one to be sued for by him just as if he was a complete stranger and, if not, to have his remedy barred, it is permissible (apart

8. (1880 81) 5 Bom 589.
9. (1888) 11 Mad 246.
10. (1893) 17 Bom 271.

from an agreement, express or implied) to defeat the intention of the legislature by allowing it to be treated as an item of account or as a debt to be discharged from the joint family funds when partition takes place, it may be, after several years. Of course, the creditor member of the family, whether a manager or a junior member, may before his debt is barred, take it out of any family money which came to his hands before his debt is barred, but he cannot do it after his claim for recovery is barred. In the result, the second appeal is dismissed with costs.

Phillips, J.—Plaintiff and defendants 1 to 3, as partners of a trading firm, defrayed the funeral expenses of plaintiff's father, a member of their family, and after dissolution of partnership, plaintiff alone became entitled to the assets of the firm. In this present suit for partition plaintiff seeks to recover the funeral expenses out of the joint family funds, although admittedly the claim, if treated as a debt, would now be time-barred. Plaintiff pleaded a separate oral agreement under which he is entitled to recover the funeral expenses, but it has been found that this agreement is not true and consequently it cannot be relied on here. It is first contended that the firm consisting of plaintiffs and defendants 1 to 3 could not have sued the joint family of which they are members, because they would have been bringing a suit against themselves, although in a different capacity. Whatever may have been the Common Law of England on this point, the rule of procedure, that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action, has not been strictly followed by Courts of equity, as is pointed out by Jenkins, C. J., in *Rustomji* v. *Sheth Purshotamdas* (1) and is certainly not applicable to this country as is shown by the provisions of O. 30 R. 9, Civil P. C. which clearly contemplate suits between the same individuals in different capacities. The trading firm of which the plaintiff and defendants 1 to 3 were partners could therefore have sued the joint family of which they were also members. Rule 9 no doubt places some restriction on execution of decrees obtained in suits between firme having one or more partners in common, but we are not now concerned, with that question. I hold therefore that plaintiffs and defendants 1 to 3 could have brought a suit for the funeral expenses against their joint family, even if it be assumed that members of a joint family are partners in a firm, and that such a suit is now time barred. It is then contended that plaintiff can claim the funeral expenses by way of set-off in partitioning the family property, although his right to sue for them as a debt is barred by limitation. The right to set off, strictly speaking, is confined to a defendant and if plaintiff makes a claim by way of equitable set-off, it is not very clear how the plaintiff who has invoked the aid of the Court against defendants, is entitled to any equity as against them. It is urged that he is so entitled because he has a legal right to demand partition. That is quite true, but there is no obligation on him to make such a demand and, consequently, when he moves the Court to enforce his rights to a share in the family property against the other defendants he is hardly entitled to claim something more than his share by way of equitable set-off. I therefore agree that the appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 262

SPENCER AND KUMARASWAMI SASTRI, JJ.

Sundara Singh—Appellant.

v.

Pazhamalai Padayachi and *another*—Respondents.

Appeal No. 40 of 1917, Decided on 10th December 1917, against the appellate order of Dist. Judge, South Arcot, in Civil Misc. Appeal No. 9 of 1916.

Civil P. C. (1908), O. 21, R. 91—Order rejecting application to set aside sale under R. 91—No second appeal lies.

No second appeal lies againit an order passed in appeal upon a petition by an auction-purchaser to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property. [P 262 C 2]

M. S. Ramanuja Ayyangar for *V. Mahadeva Ayyar*—for Appellant.

V. K. Venugopala Naidu for *K. Ramachandran*—for Repondents.

Judgment.—The appellant is a purchaser at a Court auction. No second appeal lies against an order passed in appeal upon his petition to set aside a sale by Court on the ground that the judgment-debtor had no saleable interest: see S. 104 (2) and O. 43. R. 1. (*j*) Civil P. C., and *Surendra Mohini Debi* v.

Loharam Chattopadhya (1) and *Parameswara Aiyar* v. *Veerakutti Patter* (2) in this Court. It is suggested for appellant that he was a representative of the judgment-debtor and that S. 47, therefore, applies, but it has been held in *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (3) that this is not so where, as in this case, the sale was in execution of a money decree. We have been asked to treat this appeal as a petition for revision but there are no grounds for doing so. The appeal is, therefore, dismissed with costs.

S.N./R.K. *Appeal dismissed.*

1. (1912) 39 Cal 687=14 I C 67.
2. A A A O No 111 of 1916.
3. (1910) 34 Mad 417=8 I C 429.

A. I. R 1918 Madras 263

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

Kandasami Pillai—Appellant.

v.

Muthuvenkatachala Maniagar and *others*—Respondents.

Appeals Nos. 219, 220 and 244 of 1909, Decided on 29th August 1917, against the decree of Dist. Judge., Madura, in Original Suits Nos. 42 and 41 of 1908.

Government of India Act (1915), S. 101 (2) proviso — Meaning of, as regards appointment and period of temporary Judges stated.

The proviso to S. 101 (2) must be read as meaning that appointments of temporary Judges may be made from time to time, for such period not exceeding two years as may be required on each occasion when the power is exercised. The proviso does not mean that as regards each High Court, appointments can only be made for periods not exceeding two years in all. [P 263 C 2]

N. R. K. Thathachariar—for Appellants.

T. R. Ramachandra Aiyar, *B. Sitarama Rao* and *S. R. Muthuswami Ayyar*—for Respondents.

Judgment.—A preliminary objection has been taken to the hearing of appeal No. 220 of 1909 that the Court is not legally constituted. By the proviso to S. 101(2), Government of India Act, 1915, the Governor-General in Council is empowered to appoint persons to act as Additional Judges of any High Court, for such period not exceeding two years as may be required, and this is subject to the further provision that the maximum number of the Judges of a High Court shall be twenty. The Act which is a consolidating one reproduces in this proviso provisions of the Indian High Courts Act, 1911 (1 and 2 Geo. V, Ch. 18). Reading the proviso with S. 32, Interpretation Act of 1889, it is admitted that the power conferred may be exercised by the Governor-General in Council from time to time but it is said that, as regards each High Court, appointments can only be made for periods not exceeding two years in all, however much they may be required subsequently. That would be a very singular provision in a permanent enactment and if it had been intended, would certainly have been expressed differently. The ordinary Judges who are appointed by the Crown hold the office at the pleasure of the Crown and form the permanent strength of the Court. The object of the measure clearly was to provide for occasions when the permanent strength of the Court is unable to cope with the work for disposal, but the work is not sufficient to justify the appointment of another permanent Judge, by enabling additional Judges to be appointed from time to time for such periods not exceeding two years as may be found necessary. It has been said to be the duty of the Court "to make such construction of a Statute as shall suppress the mischief and advance the remedy," *Heydon's case* (1), and it is not necessary to strain the language of the Statute in order to do so in this case.

We cannot adopt a construction which would defeat the intention of the legislature and soon render this statutory provision inap plicable when most needed, merely because the power of appointing additional Judges is vested in his Excellency the Governor-General in Council and not in His Majesty, or because it is said that conceivably the power conferred might be abused. The proviso must be read as meaning that appointments may be made from time to time for such period, not exceeding two years, as may be required from time to time on each occasion when the power is exercised. The language and the policy of the Act are clear, and it is unnecessary to rely on the fact that this construction was repeatedly acted on under the Act of 1911, as must have been perfectly well-known to those responsible for the consolidating Act which reproduced its provisions. The objection therefore, assuming it to arise on the facts, affords us no ground for declining to hear the appeal.

1. (1584) 3 Co Rep 7 a.

On the merits, we see no reason to differ from the conclusion arrived at by the District Judge. We have dealt with the facts fully in our judgment on the main appeal in *Palaniammal* v. *Muthuvenkatachala Maniagarar* (2). The appellant in Appeals Nos. 219 and 244 of 1909 claims under a deed of mortgage, Ex. 15, for Rs. 600 executed by the first defendant for himself and as guardian of his minor son. The money is said to have been borrowed to pay one Umayurbagam Pillai, who was defendant 1's agent under the power-of attorney, Ex. HH. We see no reason to differ from the findings of the District Judge based on a careful consideration of the evidence that the agent who was guilty of gross breach of duty to his principal did not spend any moneys and that the mortgage Ex. 15 executed in favour of his relation (a vakil's gumasta) was not supported by consideration. As regards the appellant in Appeal Suit No. 220 of 1909, he has been found to have made common cause with defendants 21, in the interpleader suit whose interest was adverse to those of his principal, defendant 1. The District Judge has gone fully into the conduct of the appellant in paras. 67 and 68 of his judgment and we see no reason to differ from him. Owing to his breach of duty we do not think he is entitled to recover anything, even assuming that money is due to him for work done as agent. The appeals fail and are dismissed with costs in Appeal Suits Nos. 219, 220 of 1909 and without costs in Appeal Suit No. 244 of 1909.

S.N./R.K. *Appeal dismissed.*

2. A I R 1918 Mad 242=43 I C 833.

A. I. R. 1918 Madras 264 (1)

AYLING AND SESHAGIRI AIYAR, JJ.

Sambasiva Ayyar and *another*—Plaintiffs—Appellants.

v.

Ganapathi Ayyar and *another*—Defendants—Respondents.

Appeal No. 394 of 1916, Decided on 11th September 1917, against revised decree of Sub-Judge, Kumbakonam, in Original Suit No. 47 of 1913.

Civil P. C. (5 of 1908), O. 20, R. 15—Fixing date of dissolution of partnership is matter of judicial and not arbitrary discretion—Ordinarily date of notice if any or plaint should be the date and not date of judgment.

The discretion given to a Court by O. 20 R. 15, to fix a date from which a partnership is to be declared dissolved is a judicial and not an arbitrary discretion.

Ordinarily the Court should direct dissolution from the date of any notice "given" in that behalf by one of the partners or from the date of the plaint and where the parties have been at arm's length since the filing of the plaint; it should not declare that the partnership should stand dissolved from the date of the judgment. [P 264 C 2]

Judgment.—The Subordinate Judge, in declaring that the partnership shall stand dissoved as from the date of the judgment has given no reason for fixing that date. O. 20 R. 15, Civil P. C. no doubt gives a discretion to the trial Court to fix the date; but it is a judicial discretion and not an arbitrary one. Ordinarily as pointed out in Lindley on Partnership p. 644, the Court should direct dissolution either from the date of any notice "given" in that behalf by one of the partners or from the date of the plaint. S. 25, Contract Act, shows that in some cases the date of the judgment would be the most convenient date: see also *Lyon* v. *Tweddell* (1). In the present case the parties have been at arm's length since the filing of the plaint and an attempt to get a Receiver appointed was resisted by defendant 1. We think under the circumstances the partnership should stand dissolved as from the date of the plaint. The decree will be amended accordingly. There must be further consequential amendments in the decree. Each party will bear his own costs.

S.N./R.K. *Decree varied.*

1. (1881) 17 Ch D 529.

* A. I. R. 1918 Madras 264 (2)

SESHAGIRI AIYAR AND NAPIER, JJ.

Municipal Council of Vizagapatam—Defendants—Appellants.

v.

William Foster — Plaintiff — Respondent.

Second Appeal No. 1434 of 1916, Decided on 14th December 1917, from decree of Dist. Judge, Vizagapatam, in Appeal Suit No. 256 of 1914.

(a) Tort—Liability—Municipalities in India are liable for torts.

Municipal Corporations in India are liable for acts of misfeasance. [P 267 C 1]

*** (b) Tort—Negligence—Municipalities are bound to maintain roads—Negligence in such duty causing injury renders it liable.**

It is the duty of Municipalities to lay and maintain roads so that the public may pass over them safely and they are liable for injuries resulting to the public through the negligent or improper performance of that duty. [P 266 C 2]

*** (c) Tort—Statutory bodies—Liability of Municipality for negligence in duty does not depend upon whether it derives some gain.**

The liability of statutory bodies for negligence is not based on whether a profit is derived by the levy of a cess or toll from the public. The question whether it gives them an income over expenditure is not a criterion for enforcing liability. (*Case-law discussed.*). [P 266 C 1, 2]

(d) Madras District Municipalities Act (4 of 1884)—Tort, Vicarious liability.

Municipalities in India do not act in the exercise of Sovereign powers or as agents of the State in laying or maintaining roads. 39 *Mad.* 351, *Dist.* [P 267 C 1]

*** (e) Madras District Municipalities Act (4 of 1884), Ss. 172 and 173—Municipality cannot shift its liability for non-performance of duty to contractor—They can indemnify themselves from him—Tort, vicarious liability.**

In the case of statutory bodies entrusted with the performance of public duties, their liability cannot be shifted to a contractor employed by them for a particular purpose. They may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed. But they are not thereby themselves relieved from liability to those injured by the failure to perform it. [P 268 C 1]

(f) Tort—Negligence—Plaintiff injured by gravel deposited on road—Municipality held liable.

Plaintiff sued the Municipal Council of Vizagapatam for injuries sustained by him by falling on a heap of gravel thrown on to the side of a road and allowed to project 9 feet into the roadway in the course of some repairs which were entrusted to a contractor:

Held: that the Municipal Council was liable in damages for negligence. [P 271 C 1]

(g) Madras District Municipalities Act (4 of 1884)—Municipalities—Powers are restricted—Not self-governing as in England—Their powers are derived from Government and they are governed by Acts.

Per *Seshagiri Aiyar, J.*—Municipal Councils in Madras are statutory bodies with very circumscribed powers and are not self-governing in the sense that Municipal Corporations in England are. Though they are not a department of Government, their powers are derived from the Government and they are controlled by the provisions of the District Municipalities Act.

[P 265 C 2 P 266 C 1]

(h) Tort—Misfeasance—Obstruction to use of full breadth of road amounts to misfeasance.

The public have a right to use the full breadth of a public road and any obstruction to such use amounts to misfeasance [P 268 C 2]

(i) Madras District Municipalities Act (4 of 1884), S. 173—S. 173 does not apply to contractor repairing roads—It refers to temporary obstruction by public.

Per *Napier, J.*—S. 173 does not apply to the case of a contractor executing repairs to a road under the orders of a Municipal Council. The section has reference to temporary obstructions to a thoroughfare by the erecting of pandals or arches by a private person and has nothing to do with the execution of repairs by the employees of the Municipality. [P 271 C 1]

(j) Tort—Liability—Quaere.

Whether a public body can be liable for mere non-feasance *Quaere.* [P 274 C 1]

(k) Tort—Act of State—Quaere.

Whether the making of roads by the Government is an act of sovereign power. [P 269 C 2]

B. N. Sarma—for Appellant.

P. Narayanamurty—for Respondent.

Seshagiri Aiyar, J.—The plaintiff sued the Municipality of Vizagapatam for compensation for injuries sustained by him owing to the negligent stacking of gravel in a Municipal road. The Subordinate Judge awarded damages to the extent of about Rs. 3,200 odd. The amount was increased on appeal by the District Judge. In this second appeal, I shall deal with the various questions involved in the case, in the order in which they were argued by Mr. Sarma. The first contention for the appellant was that Municipalities in India have only delegated powers from the Local Governments and that consequently their liability is subject to the same restrictions as that of the Government. This contention was raised with reference to an observation of mine in *Secy. of State* v. *Cockcraft* (1), where I pointed out that in laying out roads, the Municipal Corporations in America were exercising to some extent sovereign functions. I took care in that judgment to reserve my opinion whether the principle on which American Municipal Corporations are exempted from liability can apply to Indian Muncipalities.

The various sections to which Mr. Sarma drew our attention point to the conclusion that the Municipal Councils in India are statutory bodies whose powers are very much circumscribed. S. 21 as regards constitution, Ss. 113, 114 and 115 as regards limitations in the application of funds and S. 4 (b) which relates to the suspension of Municipalities show that Indian Councils are not self-governing in the sense that Municipal Corporations in England are. As regards the latter, charters have been conferred upon various towns since the days of Henry VI empowering the inhabitants to govern themselves completely. They have power to make laws, they have jurisdiction to administer justice, and they have got their quarter sessions. In most respects the English Corporations are complete governing bodies. Although I do not wish it to be understood that Municipal institutions in this country are a

1. (1916) 39 Mad 351=27 I C 723.

department of Government, there can be no doubt that their powers are derived from the Government and are controlled by the provisions of the District Municipalities Act. I may draw attention in this connection tc the Act which created the first Municipality in this country. Act 10 of 1842 which was passed by the President of the Council of India was an enabling act. The preamble shows that it was intended to enable the inhabitants of any place of public resort or residence under the Presidency of Fort William within the town of Calcutta to make better provision for purposes connected with public health and convenience. This Act was subsequently repealed and Act 26 of 1850 was passed. In this Act also the powers were very much limited. These enactments which have subsequently been repealed and re-enacted in a more comprehensive form show that the powers conferred upon Municipalities are of a very restricted character, they, therefore, do not stand on the same footing as Municipal Corporations in England. To this extent I am in agreement with Mr. Sarma.

The further question is whether in making roads, the Indian Muncipalities are exercising sovereign functions. The extract quoted by the learned vakil for the appellant from 28 American Encyclopaedia shows that it is only in certain States that the Municipalities in the United States are exempted from liability for injuries caused by the negligence of the Municipal Corporations in maintaining streets. In other States the liability has been enforced: vide p. 1340 (19 d). The principle of liability in such cases was laid down in *Parnaby* v. *Lancaster Canal Co.* (2). In that case it was laid down that a Canal Company which levied tolls was liable for negligence. Tendal, C. J., said:

"We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap door open without any protection by which his customers suffer injury."

It was contended before us that it is is only where a profit is derived by the levying of tolls that the principle enunciated in this case can be held applicable. I find no justification for this distinction. In most cases where a Corporation is charged with liability for misfeasance in the discharge of its duty, it would be almost impossible to prove that the particular department in administering which the misfeasance was committed was giving a surplus income to the corporation. It is not denied that a road-cess is included in the general taxes levied by the Municipality. The question as to whether that cess resulted in giving an income over expenditure is not the criterion for enforcing liability. The only question is whether the laying of the road, as in the case in 39 Madras, was a purely Governmental function for which no sort of tax is levied upon persons using that road or whether it is a road for using which some sort of consideration is being paid by persons frequenting it. In *Mersey Docks Trustees* v. *Gibbs* (3) it was definitely laid down that a corporate body authorized to perform a work and receiving tolls in respect of it, though obtaining no profit for itself from such tolls but collecting them for the maintenance of the work and the possible future benefit of the public, is responsible for the injuries arising from the improper performance of that work, and that the funds thus obtained must be applied for the discharge of that liability. Lord Cranworth said that a

"body of trustees constituted by Statute having the right to levy tolls for their own profit in consideration of making and maintaining a dock or a canal is no doubt under a liabillity to make good to the person using the dock or canal any damage occasioned by the neglect in not keeping the works in proper repair.".

The other learned Lords agreed with this view. Reference may also be made to *Hartley* v. *Rochdale Corporation* (4), *Geddis* v. *Proprietors of Banu Reservoir*, (5) *Reg* v. *Williams*, (6) *Gibraltar Sanitary Commissioners* v. *Orfila* (7), *Forman* v. *Canterbury Corporation* (8), *Gilbert* v. *Trinity House Corporation* (9), and to the latest judgment of Lush, J., in *Mc. Clellant* v. *Manchester Corporation* (10). The observation in *Harris* v. *Baker* (11) that only an indictment lies has no application to this country and I doubt

2. (1839) 11 Ad & E 223.

3. (1866) 11 H L C 686.
4. (1908) 2 K B 594.
5 (1878) 3 A C 430.
6. (1884) 9 A C 418.
7. (1890) 15 A C 400.
8. (1871) 6 Q B 214.
9. (1886) 17 Q B D 795.
10. (1912) 1 K B 118.
11. (1815) 4 M & S 27.

whether it is any longer law in England. In this country the principle of making Corporations liable for neglect of duty has been uniformly enforced. The decision in *Corporation of the Town of Calcutta* v. *Anderson* (12) is a strong authority for that proposition: notwithstanding the criticisms of the learned vakil for the appellant that that decision turned on the language of the particular section therein commented on, I feel no doubt that it enunciated a general principle of liability for neglect by corporation: *Rajendralal Maneklal* v. *Surat City Municipality* (13), *Dholka Town Municipality Desaibhai* v.(14), *McInerny* v. *Secy. of State*(15), all point to the same conclusion. I am therefore of opinion that in laying and maintaining a road, Municipalities in this country are not exercising purely sovereign functions and that consequently they are liable for misfeasance. In this view the decision in *P. and O. S. N. Co.* v. *Secy. of State* (16), which discriminates between the liability of the East India Company for purely sovereign functions and other functions which involve transactions which can be carried on by private individuals, is fully satisfied in this case.

The next point argued by Mr. Sarma was that as there is no provision for damages in the District Municipalities Act, no claim for damages can lie. I see no force whatsoever in this contention. The Act no doubt directs the application of Municipal funds in a particular manner. That is a direction given by the Government to the statutory body. That direction is not binding upon a person against whom a wrong has been committed by the statutory body. If authorities were necessary for this proposition I may refer to the case in *Attorney General* v. *Lewes Corporation* (17), where it was held by Swinfen Eady, J., that the fact that the Public Health Act of 1875 provides a statutory remedy by complaint to the Local Government Board in the case of a local authority making default

"in the maintenance of existing sewers does not preclude a private individual from obtaining damages and an injunction against that local authority in respect of a common law nuisance arising from that default: Vide also *Khagendra Nath* v. *Bhupendra Narayan* (18)."

One other minor contention of Mr. Sarma may be disposed of in a few words. He argued that as the plaintiff did not obtain a license under the Madras Act 1 of 1907, he is not entitled to damages. It would lead to startling results to hold that because a person passes in a vehicle in a public highway without obtaining a license for that vehicle he can recover no damages for injuries caused to him by the negligence of the Municipality. No authorities were quoted for this proposition nor is it possible to find any. The next point on which a great deal of learned argument was addressed to us by Mr. Sarma and by Mr. Narayanamurthi related to the question whether the Municipality can be held liable, inasmuch as it had given a contract for the making of the road to a contractor. I am in agreement with Mr. Sarma that the contractor to whom the work was entrusted must be taken to be an independent contractor, notwithstanding the finding of the learned District Judge that supervision was exercised over his work by Municipal subordinates. In *Thomes Field Evans* v. *Trustees, Port of Bombay* (19) and *Ullman* v. *Justices of the Peace for the Town of Calcutta* (20) it was held that an independent contractor would not be liable for torts. In *Steel* v. *S. E. Ry. Co.* (21) Crowder, J., with the concurrence of the other Judges, said:

"The circumstance of the work being done by Furness under a contract, negatives his being a servant of the Company."

The Full Bench laid down that where work is being done for a Railway Company under a contract (parol or otherwise), the company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done. In *Overton* v. *Freeman* (22) it was held that if one employs another to do an act which may be done in a lawful manner, and the latter in doing it unnecessarily commits a public nuisance whereby injury results to a third

12. (1884) 10 Cal 445.
13. (1909) 33 Bom 393=3 I C 511.
14. (1913) 38 Bom 116=21 I C 847.
15. (1912) 38 Cal 797=13 I C 370.
16. (1868) 5 B H C R App 1.
17. (1911) 2 Ch 495.
18. (1910) 38 Cal 296=8 I C 530.
19. (1887) 11 Bom 329.
20. (1872) 8 B L R 265.
21. (1855) 16 C B 550.
22. (1852) 11 C B 867.

person, the employer is not responsible. The principle of these decisions is that an employer is entitled to expect of the contractor that he will perform the duty lawfully and without negligence. Therefore, if there has been illegality or neglect on the part of the contractor the employer is not ordinarily liable. Reference may also be made to 28 American Encyclopaedia p. 1280. But, there is an exception to this rule even in the case of private employers and that is this. That where the employer is aware that the doing of a contract work involved a public danger he ought to see that the contractor so discharges his duty as to avoid such a danger. That was the principle enunciated in *Corporation of the Town of Calcutta* v. *Anderson* (12). There is another exception which is even more pertinent to the present case, namely, that in the case of statutory bodies entrusted with the performance of a public duty their liability cannot be shifted to a contractor.

This principle is pointedly illustrated by the decision of Lindley, L. J., in *Harda Ker* v. *Idle District Council* (23). The distinction between the liability of the contractor to the employer and the liability of the employee to the employer in the construction of public works is thus stated by the Lord Justice:

"This principle lies at the root of the modern decisions on the subject, and the distinction between the two classes is well illustrated by comparing *Reedie* v. *London and North Western Ry. Co.* (24) with *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (25). In the first of these cases the defendants employed a contractor to build a bridge. One of his men carelessly let a stone fall on the plaintiff, and the defendants were held not liable. In the second case the defendants' duty was to build a bridge which would open and let vessels pass. They employed a contractor, who built a bridge which would not open. The plaintiff was injured thereby, and the defendants were held liable for the consequences. The principle to which I am referring is further illustrated by *Pickard* v. *Smith* (26) (the coal-cellar case) and *Gray* v. *Pullen* (27), in which the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, held the employer of a contractor liable for injury caused to the plaintiff by the contractor's failure to make good a pavement under which he had constructed a drain."

The learned Lord Justice quotes with approval a passage from Lord Blackburn's judgment in *Dalton* v. *Angus* (28). On the other hand, a person causing something to be done, the doing of which costs on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it. The present case comes within the principle above enunciated. Story on Agency, S. 454, enunciates the same principle.

The next point urged for the appellant was that the stacking of the gravel on the road was not the proximate cause of the injury done to the plaintiff. The finding of the District Judge in para. 7 is against this contention. Mr. Sarma referred to the fact that the road was 27 feet in width and that the projection of the stacked gravel only extended to 9 feet from the base. Even though there was a large margin for travellers to go through, the liability of the Municipality is not lessened by that circumstance. It was pointed out in *Queen-Empress* v. *Bolappa* (29) that the passer-by has a right to use the full breadth of the road: see also *Wednesbury Corporation* v. *Lodge Hole Colliery Co* (30). The finding of the learned District Judge disposes of any contention regarding contributory negligence. It was not disputed that no red lights warning passers-by were fixed upon the gravel stacked in the road. I find no justification for re-opening the question that the plaintiff was racing along the road when he sustained injury. I must therefore disallow this contention also.

The last point related to the amount of damages. A great deal of argument was addressed to us on this subject. There can be no doubt that for two months after the accident the plaintiff was normally discharging his duties. It seems also clear that he neglected a caution conveyed to him by his medical adviser in using his right hand. It was after two months that he was told that he must get his arm set right by a specialist in England. It is open to doubt whether the necessity for going to England would have risen had

23. (1896) 1 Q B 335.
24. (1849) 6 Railw Cas 184.
25. (1861) 6 H & N 488.
26. (1861) 10 C B (n s) 470.
27. (1864) 5 B & S 970.
28. (1881) 6 A C 740.
29. (1888) 11 Mad 343.
30. (1905) 2 K B 823.

the plaintiff been more careful or had he been more prompt in getting his injuries redressed. I am therefore unable to agree with the District Judge that the cost of going to and returning from England should be charged against the Municipality. On the whole, considering the various items of charges, I have come to the conclusion that the plaintiff's damage should be reduced to Rs. 2,500. He will be entitled to costs upon the Rs. 2,500 from the appellant. The appellant will bear his own costs. The decree of the District Judge will be modified to this extent. In other respects the second appeal will be dismissed.

Napier, J.—This is an appeal from the decision of the District Judge of Vizagapatam confirming the decision of the Temporary Subordinate Court of Vizagapatam awarding damages to the plaintiff against the Municipal Council of Vizagapatam, in respect of injuries received by the plaintiff through the faulty condition of the road under the defendant's control. The lower appellate Court has found that the injuries were caused owing to the plaintiff being thrown from his motor-bicycle in consequence of collision with a heap of gravel projecting 9 feet into the roadway which was left unprotected by a light during the night. It has also found that there was no contributory negligence in the plaintiff. The District Judge has awarded him damages to the amount of Rs. 4,180-15-0. To these findings and to this amount of damages several objections have been raised in this Court. The first is, that no suit will lie against a Municipal Council in respect of any such injuries, the second is that even if a suit will lie, the liability is confined to a narrow class of public or private boides to which the defendant Municipality does not belong; the third is, that the Council are protected by the fact that they employed a competent contractor and that the most that can be charged against them is a non-feasance; and the fourth is, that the greater part of the damages is too remote. The first objection is said to be based on the decision of this Court in *Secy. of State* v. *Cockcraft* (1) which, it is contended, lays down that the making of roads by Government is an act done in exercise of sovereign powers; and it is sought to apply that doctrine to the present case by the argument that Municipal bodies act only as agents of the State in respect of such matters. In my opinion the decision is not an authority for the broad proposition asserted. That case decided that the provisions and maintenance of a military road is a function of Government carried on in exercise of sovereign powers and that accordingly a person who receives injuries owing to the negligence of a servant of Government in stacking gravel on such a road cannot recover in a suit against the Secretary of State. I am not prepared, without further argument, to accept the proposition that the making of all roads and the repairing of all roads by the State is necessarily an act in exercise of sovereign powers. But I reserve my opinion on this subject until the point comes for decision before me. But even if it be so, the proposed extension of the principle to the making and repairing of roads by a statutory body seems to be without foundation.

Mr. Sarma in his able argument before us assumed, I think too lightly, that a statutory body acts as an agent of the State and thus comes within the protection accorded by that decision to the State and its servants. The foundation of this protection is set out in the case under consideration and in the decision in *P. & O. S. N. Co.* v. *Secy. of State* (16) which was followed. The proposition shortly stated is that by operation of statutes the same protection is given to the Secretary of State and his servants in respect of torts committed by them in the exercise of the functions of sovereign powers as is granted to the Crown and its servants in respect of all torts, and that a suit will no more lie against the former than a petition of right will lie against the Crown or a suit against its servants. During the course of the argument, I asked for any authority from England that statutory bodies, in whom roads and the right to repair are vested, came under the potection given to the servants of the Crown, and the learned vakil was unable to give me any. I am unable to see how a statutory body can be said to be either the servant or the agent of the Crown unless it is so constituted by the provisions in the Act.

It may be that prior to the introduction of legislation in this country, where the East India Company granted a charter to a body to exercise such functions, such body might be an agent or servant of the

company, but bearing in mind the cases in which such bodies holding charters from the Crown have been held responsible in England, I should be slow to accept even this proposition. I would especially refer to the case of the *Mayor & Burgesses of Lyme Regis* v. *Henley* (31). There the borough of Lyme Regis held by Letters Patent from the King a certain pier on condition, among others, that they should repair and maintain it as necessary. The plaintiff's premises having been injured by the sea in consequence of the disrepair of the pier, he brought a suit against the Mayor and Burgesses. It was held that the obligation to repair being one which concerned the public, an indictment would lie in case of non-repair against the Mayor and Burgesses for their general default, and an action on the case for a direct and particular damage sustained in consequence by an individual. Throughout the argument of counsel I can find no trace of the theory of agency, nor is it suggested in the judgment of the Court.

With regard to a statutory body it seems to me to be impossible to suggest that they are servants or agents. They are not appointed by Government, but are created by the Legislature. Mr. Sarma argues from the language of the District Municipalities Act that Government has power to suspend. That is undoubtedly so, but that power, like the body itself, is the creation of the Statute and must be exercised within the limits imposed. Without such a statutory power the Government could not dissolve or suspend a statutory body and it seems to me besides the question to examine, as the learned vakil has asked us to do, the sections of the Act for the purpose of ascertaining the rights that are vested in Government. I therefore hold that the doctrine pressed on us has no application to this case.

The next point is that only a narrow class of public or private bodies can be made liable. This argument is founded on observations in two old cases: *Parnaby* v. *Lancaster Canal Compony* (2) and *Mersey Docks Trustees* v. *Gibbs* (3) In the first case it was held that a common law liability arose in the Canal Company which took tolls for navigation to use reasonable care in making the navigation secure, and in the second case, that a private person or a company having a right to levy tolls in respect of performance of a particular work would be liable in damages for injuries occasioned by performing it improperly. In neither case, however, is it stated that the absence of profit or tolls would have made a difference in the decision of the case, and even assuming that that view was taken in these earlier cases, and even if that is good law at the present time, it can have no application to public bodies as appears from other decisions by the House of Lords to which I shall now refer. The first is a decision of the Privy Council in the *Bathurst Borough* v. *Macpherson* (32). That was a suit arising out of injuries caused to the plaintiff by a non-repair of a drain. Some doubt has been cast on this case in later decisions, but not on the point now under consideration. The next is another decision of the Privy Council in *Gibraltar Sanitary Commissioners* v. *Orfila* (7). In this case, the Board repudiated the liability of the Commissioners, but in neither case did their Lordships consider the bearing of the question whether these public bodies levied a toll. Later cases are *Cowley* v. *Newmarket Local Board* (33), *Pictou Municipality* v. *Geldert* (34) and *Sydney Municipal Council* v. *Bourke* (35), the last two being decisions of the Privy Council. In none of these was this ground even argued. If, therefore, this principle has any application in these days, it must be confined to private bodies, such as the Canal Company and the Dock Company.

The next point taken was that the Municipality had been at most guilty of a mere non-feasance for which they are not legally responsible, and that any misfeasance found was that of a contractor for which the Municipality was not responsible, Mr. Sarma argued that the only breach of duty which could be laid in this case was under S. 172, District Municipalities Act, which requires that a Municipal Council shall during the repair of any street take proper precautions for guarding against accidents and shall cause every such street during its repair to be sufficiently lighted and guarded during night. He

31. (1832) 3 B & Ad. 77.

32. (1879) 4 A C 256.
33. (1892) A C 345.
34. (1893) A C 524.
35. (1895) A C 433.

wished us to read that section with S. 173 as applying to the facts of this case. S. 173 provides that no person shall cause any obstruction in any street, without the written permission of the Chairman and that when such permission is granted such person shall take proper steps to prevent accidents. His argument was that a contractor executing repairs to a road under the orders of the Council was a person to whom S. 173 applied. I am clearly of opinion that this section has no application. It has reference to temporary obstructions to a thoroughfare by the erecting of pandals or arches by a private person, a procedure with which we are familiar. All the sections grouped together under Ch. 4, streets (a) refer to projections and obstructions created by private persons, and have nothing whatever to do with execution of repairs by employees of the Municipality itself. This argument therefore fails, and in this view I do not think it necessary to discuss at any length the difficult question whether a public body is liable for mere non-feasance.

It was undoubtedly so held in a case above referred to, *Bathurst Borough* v. *Macpherson* (32), where the liability was put on the broad proposition that neglect to repair a drain caused a nuisance in the highway for which the borough was liable, and their Lordships expressly say that there is no principle upon which a distinction in this respect between non-feasance and misfeasance can be supported. There are however later cases, such as the *Pictou Municipality* case (34) and the *Sydney Municipality* case (35) above referred to, which directly negative that view, and draw a distinction which, the Board in the earlier case said, should not be drawn. The question will require fuller consideration in the light of the latest decisions of the Board when it arises necessarily for decision before this Court. In my opinion the liability of the Council must rest on the admitted fact that a heap of gravel was thrown on to the side of the road and allowed to project 9 feet into the roadway. This is an undoubted misfeasance. The question is, whether the fact that it was done by an independent contractor will protect the defendant. Mr. Sarma relied strongly on the case of *Daniel* v. *Metropolitan Ry.* (36). The injury caused to the plaintiff in that case was due to the fall of an iron girder on a train, which girder was being erected by a contractor. The decision was that the accident was not one which the company was bound to anticipate and against which it was bound to take precautions.

Although there are observations in the judgments of the learned Lords about persons over whom the railway contractors have no control, I have no doubt that the basis of the decision in that case was absence of any negligence, that being at all events the only ground on which Lord Colonsay bases his decision. At all events all the learned Lords agree in holding that there was no misfeasance by the contractor. The true proposition seems to me to be contained in the proposition laid down in *Gibraltar Sanitary Commissioners* v. *Orfila* (7), with the corollary to be found in the language of Lord Blackburn in *Dalton* v. *Angus* (28). The first case decides that the powers conferred on a body created by Statute must be executed with due care. In the absence of contrary intention its duties and liabilities are the same as those imposed by the general law on a private person doing the same thing. And the corollary is as follows:—A person causing something to be done, the doing of which casts on him a duty, cannot escape from responsibility attaching on him of seeing that duty performed by delegating that to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed. But he cannot thereby relieve himself from liability to those injured by the failure to perform it. This proposition of law was quoted by Lindley, L. J., in *Harda Ker* v. *Idle District Council* (23) and treated as an authoritative exposition on the law. In that case the District Council employed a contractor to construct a certain sewer. In consequence of his negligence in carrying out the work a gas main was broken with the result that an explosion took place by which injury was caused to the wife of the plaintiff and to his premises.

The Court of appeals, presided over by that eminent Judge mentioned, held that the District Council were responsible for the contractor's negligence. Lindley L. J. in paraphrasing Lord Blackburn's view says, that in *Hughes* v. *Percy*

36. (1871) 5 H L 45.

val (37), Lord Blackburn points out that the employer's duty was to see that his contractor did his work properly and adds: "Lord Watson, in the same case, said the same thing." The doctrine was applied to a later case which is on all fours with the present case. That is *Penny* v. *Wimbledon Urban District Council* (38), which is also a decision of the Court of Appeal. There, their Lordships pointed out the limitation to the doctrine which will also be found in Lord Blackburn's judgment. They say that where the act of negligence is a mere casual or collateral act, such as a workman employed on the work negligently leaving a pick-axe or such like on the road, the Council would not be responsible for that negligence of the contractor's servant. That is the proposition of law stated in *Pickard* v. *Smith* (26). But the Court held it had no application to a case where a statutory authority has power to do something to a road which will make it dangerous while it is being done, for then there is a duty cast upon them to take care that the Queen's subjects are not injured by any carelessness in the doing of that which has to be done, whether that action be the action of their own servants or of an independent contractor. This decision and the principles stated in it cover the present case exactly. I am therefore of opinion that the employment of a contractor did not relieve the Council of their liability.

On the question of remoteness of damage, I do not think it necessary to say anything more than that I agree with my learned brother on this point, that the damages should be reduced to the sum of Rs. 2,500. The decree will be in the terms proposed by him.

S.N./R.K. *Decree varied.*

37. (1883) 8 A C 443.
38. (1899) 2 Q B 72.

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WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

Doraisami Pillai — Plaintiff—Appellant.

v.

Chinnia Goundan and *others*—Defendants—Respondents.

Civil Appeal No. 83 of 1916, Decided on 28th September 1917, against decree of Sub-Judge, North Arcot, in Original Suit No. 37 of 1914.

(a) Hindu Law—Adoption—Custom—Consent of sapinda after adoption does not validate it.

The custom under which the consent of the sapindas is held to validate an adoption by a Hindu widow cannot be extended to consent given long after the date of the adoption [P 273 C 1]

(b) Civil P. C. (1908), O. 6, R. 17,—Amendment of pleadings—Fresh cause of action arising after institution of suit can be included in suit by amendment of pleadings—Practice—Subsequent events.

Courts have a wide discretion vested in them of allowing amendments of pleadings at any stage of the trial of a suit and a cause of action which arises subsequently to the institution of a suit may be included in the suit by such amendment, provided the amendment is otherwise proper and does not prejudice the other side. *Bourke* v. *Davis*, (1890) 44 *Ch. D.* 110, *Dist.* [P 273 C 2, P 274 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

P. R. Ganapathy Aiyar—for Respondents.

Wallis, C. J.—This is an appeal from a decision of the Subordinate Judge of North Arcot, dismissing a suit by the plaintiff for redemption of the mortgage Ex. 7 executed by the senior widow of the last male owner on 27th February 1875, and also for a declaration that a lease executed by her previously on 29th October 1874 (Ex. 13) is not binding on the plaintiff. The plaintiff's suit was based on the alleged adoption of his father by the junior widow of the last male owner in the year 1879. The last male owner died about the year 1850, and there is really no evidence of any authority given by him to his widow to make the adoption. Another question which arises is whether one widow could adopt without the consent of the other widow, and then there is the question whether the adoption was made with the consent of the sapindas. On the latter question the Subordinate Judge has found that it is not shown that the adoption was made either with the consent of the senior widow or of the sapindas. The next reversioner comes forward now as P. W. 1 and says that he was present and consented. But in 1890 he filed a suit to declare the adoption invalid, and little weight attaches either to his testimony or to the testimony of the third witness for the plaintiff whom the Subordinate Judge has not believed. We are therefore not prepared to interfere with the finding of the Subordinate Judge that the consent of the sapindas at the time of the

adoption has not been proved. There is considerable evidence that many years later, the reversioners gave their consent to the transaction.

But we are not prepared in the absence of authority to hold that such subsequent assents of the sapindas would validate the adoption. The doctrine of the consent of the sapindas validating an adoption, which was laid down by the Privy Council in the *Ramnad* case [*Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1)] was based largely upon the custom prevailing in this part of India, rather than upon cited texts. A different custom prevails in Bombay and Bengal. We are not prepared, in the absence of any evidence or authority, to hold that the custom under which the consent of the sapindas is held to validate adoption can be extended to consent given long after the date of the adoption, and we think that considerable inconvenience and uncertainty would result from giving the doctrine any such further development. It is, therefore, unnecessary to consider the question of the alleged failure of the senior widow to give her consent or the effect of her having subsequently given it. On this finding the plaintiff's case as originally laid in the plaint must fail.

The adoption was not proved. But in a supplemental written statement which he put in, he relied on a release (Ex. R) which was executed in his favour after the filing of the plaint by the person who was the right heir of the last male owner on the death of the junior widow in 1902, if there was no adoption of the plaintiff's father. That document was entered into between the plaintiff, who with his father before him had been in possession of the estate for a great many years on the footing of the adoption, and the person who was entitled to succeed in 1902 if there was no adoption. By that document the heir released all his rights in favour of the plaintiff. We cannot agree with the Subordinate Judge that Ex. R does not purport to be and is not a conveyance. The word used is release, but the intention to transfer any rights which the executant of the document had is clear, and we see no sufficient reason why it should not be treated as a conveyance. The question next arises how far the plaintiff should be allowed to rely upon this title in the present suit.

The matter was made the subject of an issue which was clearly, in our opinion, intended not only to raise the question whether he was entitled to put forward such a claim, in this suit, but also whether such a claim, if put forward, would be a good one. The Subordinate Judge held that Ex. R, which was executed after the institution of the suit, could not supply the plaintiff's want of title, and it has been strenuously contended before us that a cause of action which arises subsequently to the institution of the suit cannot properly be included in the suit by amending the pleadings and must form the matter of a fresh suit: *Attorney-General* v. *Corporation of Avon* (2), *Evans* v. *Bagshaw* (3), *Creed* v. *Creed* (4), *Prannath Shaha* v. *Madhu Khulu* (5), *Sarat Chandra Banerjee* v. *Apurba Krishna Roy* (6), *Mathura Mohan Saha* v. *Ramkumar Saha* (7), *Rangayya Reddy* v. *Subramanya Aiyar* (8). The English decision relied on by the other side, *Bourke* v. *Davis* (9), is not strictly in point as what happened was that the plaintiff, who discovered after the institution of the suit, that he was not the owner of the bed of the river as he had supposed and obtained a conveyance of it, was allowed to issue a fresh writ as to the infringement of his right as to the bed of the river, and both suits were ordered to be tried together. There are no English decisions since the Judicature Act that such a course is absolutely incompetent, and on the other hand, as observed in *Kisandas Rupchand* v. *Rachappa Vithoba Shilwant* (10), the discretion conferred under O. 6, R. 17, of the Code and O. 28, R. 1, of the English Rules is very wide. In the present case the plaintiff's father had been in possession of the estate as adopted son of the last male owner until his death with the consent of all the reversioners, and the plaintiff had succeeded him and instituted the present suit on the footing

1. (1867) 12 M I A 30=10 W R 17 (P C).
2. (1863) 3 De G J & S 637.
3. (1870) 5 Ch 340.
4. (1913) Irish Rep Ch 48.
5. (1886) 13 C 96.
6. (1911) 11 I C 187.
7. (1916) 43 Cal 790=35 I C 305.
8. (1917) 40 Mad 365=40 I C 429 (F.B).
9. (1890) 44 Ch D 710.
10. (1909) 33 Bom 644=4 I C 726.

that his title was unquestionable, as indeed it was so far as his family is concerned. When it was questioned by the defendant, he at once put himself right, as far as he could, by obtaining Ex. R from the next reversioner, and put in an additional written statement on which an issue was raised, apparently without objection.

In this state of things I do not think that we are compelled in appeal to say that the amendment was wrongly allowed and that the issue as to the plaintiff's rights under Ex. R was wrongly raised. To say that a plaintiff cannot be allowed to cure a formal defect in his title to sue at an early stage of the suit as soon as it is challenged and must be driven in every such case to a fresh suit, appears to me to impose an undue hardship on litigants in India having regard to the state of the law as to court-fees and to the costs of litigations; and I do not think we are compelled by authority to adopt such a view as to interfere in appeal in any case where such an amendment has been allowed in the lower Court. I am, of course, assuming that the amendment is otherwise proper and does not prejudice the other side. As regards the plaintiff's claim to redeem the mortgage, the mortgage has not yet become barred and will not be barred for a great many years more and in these circumstances we think that, having regard to the issue which has been framed, he should be given relief so far as regards the redemption of the mortgage. As regards his claim for a declaration that the prior lease is not binding upon him, that stands in a very different position because assuming there was no adoption the right of his assignor, the next heir, arose on the death of the last widow in 1902 and is alleged to have become barred even before the date of the assignment. We think it would be wrong to allow the plaintiff to question that lease in this suit. The position is a somewhat curious one. The lease (Ex. 13) of 29th October 1874 was a permanent lease of three villages executed by the senior widow in favour of one Papi Reddy, the ancestor of these defendants, and the usufructuary mortgage (Ex. 7). of 27th February 1875 was a mortgage by the same senior widow to a third party of one of these three villages, in which it was recited that she had arranged with Papi Reddy that the mortgagee's possession should not be interfered with, and by Ex. N executed shortly afterwards on 1st March 1875 in favour of the mortgagee Narayanasami Reddi, she affirmed the lease for the period of the usufructuary mortgage till the mortgage is redeemed. Then by Ex. 9 of 14th March 1876, Narayanasmi Reddy, the mortgagee, assigned to Papi Reddy his rights under Ex. 7 and Ex. N, which was the supplemental lease in which it was recited that Papi Reddy had attested it to show that he had suspended his rights under the lease as regards this one village until the mortgage should be redeemed.

Thus by Ex. 9 of 14th March 1876 the mortgagee assigned all his rights to Papi Reddy who thus united in his own person right under the original lease Ex. 13, the mortgage Ex. 7 and the lease supplemental to the mortgage, Ex. N. The result of these transactions is that, on redemption, the defendant will be entitled to remain in possession under the lease Ex. 13 and subject to the terms of that lease, which we as have already held cannot be questioned in the present suit, and there will be a declaration to that effect. The plaintiff is desirous of being allowed to redeem even on these terms. In the result we reverse the decree of the lower Court and direct the Subordinate Judge to take the necessary accounts and pass a preliminary decree for redemption. The plaintiff must pay the costs of this appeal. The other costs to be dealt with in the decree.

Kumaraswami Sastri, J.—I agree.

S.N./R.K *Appeal dismissed.*

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* A. I. R. 1918 Madras 274

SESHAGIRI AIYAR AND BAKEWELL, JJ.

R. S. Rama Shenoi and *another*—Plaintiffs—Appellants.

v.

M. A. Hallagna and *another*—Defendants—Respondents.

Second Appeal No. 2181 of 1915, and Letters Patent Appeal No. 56 of 1915, Decided on 20th March 1917, against the decision of Ayling, J. in Second Appeal No. 999 of 1914.

(a) Civil P. C. (5 of 1908), O. 21, R. 63—Suit under—Burden of proof is on plaintiff.

Under O. 21, R 63, the burden is on the plaintiff to establish his claim. [P 275 C 2]

*** (b) Civil P. C. (5 of 1908), S. 13 (d)—Foreign judgment—Erroneous view of bur-**

den of proof—Judgment is not 'one not given on merits' or 'erroneous on face of it.'

A wrong view of a Foreign Court as to onus of proof will not have the effect of rendering its judgment one 'not given on the merits' within the meaning of S. 13 (b), Civil P. C., or of rendering the judgment erroneous on the face of it. [P 275 C 2]

(c) Civil P. C. (5 of 1908), S. 13 (d)—Error of law does not invalidate foreign judgment —When can such judgment be said to be opposed to natural justice explained.

A foreign judgment is not liable to be vacated merely on the ground of its containing a mistake of law. There must be something in the procedure anterior to the judgment which is repugnant to 'natural justice'. A mere incorrect view of law by a foreign Court will not give the British Indian Courts jurisdiction to say that the judgment is opposed to 'natural justice' within the meaning of S. 13 (d). [P 276 C 1]

K. Pandalai and *C. V. Ananthakrishna Aiyar*—for Appellants.

C. Madhavan Nair—for Respondents.

Judgment.—A decree was obtained against the elder brother of the plaintiff in the Cochin Court. In the cause title, he was described as the manager of the joint family. Apparently the plaint alleged that the family property was liable for the claim as the debt was contracted for family purposes. The defendant in the Cochin Court pleaded that no decree should be passed against him as manager. Therefore issue 7 was framed. The Cochin Court held that the burden of proving that the defendant was not the manager and that the debt was not binding on the family lay upon him, and passed a decree against him personally and against the family properties. The decree was executed against the Cochin properties and then transferred to the British Court under S. 44, Civil P. C. In our Court, a claim was preferred by the plaintiff against the attached properties on two grounds :—(a) that the defendant in the Cochin suit had become divided from the plaintiff before suit and (b) that the decree was otherwise not executable against the properties in the possession of the plaintiff. The claim was rejected. The plaintiff has brought this suit to establish his right. The Courts below have dismissed the suit. Hence this second appeal. Dr. Pandalai, for one of the brothers, the appellant in Second Appeal No. 2181 of 1915, contended that it was the duty of the Courts below to have decided whether there was a division prior to the Cochin suit and whether the brother who was sued in that Court was the manager. It is clear under R. 63, O. 21, that the burden of proof is on the plaintiff to establish his claim. Beyond stating that he was divided, he has asked for no issue; and has adduced no evidence on the question of division or managership; the plaintiff is not therefore entitled to ask us to send the case down for a finding on that question.

The learned counsel further contended that as the Cochin Court was wrong on the question of the burden of proof, the judgment must be deemed not to have been given on the merits. We are unable to accept this contention. In the Cochin Court, the general law administered relates to Marumakatayam tarwads; and as in a suit against the karnavan as such the decree would be binding on the anandravans, unless the latter could show that the karnavan was not acting on behalf of the tarwad, the idea seems to have gained ground that in the case of suits against managers of Marumakatayam families the onus is on the other members to show that the debt is not binding on them. This is not the law as it obtains in British India. It is for the creditor to prove that the debt is recoverable against the members of the family; we may therefore take it that the Cochin Court was right in its view of Hindu law. Does that render the judgment one not given on the merits? We have not before us all the materials on which the Cachin judgment was based. Consequently, we are unable to hold that the decision was not on the merits. The decision of the Judicial Committee in *Keymer* v. *Viswanatham Reddi* (1) has no bearing on the present case. There is no warrant for the proposition that a wrong view as to onus would have the effect of rendering a foreign judgment one not given on the merits.

Mr. Ananthakrishna Aiyar who appeared for another brother, the appellant in the connected appeal, raised a more serious contention. He argued that as the Cochin Court was manifestly wrong on a point of Hindu law, the judgment was contrary to natural justice. In this connexion, we notice that the language of Cl. (d), S. 13, has undergone change. In the old Code, the words were "if it is in the opinion of the Court before which it is produced contrary to natural justice." The present language in S. 13 (d) is:

1. A I R 1916 P C 121=38 I C 633=44 I A 6=40 Mad 112 (P C).

"where the proceedings in which the judgment was obtained are opposed to natural justice."

This change carried out the view of Bramwell, B., in *Crawley* v. *Issacs* (2). The learned Baron there said:

"I think the term 'natural justice' which has been used in reference to foreign judgments refers rather to the form of procedure than to the merits of the particular case, p. 531."

Consequently, the mere fact that a judgment is wrong in law is not enough. There must be something in the procedure anterior to the judgment which is repugnant to natural justice. That cannot be said of the present case. Further as pointed out by Lord Chelmsford in *Liverpool Marine Credit Co.* v. *Hunter* (3), a mere incorrect view of law by a foreign Court would not give jurisdiction to our Courts to say that the judgment is opposed to natural justice: see also per Cockburn, C. J., in *Imrie* v. *Castrique* (4) and *Scott* v. *Pilkington* (5). Mr. Ananthakrishna Aiyar drew our attention to *Messina* v. *Petrocchino* (6). In that case it was pointed out that unless there was a manifest error or fraud in the proceedings of the judgment, the British Court should give effect to it. A wrong view as to onus does not render a judgment erroneous on the face of it. Moreover having regard to *Liverpool Marine Credit Co.* v. *Hunter* (3) we are unable to hold that a mistake as to law, which is all that can be alleged against the decision in the present case, would be sufficient to vacate the foreign judgment. For these reasons, we think the decision of the Courts below is right and we dismiss the second appeal with costs. The Letters Patent Appeal also follows.

S.N./R K. *Appeals dismissed.*

2. (1867) 16 L T 529.
3. (1868) 3 Ch 479.
4. (1860) 141 E R 1222.
5. (1862) 121 E R 978.
6. (1872) 4 P C 144.

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OLDFIELD AND PHILLIPS, JJ.

Ganapathy Mooppen and *another*—Plaintiffs—Appellants.

v.

Subba Nayakkan and *others*—Defendants—Respondents.

Second Appeal No. 56 of 1915, Decided on 19th December 1917, against decree of Dist. Judge, Madura, in Appeal Suit No. 258 of 1913.

Specific Relief Act (1 of 1877), Ss. 42, 52 and 54—Obstruction to marriage procession—Suit for injunction and declaration of right lies on proof of special damage—Actual obstruction or use of violence need not be proved—Special damage does not necessarily imply pecuniary damage—It may be mere inconvenience caused—High way—Tort.

Where a marriage procession is obstructed from passing along a public road, an action lies, on proof of special damage, for a declaration of the right to pass along the road and for an injunction restraining the obstruction. 37 *I. C.* 977, 29 *I. C.* 248 7 *I. C.* 663, and 1 *I. C.* 716 *Dist.* [P 278 C 2]

In such cases, proof of actual obstruction or the use of violence is unnecessary. It is enough to show that owing to the hostile attitude of the obstructors, the procession was not able to start. [P 277 C 1]

By special damages is not meant actual pecuniary loss. [P 278 C 1]

The special damage may consist in the inconvenience or loss consequent on a postponement of the marriage or waste of time involved in taking another route, or it may consist in some damage peculiar to the community constituting the procession. [P 277 C 1]

C. S. Venkatachariar—for Appellants.

S. Srinivasa Iyengar and *S. Desikachariar*—for Respondents.

Judgment:—The plaintiffs appellants are members of the Muppan caste and sued for a declaration, injunction and damages, because defendants, members of other castes, prevented their taking a marriage procession by the street along which it is, they alleged, customary to take them. The lower appellate Court in the decree appealed against confirmed the District Munsif's decision dismissing the suit in toto. An attempt was made to support this decision on the ground that the lower appellate Court erred in finding that the procession was prevented. It is true that it did not start and that its progress was not actually obstructed. But as the lower appellate Court found it did not start owing to defendants' hostile attitude and we agree that so far as plaintiffs proved, (sic) sufficient proof of actual obstruction or the use of violence being unnecessary. The next question raised was whether the road the use of which was disputed, is public But the lower appellate Court did not decide it, holding as we understand that plaintiffs could not in any case succeed in the absence of proof of special damage and dealing with the question of special damage on the sole ground that their procession could in fact have gone by another route and that the postponement of the marriage was not entailed. This, it is urged, is too restricted a view, firstly, because proof of special damage is not

necessary, secondly, because the lower appellate Court should have found that proof of it was forthcoming.

As regards the first position we have been referred to a very recent unreported decision of this Court, *Subbayya Nadan* v. *Aiyavoo Reddi* (1) (Second Appeal No. 2315 of 1914), in which Napier, J. (Ayling, J., expressing general concurrence) doubted the validity of the contention that mere obstruction to a procession was insufficient to justify grant of an injunction without proof also of loss of property or personal injury, his doubts being founded on the apparent inconsistency between certain observations in *Andi Moopan* v. *Muthuvirama Reddy* (2) and *Baslingappa* v. *Dharmappa* (3), and the decision in *Kandasawmy Mudali* v. *Subraya Mudali* (4). But firstly, it is not clear that the learned Judge was dealing with the necessity for proof of special damage and not with the different question to which I return, whether any had in fact been established. And next the three cases mentioned are distinguishable from the case which was before the learned Judge and from that now before us, because in each of the former there was a magisterial order obtained by the defendants forbidding the procession, whilst in the latter such orders were either not relied on or not established. This distinction being available, it is unnecessary to consider the ground of decision in these cases more closely and it is sufficient that in *Kandasawmy Mudali* v. *Subraya Mudali* (4) and *Andi Moopan* v. *Muthuvirama Reddy* (2) the necessity for proof of special damage in the absence of a magisterial order was fully recognised. Such proof must, therefore be required in this case.

The remaining question is whether the lower appellate Court's finding that the postponement of the marriage was not rendered necessary exhausted the matter. It no doubt was conclusive as regards one head, under which plaintiffs claimed pecuniary damages, the loss incurred in consequence of their preparation on the day fixed becoming useless. But proof of actual pecuniary loss is not essential. *Vide Abdul Miah* v. *Nasir Madommed* (5) *Siddeswara* v. *Krishna* (6) and the judgment of Sundara Aiyar, J., in *Khaji Syyad Hussain Saheb* v. *Ediga Narasimhappa* (7). The true principle is that laid down in a case, which has been followed frequently in this country, *Winterbottom* v. *Derby (Earl)* (8) that:

"he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade or calling."

The points for consideration in the present case are accordingly whether defendants' conduct caused plaintiffs only such damages as any member of the public would have suffered through loss of time or having to go by a way other than the one he preferred; or whether plaintiffs were as they alleged debarred, because they were Mooppans, from taking their procession by the road customarily used for that purpose by that community and therefore suffered damage peculiar to themselves as members of it. We therefore call on the lower appellate Court for a finding in the light of the foregoing on the issue "whether plaintiffs suffered any special damage?" and we also ask it to return a finding on the District Munsif's issue 1, "whether the street is a private street." Findings shall be returned on the evidence on record within six weeks, and seven days will be allowed for filing objections.

(In compliance with the order contained in the above judgment the District Judge of Madura submitted the following :)

Finding. — The High Court has remanded this appeal to me for a finding as to: (1) whether the street is a private street and (2) whether plaintiffs suffered any special damage. 2. As to whether the street is a private street. The onus is clearly on the defendants to show it is not, as under the Local Boards Act all streets are presumed to be public streets unless the contrary is shown. This particular street is shown in the survey plan, Ex. J, as a cart-track and that plan is more than 30 years old. Ex. H, the Settlement Register, shows that 20 per cent. has been deducted for roads, channels, streets, etc., from all pattas, and the pattadars have no rights in such roads and channels merely because they happen to be shown in their pattas. *Kandasawmy Mudali* v. *Subraya Mudali* (4) sets out the law on the point. In Ex. B the defendants all say that they

1. (1917) 37 I C 977.
2. (1915) 29 I C 248.
3. (1910) 34 Bom 571=7 I C 663.
4. (1909) 32 Mad 478=1 I C 716.
5. (1895) 22 Cal 551.
6. (1891) 14 Mad 177.
7. (1912) 16 I C 962.
8. (1867) 2 Ex 316.

are determined not to allow processions to pass. In a criminal case, Ex. 1, they did not set up that it was a private road, D. W. 1's evidence before the Magistrate was that it was a public street. D.W. 3, the karnam, says that the street is partly poramboke and partly a patta land. The defendants have produced no pattas to show that this street is private and even if they did do so, Ex. H would show that deduction had been made for the cart-track as it then was and that it was not a part of the pattadar's private land. My finding is that the street is a public street.

3. *Issue* 2.—The plaintiffs did not set up any special damage. They claimed that it is a public street and as such they were entitled to use it. It is not open to the public to file a suit for an injunction and declaration with reference to the obstructing of a street unless special damage is proved. The plaintiffs have got to show that they have suffered special damage. Originally they set up losses owing to the marriage being adjourned, also costs of the criminal cases and also loss of reputation making Rs. 536.4.0 in all and they sued for Rs. 350. In appeal they claimed Rs. 200 only on the first two items, but in the High Court they claimed only Rs. 10 as damages. As nothing is shown as to how this Rs. 10 is arrived at presumably it is based on the lower Court's finding that had it had to assess damages, it would have fixed Rs. 10. Plaintiffs are certainly not entitled to damages for costs of the criminal cases and they have withdrawn their claim for loss of reputation.

Therefore presumably they claim only on the first ground of losses owing to the marriage being adjourned in that they had to pay Rs. 25 for horses, Rs. 12 for flowers and Rs 25 for a piper ; but it is in evidence that they could have gone on horseback with the piper and with the flowers to the second temple by another route as they had already visited the first. Therefore I do not consider that these items of expenditure can be regarded as special damages. The only damage that apparently they suffered was not being allowed to go on horseback through this particular street. I find it difficult to fix any monetary value on this obstruction. I would therefore find that no special damage has been made out. This second appeal coming on for final hearing after ths return of the finding of the lower appellate Court on the issues referred by this Court for trial the Court delivered the following

Judgment.—Defendants' objection to the finding that the street in question is public is not pressed. We accept the finding. On the other point remanded we understand the District Judge to have found that plaintiffs suffered special damage in consequence of their not being allowed to ride on horseback through the street, although that damage was not assessable in money. We dissent only from the latter portion of this for we can see no reason why the compensation cannot be awarded on an estimate of the moral damage suffered. It is not however necessary for us to ask the District Judge to make such an award or to make one ourselves, since appellants do not press for damages and their right to them is material only as justifying their claim to the other reliefs asked for, a declaration and injunction. As the street is public and special damage has been sustained, their right to these reliefs is established. We therefore allow the appeal to the extent that the lower Court's decisions are set aside that plaintiffs will have a decree for declaration that they have a right to pass through the street lying east of the Tirumangalam road on horseback on the occasion of marriages and to a corresponding injunction. The parties will pay and receive proportionate costs throughout.

S.N./R.K. *Appeal allowed.*

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SESHAGIRI AIYAR AND KUMARASWAMI SASTRI, JJ.

Ammu Ammal and *another*—Plaintiffs—Appellants.

v.

Puthiaparambath Moidin and *others*—Defendants—Respondents.

Second Appeal No. 1007 of 1916, Decided on 4th October 1917, against decree of Dist. Judge, South Malabar, in Appeal Suit No. 631 of 1915.

(a) Landlord and Tenant—Tenant encroaching on stranger's land—His possession is prima facie for landlord's benefit—Onus is on him to prove otherwise.

Where a tenant, during the continuance of the tenancy, encroaches upon lands belonging to a stranger, his possession of such lands is prima facie for the benefit of the landlord, though it is open to the tenant to prove that he made the ac-

quisition for his own exclusive benefit. The burden lies on him to establish this fact. [P 279 C 1]

(b) Landlord and Tenant—Grant of patta by Government does not end original tenancy.

The grant of a patta by the Government to a enant who holds under a lease from a private party does not put an end to the tenancy, though it is open to a person having a paramount title to put an end to the rights of the intermediate landlord, thereby extinguishing the subtenancy as well; 15 *M L J* 368, *Rel. on.* [P 279 C 2]

C. V. Ananthakrishna Ayyar and *K. P. Ramakrishna Ayyar*—for Appellants.

P. V. Parameswara Ayyar—for Respondents.

Judgment.—It is admitted that a portion of the land sued for was demised by plaintiff 1's tarwad to the predecessor-in-title of the defendants. This was in 1871. Subsequent to the demise the defendants encroached upon the neighbouring land. We need not decide now whether that land belongs to the Government or not. The case has proceeded on that presumption; apparently by virtue of their possession the defendants obtained pattas from the Government for the land. The plaintiff now sues to eject the defendants from the land originally leased to them as well as from the lands for which they hold patta under the Government. The District Munsif decreed the plaintiff's claim. This was reversed in appeal as regards a portion of the property. In our opinion, the real point for decision has not been argued or considered by the Courts below, although it arises on the pleadings and is covered by the issues. It is clear that where a tenant during the continuance of the tenancy encroaches upon lands belonging to a stranger, his possession of the encroached grounds is prima facie held by him for the benefit of the landlord: see *Earl of Lisburne* v. *Davies* (1) and Woodfall's Law of Landlord and Tenant, page 858. This view was accepted in India in *Nuddyarchand Shaha* v. *Meajan* (2). No doubt it is open to the tenant to prove that in making the encroachment he was making an acquisition for his own exclusive benefit. The burden would be on him to establish this: see *Birendar Kisore* v. *Laksmi* (3). Prima facie therefore the landlord can demand possession of the acquired property.

It was argued by Mr. Parameswara Iyer for the respondent that his client's attornment was the result of fraud on the landlord. This was found against by the District Munsif and the District Judge has expressed no definite opinion on that question. He must deal with that point when the case goes back to him. It was also argued that the grant of a patta by the Government put an end to the original tenancy. We are wholly unable to accept this contention. It may be that a person having a paramount title may put an end to the rights of the intermediate landlord, thereby extinguishing the sub tenancy as well. In the present case, the Government and the plaintiffs are rival claimants. Consequently the citations from For and from 4 Halsbury 535 about eviction by a person claiming title paramount have no application to the present case. On the other hand *Usman Koya* v. *Chidriamokkausa Akoth* (4) supports the view taken by us. In this case the exact measurement of the encroached plots has not been determined; that has to be done now. We do not think that the Government is a necessary party. For these reasons we reverse the decree of the District Judge and remand the appeal to him for disposal on the merits in the light of the above observations. Parties may be permitted to adduce fresh evidence. Costs will abide the result.

S.N./R.K. *Appeal allowed.*

1. (1866) 1 C P 259.
2. (1884) 10 Cal 820.
3. (1915) 30 I C 896.
4. (1905) 15 M L J 368.

A. I. R. 1918 Madras 279

SPENCER AND KUMARASWAMI SASTRI, JJ.

M. Ponnusami Pillai and *another*—Appellants.

v.

Chidambaram Chettiar and *others*—Respondents.

Appeal No. 39 of 1917, Decided on 19th December 1917, against appellate decree of Dist. Judge, Tanjore, in Appeal Suit No. 375 of 1915.

(a) Decree—Assignment—Assignment conveys rights of decree-holder—Assignee is entitled to execute decree in appeal—Civil P. C. O. 21, R. 16.

When a decree is assigned, what is transferred is not the decree itself but the interest of the decree-holder in the decree as may be finally determined.

An assignment of a decree therefore during the pendency of an appeal against it carries with it the right to execute the decree passed in appeal. [P 280 C 1]

(b) Hindu law—Joint family business—Agent of Hindu trading family continues to be so even on death of one member—Princi-

ples of S. 253 do not apply—Contract Act (1872), S. 253.

A power-of-attorney granted to a person by two or more members of a Hindu trading family is not terminated by the death of one of them where the interest of the deceased member passes to the surviving member. The analogy of S. 253 (10), Contract Act, does not apply to such cases. [P 280 C 1, 2]

G. S. Ramachandra Aiyar—for Appellants.

K. Ramchandra Aiyar—for Respondents.

Judgment.—The first question to be decided in this appeal is whether the assignment pendente lite of the decree of an original Court carried with it the right to execute whatever decree may be passed in appeal. We hold that it did in this case, under the present Code of Civil Procedure at any rate. The change of language in O. 21, R. 16 compared with S. 232 in the old Code is significant. It evidently arose out of the decision in *Muthunarayana Reddi* v. *Balakrishna Reddi* (1). It shows that what is really transferred when a decree is assigned is not the decree itself but the interest of the decree-holder in the decree. The word 'interest' must mean 'interest as finally determined'. O. 22, R. 10 (1), contemplates such an assignment of interest being made during the pendency of a suit (suit including appeal) vide sub-Cl. 2 and R. 11) and the continuance of the suit or appeal by the assignee. The mention in Ex. A, the deed of assignment, of the fact that the decree was under appeal clearly indicates the intention of the parties that all rights under the decree should pass. The assignees (respondents 2 to 23 in this Court) in this case, having in fact been brought on record as parties to the appeal, must be deemed to have succeeded to all the rights and liabilities of their assignors: see *Chunni Lal* v. *Abdul Ali Khan* (2). In this view it is unnecessary to invoke the doctrine of lis pendens which applies under S. 52, T. P. Act, to immovable property, a class of property into which a simple money decree cannot be treated as falling. The next question is whether a power-of-attorney given by two members of a Hindu trading family must be deemed to be terminated by the death of one of the members.

Section 253 (10), Contract Act, declares that a partnership is dissolved by the death of the partner. There is no principle of Hindu law that a joint family is extinguished by the death of one member, but if one member dies without effecting a partition, his undivided share passes by survivorship to the surviving members of the family. In the present case the uncle Venkatachallam Chetty died without other heirs than his nephew Chidambaram Chetty, with whom he was joint till the day of his death. The whole of his interest therefore devolved on the survivor whose authority to the agent contained in the power-of-attorney remained unaffected by the death of one of the principals: see *Re Sital Prosad* v. *Raja Brijnarain Roy* (3). It is not suggested that the surviving principal (respondent 1) has revoked or attempted to revoke his authority under Ex. B. The objection is a technical one coming only from the judgment-debtors. Respondent 1, after being made a party to these proceedings, has taken no part in supporting this objection. On both points the District Judge's decision was right. We must therefore dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

1. (1896) 19 Mad 306.
2. (1901) 23 All 331.
3. (1917) 41 I C 288.

A. I. R. 1918 Madras 280

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

Gotatai Vigneswarudu—Plaintiff—Appellant.

v.

Tadanki Venkata Suryanarayanamurthi and *another*—Defendants—Respondents.

Second Appeal No. 98 of 1917, Decided on 18th December 1917, against decree of Court of Temporary Sub-Judge, Guntur, in A. S. No. 39 of 1916.

(a) Civil P. C. (5 of 1908), S. 73 and O. 21, R. 89—Sale set aside under R. 89—No assets are available for rateable distribution.

Where a sale is set aside under O. 21, R. 89, the result is that there are no assets realised under which other creditors of the judgment-debtor can claim rateable distribution: *A. I. R.* 1916 P. C. 238, *Foll.* [P 281 C 1, 2]

(b) Civil P. C. (5 of 1908), S. 64 and O. 21, R. 7—Sale set aside—Attachment ceases—Decree-holder can attach and sell but cannot use same attachment for purpose of other decrees.

The attaching decree-holder, when a sale is set aside, cannot use the attachment for the satisfaction of other decrees obtained by him. He can only bring the property to sale a second

time, if there has been no alienation of it by the judgment-debtor in the meantime. [P 281 C 1]

B. Narasimha Row and *N. Rama Row* — for Appellant.

V. Ramadoss—for Respondent.

Judgment.—In this case defendant 2 attached the suit property in execution of a decree and brought it to sale. The sale was set aside under O. 21, R. 89, Civil P. C. The result of setting aside the sale was that in accordance with a recent decision of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (1) and a recent Full Bench decision which followed it. No assets had been realised under that attachment against which other creditors could claim rateable distribution under S. 64 of the Code.

Defendant 2's claim against the suit property was satisfied by the deposit pursuant to R. 89, but the decree was not fully satisfied and a particular sum has subsequently accrued as interest. Assuming that defendant 2, the attaching creditor, had the right to bring the property to sale a second time in satisfaction of that balance, that has not been done; if it were done, that sale could again be set aside on payment of the balance and other charges provided for in the rule. No assets have been realised under this attachment against which defendant 2 is entitled to proceed in respect of another decree which he has obtained. If defendant 2 wishes to bring this property to sale, he must attach under that other decree and bring it to sale. But then he would be met by the objection that the sale to the plaintiff was prior to that attachment. The circumstances very much resemble the circumstances of the Privy Council case. In both the cases, the attaching decree-holder was seeking to make use of the attachment for the satisfaction of some other debt when there had been no sale and no realisation of the assets under the attachment. On the other hand there has been an alienation to a third party, which is good against any subsequent attachment by defendant 2. In the result we allow the appeal, reverse the decrees of the lower Courts and remand the case to the District Munsif for disposal on issue 1. Costs will abide.

S.N./R.K. *Appeal allowed.*

(1) A I R 1916 P C 238=40 I C 242=44 I A 72 =44 Cal 662 (P C).

1918 M/36 & 37

A. I. R. 1918 Madras 281

AYLING, J.

Natuthodi Kunhi Moidin— Accused— Petitioner.

v.

P. R. Chamu Nair — Complainant — Opposite Party.

Criminal Revn. No. 332 of 1917 and Criminal Revn. Petn. No. 262 of 1917, Decided on 12th October 1917, from order of Stationary Second Class Magistrate, Ernad Taluk, D/- 8th January 1917 in Mis. Case No. 193 of 1916.

(a) Workman's Breach of Contract Act (13 of 1859), S. 1—"Workman"—Supervisior of coolies is not workman.

The word "workman" in S. 1 must be understood as connoting manual labour of some kind, whether skilled or unskilled. A man who does work of an intellectual nature in connexion with a contract involving manual labour cannot, simply for that reason, be viewed as a manual labourer. A supervisor of coolies therefore who has also contracted to get work performed by them is not a "workman" within the meaning of S. 1, Workman's Breach of Contract Act. [P 283 C 2]

(b) Workman's Breach of Contract Act (13 of 1859), Ss. 1 and 2 — Status of accused as workman must be established.

The status of the accused person against whom the Act is sought to be enforced, whether he is an "artificer, workman or labourer," is an integral part of the case which the complainant has to establish, and if no evidence is let in on the point, the complaint should be dismissed whether the accused does or does not raise the point. [P 283 C 1]

B. Pocker—for Petitioner.

D. Chamier, for *King* and *Patridge*— for Opposite Party.

Public Prosecutor—for the Crown.

Sadasiva Aiyar, J.—I am clear that the words "workman" and "labourer" in Act 13 of 1859 (which does not define these terms) are used in the ordinary popular sense. "Labourer" means "man doing for wages work that requires strength or patience rather than skill or training and "workman" means "operative, man hired to do manual labour : (see the Concise Oxford Dictionary)."

It seems to me that the petitioner, who was entrusted with such a large sum of money as Rs. 2,500 as advance and who was considered to possess the influence, tact and skill necessary to bring and keep on the estate 170 ordinary coolies and 80 coolies skilled in tapping for rubber, cannot be presumed to be a workman or labourer. He was to be given 10 per cent commission on the wages of his Kol maistries and coolies and he was to be given a further Rs. 25 a month if he chose to reside on the estate. The promise to pay Rs. 25 a

month to induce him to reside in the estate was (according to what I consider the natural and reasonable construction of the agreement) evidently in order that the estate might have the benefit of his continual supervision of his coolies on the very spot, and it does not show that he was himself a workman or labourer or that it was intended that he should employ himself as such during his residence on the estate.

The Sub-Magistrate has passed his order in a very summary manner While the agreement states that the petitioner was to supply 170 ordinary coolies and 89 tapping coolies, the Magistrate refers only to the latter 80 coolies ; the complaint and the sworn statement of complainant do not allege that the petitioner is a workman or labourer, the Magistrate does not state in his order that the petitioner is a workman or labourer (admittedly he is not an "artificer") and on the petitioner's bare admission that he had executed the contract, received the advance and failed to have the work completed, an order was made under S. 2, Act 13 of 1859. There is nothing to show that the petitioner was asked to state his defence whether on the law or on the facts. I would therefore set aside the order as the complaint does not state that the petitioner is a workman or labourer, as the Magistrate has not found that the petitioner is a workman or labourer and as there is no legal evidence on the record to prove that he is one.

Phillips, J.—The Magistrate has dealt with this case as one falling under S. 2 of Act 13 of 1859, but petitioner now contends that he was wrong. His two chief grounds of contention are: (1) that petitioner did not contract to do any work but only to supply coolies; (2) that petitioner is not a workman, labourer or artificer within the meaning of the Act. It has been held by this Court that when a workman contracts to get work done by coolies he comes within the provisions of the Act, even though he does not actually work himself: *Rowson* v. *Hanama Mestri* (1) and *Ramasami* v. *Kandasami* (2). In the present case the contract was clearly one to get work performed and not merely one to supply labour, and therefore comes within the Act.

As regards the second point we have really no direct evidence of petitioner's status. No doubt to bring him within the Act petitioner must be a labourer, workman or artificer. The word "workman" has a very wide meaning and is defined in the Century Dictionary as (1) a man who is employed in manual labour whether skilled or unskilled, (2) one who works in any department of physical or mental labour. Even under the Workman's Compensation Act the work has a very wide meaning: vide Stroud's Judicial Dictionary. In *Mamu Beari, In re* (3) the question was considered and it was held that "conveying clay" would be work within the meaning of Act 13 of 1859, provided the personal labour of the person undertaking the conveyance is intended to be utilized. The case in *Gibly* v. *Subbu Pillai* (4) may be distinguished on the ground that in that case there was a distinct finding of fact that the contractor was not a workman. In the present case it is clear from the contract that petitioner was to do some kind of work, for he is to be paid Rs. 25 per mensem as remuneration and an additional commission provided he "works" satisfactorily. His work might merely consist in supervision but in any case he had some work to do. The provision in the contract that he was to live on the estate shows that he was expected to do some work in connexion with the contract, which was a contract for the performance of manual labour. This being so it would appear that he was a workman within the meaning of the Act, and as he did not raise this point in the lower Court I do not think he can now be allowed an opportunity of showing that he was not to do any work under the contract and was not a workman. I would therefore dismiss this petition.

[This petition coming on again for hearing under S. 429, Criminal P. C., on 2nd October 1917, upon perusing the petition, the order of the lower Court and the records in the case and upon hearing the arguments of counsel on both sides and the case having stood over for consideration till this day, the Court made the following:]

1. (1876) 1 Mad 280.
2. (1885) 8 Mad 379.
3. A I R 1915 Mad 88=25 I C 979=15 Cr L J 651.
4. (1884) 7 Mad 100.

Order.—I agree with Phillips, J., that the contract was one not merely to supply labour, but to get work performed by workmen or labourers, and to that extent comes within the scope of Act 13 of 1859. But it is further necessary (vide S. 1) that any person against whom the Act is sought to be enforced should be himself "an artificer, workman or labourer"; and this is a point, on which not only is there no finding by the Magistrate but which has apparently escaped his attention altogether. This status of the accused person is an integral part of the case which the complainant has to establish; and if there is no evidence, the Magistrate's order cannot stand, no matter whether the accused did or did not raise the point before him.

With all respect I cannot agree with my learned brother Phillips, J., in holding (as I think he does) that the evidence on record is sufficient to establish that the present petitioner (accused) is a workman within the meaning of the Act. The secondary definition of "workman" quoted by him from the Century Dictionary "one who works in any department of physical or mental labour" cannot, in my opinion, be applied here. It is broad enough to include anyone but an absolute idler, and would cover many classes who have been specifically held not to come under the Act, e. g., horsekeepers, cooks, temple servants and cartmen. (vide Criminal Revision Cases Nos. 159 of 1883, 2 of 1890, 412 of 1902 and 1427 of 1877 all reported in 1 Weir Criminal Rulings Pp. 688—690). In a recent case Miller, J., held that a musician in a band was not a workman: vide *Re. Rosario Quadros* (5). Of course all these are very different from plantation coolies; but the cases are good authority for holding that the word "workman" cannot be understood in this sense. The position of the word "workman" sandwiched in between "artificer" and "labourer" is most significant, and I am inclined to agree with petitioner's vakil that the words were purposely used in the order in which they appear in order to indicate a descending scale from skilled to unskilled labour. A perusal of the preamble of the Act, which was passed primarily in the interests of manufacturers, tradesmen and others in the presidency towns, goes to strengthen this impression. I think the word "workman" must be understood as connoting manual labour of some kind, whether skilled or unskilled.

Then it is argued that as the coolies and tapping coolies by whom petitioner contracted to get work done were undoubtedly workmen, he also must be regarded as a workman, on the ground that he was employed to supervise them. It is not suggested that he had any other work to do beyond supervision of themost general description. There is a separate provision for Kol maistries"—one for every 16, or 25 coolies according to the nature of the work Even this general supervision by petitioner is no essential part of the contract. There is no provision requiring that he should live on the estate: it is simply provided that, if he does, he is to get Rs. 25 a month. His work even as a general supervisor is purely optional; and there is nothing to show that he did any or cared to avail himself of the clause in question. Even apart from this and assuming that his working as a supervisor over the coolies supplied by him was a part of his undertaking, I should find the greatest difficulty in the way of holding that a supervisor over 250 coolies, regarding whose labour he has contracted, is a "workman" within the meaning of the Act. A man, who does work of an intellectual nature in connexion with a contract involving manual labour cannot, I think, simply for that reason, be viewed as a manual labourer: and the word "workman" must be understood in the same sense wherever it occurs in the Act.

That personal (in the sense of manual) labour by the defendant contractor is essential to the enforcement of the Act, seems to me to be recognised in *Gibly* v. *Subbu Pillai* (4) and *Caluram* v. *Chengappa* (6) as well as in a recent case to which I was a party [In Re: *Mannu Beari* (3)] while in another reported case [*Ramasami* v. *Kandasami* (2)], it is made clear that the defaulting contractor was a person of the coolee class who bound himself to render personal labour, if the advance was not worked out by the coolies whom he contracted to supply. I find two early cases, High Court Proceedings, 13th July 1887 (7), and *Rowson* v. *Hanama Mestri* (1), in which the enforcement of the Act was certainly allowed without, so far as

5. (1915) 38 Mad 51= 30 I C 453.

6. (1890) 13 Mad 351.
7. (1866) 3 M H C R App 25.

appears any consideration of this point, merely on the ground that the contract was one to get work performed. But it seems to me more likely that the point was one to which the attention of the learned Judges was not directed, rather than one which they considered immaterial. There is nothing in these judgments to suggest that they adopted the reasoning referred to above. All the later cases tend in the contrary direction and they seem to me to be in accord with the wording of the Act. After careful consideration I can only concur in the conclusion of Sadasiva Aiyar, J. and direct that the order be set aside.

S.N./R.K. *Order set aside.*

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SESHAGIRI AIYAR AND KUMARASWAMI SASTRI, JJ.

Vairappa Thevan and *another*—Defendants—Appellants.

v.

Subbiah Thevan and *others*—Plaintiffs—Respondents.

Second Appeal No. 56 of 1917, Decided on 20th December 1917, from decree of Temporary Sub-Judge, Tanjore, in Appeal Suit No. 54 of 1916.

Civil P. C. (1908), S. 11 and O. 34, Rr. 1, 2, 3 and 10 — Redemption suit — Suit for mesne profits after date of payment in preliminary decree lies — Mortgagor's remedy not being restricted to adjustment in final decree.

A suit lies for mesne profits after date of payment under a preliminary decree in a suit for redemption of mortgage, the mortgagor's remedy not being confined to a claim for adjustment of accounts at the time of the passing of the final decree : 6 *I C* 336, *Appr* ; 42 *I C* 230 and 31 *Bom* 527, *Dist.* [P 284 C 2]

K. Bashyam Aiyangar — for Appellants.

C. S. Venkatachariar — for Respondents.

Judgment.—The previous suit was for redemption. A preliminary decree was passed on 30th September 1909, which gave a month for the payment by the mortgagor. The payment was actually made on 29th October 1909. The final decree was passed on 13th December 1912. The present suit is for mesne profits between 29th October 1909 and the date of the suit. Both the lower Courts, following *Sakari Datta* v. *Sheikh Ainuddy* (1) gave plaintiff a decree. In second appeal Mr. Bashyam Aiyangar argued that the claim is barred by res judicata. His contention is that as O. 34, R. 10, provides for an adjustment of the amount due on the occasion of passing the final decree, the relationship of mortgagor and mortgagee subsists till then and the only remedy open to the mortgagor is to claim a settlement of accounts in the passing of the final decree and not to sue separately for the mesne profits. The question is whether the mortgagor is compellable to adopt this course indicated by the learned vakil.

It was recently held by a Full Bench of this Court, that a claim for future mesne profits can be sued on separately. It is not seriously disputed that a decree for redemption is practically a decree for possession, subject to the condition of paying a certain amount fixed by the Court. Therefore when that amount has been paid, the mortgagor is entitled to possession and the retention of possession by the mortgagee is that of a wrong-doer. This is the view taken in *Sakari Datta* v. *Sheikh Ainuddy* (1) and we agree with that decision. Under O. 34, R. 1 (a), the moment the amount ascertained by the preliminary decree is paid into Court, the mortgagor acquires a right to the property. There is nothing more to be done by way of adjustment. Moreover, in this case, the possession of the property was to be in lieu of interest. Therefore no question of further accountability arises : vide S. 77, T. P. Act.

Our attention was drawn to a decision of Abdur Rahim and Bakewell, JJ., in *Papla Chakrapani Chettiar* v. *Ramaswamy Thenkondan* (2). The learned Judges held in that case that the Court had power, even after the preliminary decree, to adjust the rights of the parties. It was neither argued nor decided that the mortgagor is bound to claim this adjustment and that if he did not do so, his right to mesne profits will be barred as res judicata. *Rukhminibai* v. *Venkatesh* (3), which was strongly relied on by the learned vakil for the appellants, was a case in which tender was before decree. No payment was made under the decree and consequently the present question is unaffected by that decision. The other cases quoted do not decide that the mortgagor's only remedy is to claim an adjustment before the passing of the final decree.

1. (1910) 6 I C 336.

2. (1917) 42 I C 230.

3. (1907) 31 Bom 527

We think the decision of the lower appellate Court is right and dismiss the second appeal with costs.

S.N./R.K. *Appeal dismissed.*

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SESHAGIRI AIYAR AND NAPIER, JJ.

Eledath Thavazhi—Defendant—Appellant.

v.

Eliangattil Sankara Valia Rajaha Avargal and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1748 of 1916, Decided on 29th November 1917, against decree of Temporary Sub. Judge, Palghat in Appeal Suit No. 1000 of 1916.

(a) Evidence Act (1 of 1872), S. 116—Tenant is estopped from setting up adverse title.

Where the relationship of landlord and tenant has once been created, it cannot be terminated by any adverse action taken against the landlord by a third party, whether that party be the Government or some other rival claimant, and the tenant will still be estopped from denying the landlord's title. 43 *I. C.* 677 *Foll.* 27 *I. C.* 785 and 2 *Mad.* 226, *Diss. from*; 12 *Mad.* 422, *Dist.*

(b) Land lord and Tenant—Adverse possession—Tenant cannot set up adverse title on basing of Patta from stranger and no adverse possession can be claimed—Limitation Act (9 of 1908), Art. 144.

The grant of a patta by Government to the tenant of a third person or a declaration of its ownership of the property will not dissolve the relationship of landlord and tenant already existing or start adverse possession in favour of the tenant against the landlord. [P 286 C 1]

A. V. K. Krishna Menon—for Appellant.

C. Madhavan Nair and *C. V. Anantha-krishna Aiyar*—for Respondents.

Judgment.—Defendant 2 obtained a kanom from the plaintiff's Tarwad in 1860. There was a decree for redemption against him; after decree and before restoring possession, he assigned his rights to the grandmother defendant 1 by Ex. 8. Subsequently, defendant 1's grandmother obtained a kanom in 1888 from the plaintiff's Tarwad which was renewed in 1899. Defendant 2 took on lease the properties included in these demises from defendant 1, Ex. 30. Plaintiff sues to redeem the kanom. Defendant 2 contended that the lands in suit were not included in the demise sued on. The Subordinate Judge has found after full discussion that they were included, and we see no reason to differ from him. The learned vakil for the appellant next contended that the lease under which he was holding was determined by the Government granting him a patta for the lands in 1893 and as he has been holding the lands under the Government, since then without paying any rent to defendant 1 or the plaintiff's Tarwad, he had acquired a title to them by adverse possession.

The case strongly relied on by him for this proposition is *Subbaraya* v. *Krishnappa* (1). But an examination of the facts of the case shows that that decision lends no support to the appellant. In that case, plaintiff 1 and defendant 1 were adjoining landowners, the former being an old wargdar and the lattar a person to whom a warg patta was newly granted. The land in question was Government waste land situated near the two wargs. The plaintiff, under the impression that the waste land would be granted to him by the Government, allowed plaintiff 2 to take them on lease from him. Plaintiff 2 assigned that lease to defendant 2. The Government, however, did not grant a patta to plaintiff 1, but gave the lands to defendant 1. Defendant 2 contended that this action of the Government put an end to his tenancy from plaintiff 1; and the Court upheld that contention. It was apparently conceded by the contending parties that the lessor and the lessee did not deal with the property in the belief that the lessor had a right to grant a lease. The lease was accepted on the footing that the right to the land would be granted subsequently by the Government. When that understanding between the parties was not realized, defendant 2 was held entitled to repudiate the relationship of landlord and tenant. We are therefore of opinion that that decision is no authority for the broad proposition that an interference by a third party, whether that party be the Government or some other rival claimant, can have the effect of determining the relationship originally created between the landlord and the tenant. The next case relied on was *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib* (2). Hannay J., seems to have held that *Subbaraya* v. *Krishnappa* (1) was authority for the theory that a declaration by the Government can sever the relationship of a tenant to the landlord under whom he held properties. In our opinion the learned Judge has stated the inference from the earlier case too broadly. As

1. (1889) 12 Mad 422.
2. (1915) 27 I C 785

regards *Ammu* v. *Ramakrishna Sastri* (3), we are clear that the statement

'the tenancy under which the appellant held the plot of which she is now in possession was determined when the Deputy Collector declared the land to be the property of Government and granted it to the appellant as a riayat of the Government, and thereafter the appellant was not estopped from contending that the interest of the former landlord had expired' [see *Amman* v. *Ramkrishna Sastri* (3)]

does not enunciate the law correctly. In more recent cases, this Court has recognized the principle that any adverse action taken by a third party cannot have the effect of terminating the relationship of landlord and tenant and that the tenant will be estopped by a provisions of S. 116 Evidence Act from denying the landlord's title. See *Ammu Ammal* v. *Puthiarambath Moidin* (4) and second appeal No. 320 of 1915. We think these decisions lay down the law correctly. In both the second appeals the action of the Government was relied on as starting adverse possession against the landlord. As regards improvements, defendant 2 has been awarded compensation after the date of Ex. 7, under which he sold his right to the then existing improvements to defendant 1. The Subordinate Judge is right and we dismiss the second appeal with costs.

S.N./R.K. *Appeal dismissed*

3. (1878) 2 Mad 226.
4. A I R 1918 Mad 278=43 I C 677.

A. I. R. 1918 Madras 286

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Kalliani Ammal and *others*—Plaintiffs—Appellants.

v.

P. Narayana Menon and *others*—Defendants—Respondents.

Second Appeal No. 149 of 1916, Decided on 3rd October 1917, against decree of Temporary Sub-Judge Palghat, in A. S. No. 120 of 1915.

Ratification— Bequest to heir of share allotted in partition—It amounts to ratification and legatees are barred from disputing partition—Will.

A testator, by his Will, declared that the share allotted to him in a partition previously effected as between himself and his co-parceners was to be taken by his heirs on his death, if he did not question the partition during his lifetime. In a suit by the legatees under the Will to set aside the partation:

Held: that the conditional ratification of the partition by the testator was valid and that the suit was, therefore, not maintainable. 29 *Mad.* 62 *Foll.*

[P 288 C 1]

C. V. Ananthakrishna Aiyar—for Appellants.

K. P. M. Menon—for Respondents.

Facts. of the case are clear from the following judgment of the lower appellate Court. The plaintiffs, the wife and children of one Sankunni Menon, deceased, brought the suit to recover possession of the plaint properties with mesne profits from defendant 1 as karnavan and manager of his family. The other defendants in the suit are the remaining members of the tavazhi (branch) of which defendant 1 is the karnavan and manager. Plaintiffs' suit was decreed and defendant 1 appeals. The respondents are the plaintiffs. The facts of the case are not in dispute. Plaintiff 1's husband, Sankunni Menon, the defendants and some other persons formed members of Parutholli Tarwad. The defendants and other members of the Tarwad effected a partition of the Tarwad properties under a deed dated 29th Dhanu 1086 (13th January 1911). The deceased Sankunni Menon was not a party to the partition, but the properties which under the partition were set apart for the share of Sankunni Menon were put in the possession of defendant 1 by the other parties to the partition deed and it was provided that if Sankunni Menon did not take possession of the items set apart to him, during his lifetime, the defendant's tavazhi was to enjoy the same. Sankunni Menon, so long as he was alive, was not for treating the partitien as valid and for accepting the properties allotted by the partition deed for his share as his own. He, however, executed a will (Ex. B) in favour of the plaintiffs (his wife and sons), whereby he bequeathed the property reserved for his share under the partition deed to his wife and children contingent upon the event of his not setting aside the partition-deed in his lifetime. The plaintiffs claim the properties as the devisees under the will. Defendant 1 resisted the claim and contended that the plaintiffs have acquired no title to the properties and that the late Sankunni Menon had no right to execute a will in respect of his properties. He denied that he was a trustee for the suit properties and also disputed his liability to render accounts as claimed by the plaintiffs and to pay mesne profits. The points for decision are: (1) Whether the plaintiffs have become the owners of the suit properties on

the death of Sankunni Menon by virtue of the will left by him in favour of the plaintiffs and of the fact of Sankunni Menon's marriage by plaintiff 1 having been registered under the Malabar Marriage Act, and (2) whether Sankunni Menon had a valid disposing interest in the suit properties on the date of the will; Ex. A is a copy of the partition-deed entered into among the members of the defendants' Parutholi Tarwad, dated 27th Dhanu 1086 (13th January 1911). As already observed Sankunni Menon was not a consenting party to the partition and he was not one of the executants thereof. In fact, he objected by Ex. 1, a letter (22nd December 1910) sent by him to the Sub-Registrar of Ponnani, to the partition-deed being registered. Till his death he was not for approving the arrangement evidenced by the partition-deed Ex. A, and Exs. 2 and 3 show his attitude of mind in respect of the partition, Ex. A. Even from the very instrument of will, which he left in favour of the plaintiffs (Ex. B dated 28th June 1911), two months prior to his death, it is clear that Sankunni Menon had not given up the idea of setting aside the partition arrangement evidenced by Ex. A, either through Court or otherwise. He bequeathed the properties in favour of the plaintiffs only contingent upon the event of his not setting aside the partition-deed during his lifetime.

It is not alleged in the plaint that Sankunni Menon ratified the arrangement made in the partition-deed. As a matter of fact, it could not be in the nature of things, as we find that even when he drew up the will (Ex. B), he had the intention of setting aside, if possible, the partition arrangement. It is unquestionable that a partition of property belonging to the members governed by Marumakkathayam Law, to be valid, requires the consent of each and every one of the persons interested in the property: *Arayalprath Kunhi Pocker* v. *Kanthilath Ahmad Kuti Haji* (1). It admits of no doubt that an adult member of a family is entitled to be consulted and his consent secured before a valid partition could be effected. It does not appear that Sankunni Menon was consulted in the matter of the partition. It is however beyond doubt that Sankunni Menon was not for effecting a partition and did not consent to the partition. Nor did he, at any time before his death, ratify the arrangement so far at any rate as it related to his share of the properties mentioned in the partition-deed. If he had ratified the arrangement and signified his assent to the other members of the Tarwad to take possession of the properties set apart for his share before his death, the plaintiffs would be entitled to succeed. It is not correct to say that it was unnecessary for Sankunni Menon to accept the partition-deed before any title passed to him, because the other members have renounced their rights to the suit items in his favour in consideration of their getting some properties for their shares. To effect a valid partition in a Marumakkathayam Tarwad, the consent of each and every one of the adult members of the family, and if they are minors, the beneficial nature of the arrangement to the family as a whole, including the minor members, are essential. If one adult member of the Tarwad stands against the partition, the partition, as a whole, is invalid and it cannot be said to be invalid only in respect of his share.

It is, no doubt, true that the other members of the Tarwad have given effect to the partition and were in possession and management of the respective shares in the properties as per the partition deed. This fact, by itself, cannot render a partition valid when its validity is impeached, as it could certainly be impeached. With this matter however we are not here concerned. Sankunni Menon had the personal right of election either to avoid the partition or to ratify the partition during his lifetime. He did neither before his death. And failing to do so, he had no disposing interest in the properties (at the time of his death) either at the time of the will or at the time of his death. The will takes effect only after his death. Plaintiffs acquired no right to the properties, under the will or by the marriage. My findings on the two points are in the negative. As regards the mesne profits, I am not prepared to distrub the finding of the lower Court. The acccount books Ex. 7 and 8 are unreliable as defendant 1, admittedly, has no personal knowledge of the entries contained therein. Grounds 2 and 3 attack the position assigned to defendant 1 as the trustee for Sankunni Menon so far as the plaint properties are concerned. I think that on a reading of the partition-deed, defendant 1 is, more or less, an implied agent for Sankunni

1. (1906) 29 Mad 62.

Menon in respect of suit properties. In the result I allow the appeal with costs throughout.

Judgment. — We think the will amounted to a conditional ratification of the partition, to take effect if he died without setting it aside, and that the ratification completes the partition. *Arayalprath Kunhi Pocker* v. *Kanthilath Ahmad Kuti Haji* (1). The properties claimed were assigned to the deceased as his share, and we do not think his right to them could be made conditional on his taking possession of them during his lifetime.

We reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs here and in the lower appellate Court.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 288

WALLIS, C. J., BAKEWELL AND KUMARASWAMI SASTRI, JJ.

Mannath Veettil Itti Panku Menon—Defendant—Appellant.

v.

Thazheth Meladam Dharman Achan Avergal and *another*—Plaintiffs — Respondents.

Letters Patent Appeal No. 19 of 1917 Decided on 5th October 1917, from judgment of Phillips J, D/- 22nd December 1916, in Second Appeal No. 586 of 1915.

(a) Malabar Law — Melkanom deed — Stipulation for redeeming kanom by melkanomdar—Melcharth assigned to kanomdar —Assignee agreeing to pay arrears of rent to jenmi—Mortgagor's right of enforcement is not extinguished and limitation is of three years—Limitation Act (1908), and Art. 62.

Per *Wallis C. J* and *Kumaraswami Sastri J*. *Bakewell J*. dissenting: plaintiff, jenmi, granted a kanom to defendant 2, on 6th July 1893 to enure for period of 12 years. On 28th January 1904 the plaintiffs granted a melcharth of the same lands to defendant 1, whereby the latter was to redeem the kanom on the expiry of the kanom period; and pay to plaintiff the arrears of rent due to him by the kanomdar for the years 1896 to 1905 and 1910 to 1913, even "in case there was delay in defendant getting possession of the properties." Defendant 1 did not redeem the kanom which expired in 1905 but assigned the melkanom to the kanomdar, defendant 2, in 1909 by a document, whereby the assignee undertook to pay the arrears of rent due to the jenmi. The plaintiff sent a notice to defendant 2, on 18th January 1912 demanding the arrears of rent under the deed of assignment and subsequently filed the present suit:

Held, Per *Wallis, C. J.*, and *Kumaraswami Sastri, J.*) *Bakewell. J.*, dissenting).—(1) that the melkanom was not invalid and inoperative by reason of the melkanomdar's failure to redeem the kanom and that, under the terms of the assignment of the melkanom, the plaintiff became entitlad to recover the arrears of rent from defendant 2. [P 290 C 2; P 292 1, 2]

(2) that the suit was governed by Art. 62, being a suit for money had and received by defendant 2 to the plaintiff's use and could be brought within three years from the date of his notice. [P 290 C 1]

Per *Wallis, C. J.*,—By reason of the assignment, defendant 2 became bound to redeem the old kanom and to hold the demised land for a further term for the old kanom debt less the amount of arrears which were due at the date of redemption. The redemption could not be treated as having taken place on the date of the assignment, as the arrears of rent were not paid over to the plaintiff as they should have been. Even if it were, time would not run against plaintiffs under Art. 62, read with S. 18 Limitation Act, so long as he was kept in the dark as to the manne, in which his rights were affected by the assignr ment. [P 290 C 1]

Per *Kumaraswami Sastri, J.*—The rights of the parties must be dealt with on the footing that defendant 2 remains liable for all the legal consequences that would flow from his being both the kanomdar and the assignee of the melcharth. [P 292 C 2]

The effect of the assignment was to extinguish the kanom at least from the date the jenmi assented to the assignment, and to allow the kanomdar to remain in possession for the period provided in the melkanom. [P 292 C 2]

It is not open to the kanomdar to claim the advantages which he got by reason of the assignment of the melcharth without performing the obligations imposed by the melcharth.

(b) Malabar Law—Kanom—Whether jenmi has charge on kanom debt for arrears of revenue—Quaere

Quaere.—Whether, under Malabar Law, the jenmi has a charge on the amount of the kanom debt for arrears of revenue or merely a right to take credit for the amount of such arrears when the account is taken as between the mortgagor and the mortgagee? [P 290 C 1]

Per *Bakewell, J.*—The demise under the melkanom document was not intended to take effect till the melkanomdar paid the rent to the jenmi and as this was not done, the term of 12 years contemplated by it did not come into existence and the assignment, in consequenee, was in breach of its terms and passed nothing to plaintiff. [P 291 C 1]

Defendant 1's stipulation to redeem the kanom and pay rent to the jenmi was only a personal convenant and could not be said to run with the land so as to be enforceable against the kanomdar, defendant 2. [P 291 C 2]

The sum due for rent cannot be said to be money had and received by the mortgagee to the use of the mortgagor. [P 290 C 2]

(c) Contract Act (1872), Ss. 2 (d), 37—Person not party to contract, can enforce it if it is for his benefit.

Parties to a contract are the proper parties to sue on it, except where the contract was made for the benefit of third parties and in such circumstances as to give rise to a presumption as to a trust in their favour. [P 289 C 2]

A person, who, though not a party to a contract, takes benefits under it is bound to pay money due under it. The rule in *Tweedle* v. *Atkinson* 1 B. and S. 393; that no stranger to the consideration can enforce performance of a contract though made for his benefit has exceptions and is not of universal application in India. 13 *I C* 304 *Dist.* [F 292 C 2; P 293 C 1]

P. K. M. Menon and *K. Kutti, Krishua Menon*—for Appellant.

C. Madhavan Nair, K. P. Ramkrishna Iyar and *P. Appu Nair* — for Respondent.

Wallis, C. J.—This appeal raises a question of some difficulty. In 1904 the plaintiff, Jenmi, who was entitled to redeem in 1905 a Kanom granted by him to defendant 2 in 1893, executed a Melcharth in favour of defendant 1, by which the latter became entitled to redeem defendant 2, on the expiry of his Kanom and to hold the lands himself on a fresh Kanom. The Kanom debt payable to defendant 2 on redemption was subject to reduction by the amount of the arrears of rent due from defendant 2 to the plaintiff under the Kanom even though a suit for the arrears had become barred, and defendant 1 was required on redemption to deduct this amount from the Kanom debt and pay it over to the plaintiff, or in other words to collect the arrears due to the plaintiff. He did nothing till 1909 when he assigned his rights under the Melcharth to the Kanomdar, defendant 2, stipulating at the same time that defendant 2 should pay the plaintiff the arrears of rent due under the Kanom which he had bound himself to collect and pay on redeeming defendant 2. One of the questions argued before us is whether the plaintiff is entitled to sue on this contract made between defendant 1 and defendant 2. As regards this I agree with Abdur Rahim, J., that he cannot, and that the question is concluded by the recent decision of the Privy Council in *Jamna Das* v. *Ram Autar Pande* (1), where Lord Macnaghten delivering their Lordships' judgment held that a purchaser's contract with his vendor to pay off a mortgage on the property sold could not be enforced by the mortgagee:

"The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him and the purchaser is not personally bound to pay off the mortgage-debt."

This, in my opinion, recognizes the general applicability in India of the Common law rule that the parties to a contract are the proper parties to sue on it, which was also the rule in equity except in so far as equity made an exception, as explained in *Gandy* v. *Gandy* (2), in cases where the contract was made for the benefit of a third party and in such circumstances as to give rise to a trust in his favour, which is not the case here. In the earlier case of *Nawab Khwaja Muhammad Khan* v. *Nawab Husaini Begum* (3) their Lordships held that this Common law rule was not applicable to the facts and circumstances of that case, in which the agreement executed by the defendant had specifically charged immoveable property for the allowance which he had bound himself to pay to the plaintiff then a minor in contemplation of her marriage. Their Lordships observed that, although no party to the document, she was clearly entitled in equity to proceed to enforce her claim, and that in India, where marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connexion with such contracts. It is clear however from the later case that their Lordships did not intend to lay down that the common law rule had no application to India. In *Tweddle* v. *Atkinson* (4), to which their Lordships referred, reliance had been placed on certain old cases in which persons not parties to the contract had been allowed to maintain an action in assumpsit apparently, as observed by Crompton, J., on the ground that the action of assumpsit was in its origin an action of trespass on the case.

In *Gandy* v. *Gandy* (2) Bowen, L. J. considered that it would be mere pedantry now to go through the history of that idea; and this is probably why their Lordships in the case we are considering disposed of the case of *Tweddle* v. *Atkinson* (4) with the remark that it was an action of assumpsit; but, as I have already said, they did not mean by this that the Common law rule on the basis of which that action was dismissed was generally inapplicable in India. This however does not appear to me to dispose

1. (1912) 34 All 63=13 I C 304=39 I A 7 (P C).
2. (1885) 30 Ch D 67.
3. (1910) 32 All 410=7 I C 237=37 I A 152 (P C).
4. (1861) 1 B & S 393.

of the present case. The assignment by defendant 1 of his right under the Melcharth to defendant 2 has been recognized by the plaintiff, who, by the notice Ex. B, dated 8th January 1912, demanded payment of the arrears from defendant 2 by reason of the assignment and has also framed the present suit upon it; and even if it could be said that the Melcharth contained an applied covenant against assignment to defendant 2 I do not think the validity of the assignment can now be questioned. I think however that by reason of this assignment defendant 2 became bound to redeem the old Kanom and to hold the demised lands for a further time for the old Kanom debt less the amount of arrears which were due at the date of redemption and that the plaintiff Jenmi when he came to know of the assignment, which was apparently shortly before he served the notice Ex. B on defendant 2, became entitled to insist on his so redeeming the old Kanom and to treat the arrears as money in defendant 2's hands had and received to the plaintiff's use and to recover it within three years under Art. 62, and I think he must be taken to have exercised this right when he demanded payment of the arrears from defendant 2 by Ex. B on the basis of the assignment.

I do not think we are bound to treat the redemption as having taken place on the date of the assignment by defendant 1 to defendant 2, seeing that the arrears were not paid over to the plaintiff as they should have been. Even if we were, I should be prepared to hold that under Art. 62, read with S. 48, Lim. Act, time would not run against the plaintiff so long as he was kept in the dark as to the manner in which his rights had been affected by the assignment of the defendant's 1's Melcharth rights to defendant 2. In this view of the case I do not think it necessary to decide the question which has been raised, whether under the Malabar law the Jenmi has a charge on the amount of the Kanom debt for arrears of revenue or merely a right to take credit for the amount of such arrears when the account is taken as between the mortgagor and the mortgagee. A charge may be realized at any time under S. 100, T. P. Act, and one test would appear to be whether under the Malabar custom barred arrears can be recovered at any time by enforcing the charge. If not I should, as at present advised, be disposed to hold that there cannot, strictly speaking, be said to be a charge. In the result the Letters Patent appeal will be dismissed with costs.

Bakewell, J.—The plaint recites a Kanom deed, dated 6th July 1893, granted by the plaintiff to defendant 2, and a Melcharth, dated 28th January 1904, to defendant 1, and alleges that under the provisions of the Melcharth defendant 1 was bound to redeem defendant 2 on the expiration of the term of the Kanom in 1905 and to pay to the plaintiff the arrears of rent due by defendant 2 for the years 1896 to 1905. The plaintiff also recites an assignment of the Melcharth, dated 6th July 1909, by defendant 1 to defendant 2 and an agreement therein contained that the latter would pay the arrears of rent to the plaintiff. The cause of action is stated to have arisen on the date of the Melcharth and the plaint prays for payment of the arrears of rent from 1896 to 1905 and from 1910 to 1913 and for sale of the defendants' Kanom right. The suit is therefore to enforce payment of moneys due to the plaintiff under the provisions of the Melcharth. The plaintiff's remedy for rent for the earlier period is barred, but in a suit for redemption he would be entitled to have it credited to him in taking an account as between the mortgagee in possession and the mortgagor. In such a suit the mortgagor is entitled to be credited with any moneys received or due by the mortgagee, including rent, as on the dates on which they were received or fell due; and I do not think that it is correct to say that these moneys are a charge on the mortgage moneys, or that the learned Judges in the case of *Kanna Pisharodi* v. *Kombi Achen* (5) intended to hold that any kind of charge is created by non-payment of rent.

I do not think that the sum due for rent can be said to be money had and received by the mortgagee for the use of the mortgagor; he was bound to pay this sum but he never in fact received it on account of the mortgagor. At the date of the Melcharth the plaintiff was therefore entitled to have an account taken of the amount due to defendant 2 under his Kanom, in which the arrears of rent would be credited to the plaintiff, and to redeem this defendant by payment

5. (1885) 8 Mad 381.

of the balance, but there was no specific sum due and payable by the defendant to the plaintiff.

It appers from the recitals of the Melcharth that the plaintiff had disputes with defendant 2 and was anxious to redeem him and compel him to give up possession of the land, and also to obtain payment of arrears of rent, and the bargain between the plaintiff and defendant 1 as evidenced by this document was that on the expiry of the term granted by the Kanom defendant 1 should redeem defendant 2 by payment of the balance due to the latter and take possession of the land and that defendant 1 should then pay to the plaintiff the arrears of rent which would have been credited to him in the account. The document contains a demise of the land to defendant 1

"for a period of 12 years commencing from the date of recovering possession of the said properties,"

but provides that defendant 1 shall pay rent from 1905, when the Kanom term expired, "even in case there is delay in getting possession of the properties." The last provision appears to have been inserted for the purpose of ensuring prompt performance of defendant 1's obligation to redeem the mortgagee. In my opinion the demise under this document was not intended to take effect until this obligation had been fulfilled, and that since this has not been done the term of 12 years contemplated by the Melcharth has not yet come into existence, and the assignment of the benefit of the document was in breach of its terms and passed nothing to defendant 2. The relations between the plaintiff and defendant 2, therefore fall to be determined in accordance with the provisions of the kanom, and the plaintiff is not entitled to any remedy under the melcharth as against defendant 2.

Assuming that on the true construction of the melcharth a leasehold interest was created in favour of defendant 1 immediately upon the determination of the term granted by the kanom to defendant 2, and that the assignment of the melcharth to defendant 2 imposed upon him an obligation to take an account of the amount due under his kanom and to reedeem himself, the result would be that he would hold the term granted by the Melcharth as security for the balance found to be due to him. The obligation to pay a certain item taken into the account in ascertaining the balance would arise not from the redemption but from the personal liability undertaken by defendant 1 under his melcharh. Defendant 1's obligation to pay a sum of money determined by the arrears of rent due under the previous demise in fact formed part of the consideration for the grant of the new lease; this sum was not rent due under the latter, and the agreement to pay it cannot be said to run with the land so as to be binding upon an assignee. The sum agreed to be paid might possibly be a charge upon the interest (if any) of defendant 1 in the land, as unpaid purchase money, but this point has not been taken either in the plaint or the arguments. I respectfully agree with the learned Chief Justice that a contract cannot be enforced by a person not party to it, and I think that the provisions of the melcharth that defendant 1 shall redeem the kanomdar and pay a certain sum to the plaintiff are personal covenants and cannot be enforced against defendant 2. The same reasoning applies to the provisions of the assignment to defendant 2.

The plaintiff appears to have acquiesced in the assignment of the melcharth to defendant 2, but it has not been shown that the latter has, by conduct or otherwise, agreed to be bound by its terms; on the contrary the assignment appears to have been obtained by him with the view of preventing the provisions of the melcharth from coming into force and thus postponing the redemption of his mortgage. The lower Appellate Court refused relief against defendant 1; and there is no appeal from that order by the plaintiff For these reasons I think that this appeal should be allowed, the decrees of the lower Courts set aside and the plaintiff's suit in respect of rent for the period from 1895 to 1905 dismissed.

Kumaraswami Sastri, J.—The suit out of which this appeal arises was filed by the plaintiff (the Jenmi) to recover arrears of rent. Defendant 2 obtained a kanom from the Jenmi under Ex. 3 on 6th July 1893, whereby he was entitled to be in possession of the properties demised for 12 years (i. e., till 6th July 1905). On 28th January 1904 the Jenmi granted a melcharth to defendant 1 by Ex. 1, the material portion of which runs as follows:

"On the expiry of the term of the demise you shall either directly or by suit pay to Gopala Menon and another (the kanomdars under Ex. 3) the balance kanom after setting off the arrears of purapad and interest against the kanom and obtain possession of the properties. And you shall hold the properties on paying properly the purapad due from 1081 (1905—1906). You should then pay to the edom the value of the purapad which you get set off against the kanom and obtain receipt therefor . . . It is stipulated that you should pay the whole of the purapad from 1081 (1905—1906) even in case there is delay in getting possession of the properties '.

Defendant 1 did not redeem the Kanom of defendant 2 when it became redeemable on 6th July 1905, but assigned his rights under the Melcharth deed Ex. 1 to the Kanomdar by the deed of assignment Ex. 2, dated 6th July 1909. The material portion of the document runs as follows:

"I have this day received in cash from you Rs. 600 made up of the renewal fee of Rs. 400 due to me in accordance with the said melcharth and interest thereon and Rs. 25 being the value of paddy consisting of the michavaram paid by me to the jenmi from 1081 (1905—1906) to 1084 (1903—1909) with interest thereon, and I have hereby assigned to you all the rights belonging to me under the said melcharth . . . You should directly pay to the jenmi the arrears of michavaram, etc., payable to the jenmi from 1071 (1895—1896) to 1080 (1904—1905) inclusive. If you do not do so, you shall be liable for the damages arising therefrom".

Although the jenmi might have repudiated the Melcharth owing to the Melcharthdar's failure to redeem the prior Kanom as expressly stipulated in the Melcharth, he did not choose to do so; but on the contrary sent the notice Ex. B to the assignee of the Melcharth demanding arrears of rent, "as he held in himself the entire rights of the prior tenant and the Melcharthdar". In his plaint the jenmi recognizes both the Melcharth and the assignment as valid and subsisting transactions at the date of suit and he obtained a decree against defendant 2. The melcharth provides for rent being paid to the jenmi even if the melcharthdar delayed in redeeming the kanom, and there is nothing so far as I can see to prevent (in the absence of any objection raised by the jenmi) the kanomdar and melcharthdar from agreeing between themselves that the kanomdar is to remain in possession so long as the rights of the jenmi to the rent reserved by the melcharth and his right to recover arrears of rent on the kanom are not affected. I do not think that the melcharth was at the date of the assignment invalid and inoperative by reason of the failure of the grantee to redeem the kanom. The rights of the parties must be dealt with on the footing that defendant 2 remains liable for all the legal consequences that would flow from his being both the kanomdar and the assignee of the melcharth. I am of opinion that the effect of the assignment of the melcharthdar's rights to the kanomdar was to extinguish the kanom at least from the date the jenmi assented to the assignment. The kanomdar then became entitled to use the melcharth as a shield against any attempts which the jenmi might make to recover possession of the land. If the melcharthdar instead of assigning the melcharth had acted according to its terms and redeemed the kanom, the jenmi would, under the terms of Ex. 1, have been entitled to recover the sum which would be in the melcharthdar's hands as arrears of rent which had been set off against the kanom amount.

There can be little doubt that the effect of the assignment of the melkanom to the kanomdar was to allow the kanomdar to remain in possession for the period provided in the melkanom, and the question is whether the kanomdar can be heard to say that he is under no obligation to pay the jenmi arrears of rent on the kanom which the kanomdar bound himself to pay the jenmi under Ex. 2. I do not think it is open to the kanomdar to claim the advantages which he got by reason of the assignment of the melcharth without performing the obligations imposed by the melcharth. In *Kulandavelu Pedayachi* v. *Kumatchi Ayengar* (6) it was held that a person, who though not a party to a contract, takes benefits under it, is bound to pay money due under the contract. The case was one where by a partition deed between two brothers, lands were given to a female member for her maintenance on condition that she paid a certain sum of money to each of the brothers. She took possession and was sued by one of the brothers for the amount payable. The lower Court dismissed the suit on the ground that she was no party to the contract but in revision Sundara Aiyar, J., held that though not a party to the contract she took a benefit under it and was subject to the burden imposed on her by the document. I might in this connexion refer to *Irving* v. *Turnbull* (7). It was a case where a

6. (1912) 15 I C 388.
7. (1900) 2 Q B 129.

common vendor of various plots of land agreed to pay the purchaser of one plot one-half of the cost of erecting a party wall which was partly built on a portion of an adjacent plot, and then sold the adjacent plot to another person with covenant that the second purchaser should pay to the first purchaser the sums which the vendor had agreed to pay in respect of the building of the party wall. In a suit by the first purchaser against the second, objection was taken that there was no privity of contract, but a decree was passed on the ground that :

"sufficient had taken place to constitute privity of contract where the second purchaser in fact used the wall that had already been built upon by his neighbour and that consequently at that stage there was sufficient for the Court to hold that an action at common law as upon an implied contract would arise from such a use of the wall."

Channel, J., observed that :

"very little will create that privity of contract where it is so convenient for all parties that the matter should be carried out between two parties really interested in it."

It has been contended on the authority of *Tweddle* v. *Atkinson* (4) that no stranger to the consideration can enforce performance of a contract though made for his benefit. That the rule laid down in *Tweddle* v. *Atkinson* (4) has exceptions and is not of universal application in India is clear from the following observations by their Lordships of the Privy Council in *Nawab Khwaja Muhammad Khan* v. *Nawab Husaini Begum* (3) :

"First, it is contended, on the authority of *Tweddle* v. *Atkinson* (4), that as the plaintiff was no party to the agreement she cannot take advantage of its provisions. With reference to this it is enough to say that the case relied upon was an action of assumpsit and that the rule of common law on the basis of which it was dismissed is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case."

Their Lordships were of opinion that the fact that the payment was charged on the immovable property and that the plaintiff was beneficially entitled to it gave her the right to sue on the contract to which she was not a party. In *Shuppu Ammal* v. *Subramaniam* (8) it was held on the authority of *Rakhmabai* v. *Govind* (9) and *Husaini Begum* v. *Khwaja Muhammad Khan* (10) [which was confirmed by the Privy Council in *Nawab Khwaja Muhammad Khan* v. *Nawab Husaini Begum* (3)] that a person who is no party to a document but in whose favour a charge is created by it was entitled to file a suit to enforce its terms either as actual beneficiary or charge-holder. If the decision in *Tweddle* v. *Atkinson* (4) is to be followed as a rule of general application, it is difficult to see how the fact that a charge has been created makes any difference so far as the person not a party to the contract is concerned. In *Arumuga Goundan* v. *Chinnammal* (11) it was held that a person could sue on an agreement to which she was no party, whereby two persons agreed to give her a certain quantity of paddy for her maintenance. Sundara Aiyar, J., referring to *Nawab Khwaja Muhammad Khan* v. *Nawab Husaini Begum* (3) observed that :

"the rule that a person not a party to the contract cannot sue to enforce any rights created by it is one which would require considerable modification in . . . this country."

He thought that if the rule was subject to exceptions, one very proper exception was where co-parceners agreed to provide for maintennance of female members of the family. In *Kulandavelu Pedayachi* v. *Kamatchi Ayengar* (6), the same learned Judge held that a person who is not a party to a contract but who takes a benefit under it was subject to the burden imposed.

Though *Dutton* v. *Pool* (12), affirmed on errror in *Dutton* v. *Pool* (13), was dissented from in *Tweddle* v. *Atkinson* (4), it was followed in *Venkata Chinnaya Rau* v. *Venkataramya Garu* (14) and as pointed out by Pollock in his commentaries to the Contract Act: *Dutton* v. *Pool* (12), is, having regard to "consideration" in S. 2, Cl. (d), Contract Act, good law in India, where consideration need not move from the promisee. All that was decided in *Jamna Das* v. *Ram Autar Pande* (1), was that a purchaser of property subject to a mortgage was not personally liable to pay the sum due on the mortgage to the mortgagee, so as to entitle him to a personal decree should the sale proceeds of the mortgaged property be insufficient. It was not alleged that the mortgagee was in any way prejudiced by the transfer or that any exceptional circumstances existed. If, as pointed out

8. (1909) 33 Mad 238=4 I C 1083.
9. (1904) 6 Bom L R 421.
10. (1907) 29 All 151,
11. (1911) 12 I C 185.
12. 1 Vent 318.
13. Raym Sir T 302.
14. (1882) 4 Mad 137,

by their Lordships of the Privy Council in *Nawab Khwaja Muhammad Khan* v. *Nawab Husaini Begum* (3) and by Sundara Aiyar, J., in *Arumuga Goundan* v. *Chinnammal* (11), the rule in *Tweddle* v. *Atkinson* (4) is not of universal application and is subject to exceptions in India, I think the Jenmi, situated as the plaintiff in the present case is, is entitled to sue on the contract between the Kanomdar and Melkanomdar.

Even assuming that the Jenmi cannot enforce the contract evidenced by Ex. 1 against the Kanomdar, I think that an action for money had and received would lie. This aspect of the case has been fully dealt with by the Chief Justice in his judgment which I have had the advantage of perusing, and I entirely agree with his observations on the point. Whether the claim of the Jenmi is based on his right to sue on the arrangements evidenced by Exs. 1 and 11 or on the ground that the Kanom must be deemed to have been redeemed when the assignment of the Melcharth to the Kanomdar was assented to by the Jenmi, it is not barred. In the former case he would have six years within which to file the suit as Exs. 1 and 2 are registered documents, and in the latter, he would have three years from the date of his assent. It is unnecessary to deal with the contention of the respondents that the Jenmi has a charge on the Kanom amount in respect of rent due to him from the Kanomdar. I am of opinion that the decision of Phillips, J., is right and would dismiss the Letters Patent Appeal with costs.

S.N./R.K. *Appeal dismissed.*

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AYLING AND PHILLIPS, JJ.

Subbaraya Chettiar (*dead*) and *another* —Plaintiffs—Appellants.

v.

Papathi Ammal and *others* — Defendants—Respondents.

Second Appeal No. 820 of 1915, Decided on 2nd November 1917, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 815 of 1913.

Provincial Insolvency Act (3 of 1907), S. 16 —On adjudication and vesting order insolvent has no right of suit or appeal.

After the passing of an order of adjudication and the vesting of the insolvent's property in the Official Receiver under S. 16, Act 3 of 1907, the insolvent is ipso facto divested of the same and can have no vested interest in the property until after it is restored to him after administration. The insolvent cannot maintain a suit in respect of such property, nor has he a right of appeal against any decree passed in a suit instituted by him, the Official Assignee alone being competent to sue for enforcing the right possessed by the insolvent at the date of adjudication: 30 *Mad* 145, *Dist.* [P 294 C 2]

T. R. Venkatarama Sastriar—for Appellants.

S. T. Srinivasa Gopalachariar, *A. Krishnasami Iyer* and *R. Ramachandra Iyer*—for Respondents.

Judgment.—In this case an objection has been taken that appellant has no right to appeal. Two grounds are put forward: (1) that plaintiff being an insolvent, had no right to bring the suit and consequently has no right of appeal, and (2) that even if he had a right to sue, the right of appeal was taken away by the intervention of the Official Receiver after plaintiff obtained a decree in the Original Court.

At the date of suit the plaintiff was an undischarged insolvent, and under S. 16, Provincial Insolvency Act, all his property vested in the Official Receiver, who would then have the right to sue in respect of that property. It is however contended for the appellant that he had the permission of the Official Receiver to bring this suit, and therefore could do so inasmuch as there remained vested in him an interest in the property, as would appear from the fact that any residue of his estate after administration in insolvency would be returned to him. This contention must however be rejected, for when the property becomes vested in the Official Receiver, the insolvent must ipso facto be divested of the same, and can have no vested interest in the property until after it is restored to him after administration; *Sadodin* v. *Spiers* (1), is authority for the proposition that the Official Assignee alone is competent to sue for enforcing the rights to property possessed by an insolvent at the date of adjudication: vide also *Ramasamy Iyengar* v. *Ramalinga Mudaliar* (2) and *Ramasami Aiyangar* v. *Pavadai Chetty* (3), and there is no authority to the contrary. Reliance is then placed on *Sriramulu Naidu* v. *Andalammal* (4), where it was held that an undischarged insol-

1. (1878) 3 Bom 437.
2. A I R 1914 Mad 154=22 I C 687.
3. A I R 1914 Mad 395=23 I C 813.
4. 30 Mad 145.

vent could sue in respect of property acquired after his adjudication and before the intervention of the Official Receiver. That case however is based on the rule in *Cohen* v. *Mitchel* (5) that

"until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value in respect of his self-acquired property, whether with or without knowledge of bankruptcy, are valid against the trustee."

That rule now appears to be embodied in a modified form in S. 47, Bankruptcy Act, 1914, and appears to be for the protection of a third party who deals bona fide with an undischarged bankrupt. Whether the rule can be applied so as to give a right to sue in respect of such property need not be considered now, for as pointed out in *Sundarappaiyar* v. *Arunachella Chettiar* (6), the ruling in *Sriramulu Naidu* v. *Andalammal* (4), does not refer to property in the possession of the insolvent at the date of adjudication. We must therefore hold that plaintiff had no right to institute this suit and consequently the second objection taken need not be considered. This second appeal is dismissed with costs. The court-fee due must be paid to Government by appellant.

S.N./R.K. *Appeal dismissed.*

5. (1890) 25 Q B D 262.
6. (1908) 31 Mad 493.

A. I. R. 1918 Madras 295

SPENCER, J.

Muthu Bhattar — Defendant — Petitioner.

v.

Mrithunjaya Bhattar and *another* — Planintiff—Opposite Party.

Civil Revn. Petn. No. 872 of 1916 and Civil Misc. Petn. No. 2597 of 1916, Decided on 2nd March 1917, from the order of Dist. Judge, Madura, D/- 14th April 1916.

Civil P. C. (1908), S. 152—Clerical errors in judgment can be corrected even pending appeal—Court which passed is proper Court to amend errors.

Clerical errors or slips in a decree or order can be corrected by the Court which passed it, although an appeal against the same is pending in a superior Court. The proper Court to correct them is the Court in which the errors were made.

[P 296 C 1]

K. S. Ramabhadra Ayyar and *S. Subramania Ayyar*—for Petitioner.

K. Jagannatha Ayyar, *K. V. Sesha Aiyangar* and *K. V. Krishnasami Ayyar* —for Opposite Party.

FACTS.—*A* instituted a suit against *B* and *C* for recovery of possession of a house from *B*, on the strength of a sale deed executed in his favour by *C*. He also prayed in the alternative for the return of the purchase-money in case *C* his vendor were found to have no title. *B* claimed the house as his ancestral property and if that were found against, he relied on title by adverse possession for more than the statutory period. The District Munsif found that the title to the house was in *C* and that *A*, his vendee, was entitled to recover and accordingly gave *A* a decree for possession, observing that in this view it became unnecessary for him to consider and find the issue raising the question of alternative relief, viz, the return of purchase-money. On appeal the District Judge held that *B* had acquired title to the house and that *A* was not entitled to recover.

He, however dismissed the suit without considering the question of alternative relief, the consideration of which had become nesessary by his finding on the question of title. *A* thereupon preferred a second appeal to the High Court and also a review petition in the District Court, claiming in both the alternative relief to which he had become entitled in the view which the District Judge had aken as to his right to the main relief. The second appeal was admitted and was confined to the relief against *C*, who alone was made the respondent. The District Judge allowed the review petition, but in his order by a mistake put "defendant 1" (*B*) for "defendant 2" (*C*), so that the order directing *C* to make good the purchase-money read as an order directing *B* to return the same, which the District Judge could not have meant. Similarly, "defendant 2" (*C*) was held to be an unnecessary party, while what was meant, and alone could have been meant, was that defendant 1 (*B*) was an unnecessary party. *A* thereupon withdrew the second appeal, which was consequently dismissed. Meanwhile, *B* had put in a petition for the amendment of this accidental slip in the District Court but the District Judge, while recognizing the mistake, held that he had no power to correct it as the second appeal was pending in the High Caurt. *B* thereupon preferred a Civil Revision Petition against the order of the District Judge and also prayed the High Court by a simultaneous Civil Miscel-

laneous Petition to correct the mistake itself in case it should agree with the District Judge that he had no jurisdiction to amend.

Civil Revision Petition No. 872 *of* 1916.

Judgment.—The District Judge was mistaken in thinking that he had no power to correct a clerical error occurring in his Review Order because of the pendency of a second appeal in this Court. The clerical errors alleged in the affidavit, which was before the Judge, consisted of the words: "defendant 1" occurring where the words "defendant 2" were intended and vice versa. This was a matter to be dealt with under S. 152 Civil P. C. and that section distinctly provides that where such clerical errors arise from any accidental slip. the Court (that is, the Court in which they have occurred) may correct them at any time. I set aside the District Judge's order and direct him to pass fresh orders according to law after giving notice to the parties concerned. The parties will bear their own costs of this application.

Civil Misc. Petition No. 2597 *of* 1916.

The proper Court to correct clerical errors is the Court in which the errors were made. Tbe petition is dismissed.

S.N./R.K. *Order set aside.*

A. I. R. 1918 Madras 296

SESHAGIRI AIYAR AND NAPIER, JJ.

Madepalli Venkataswami—Defendant—Appellant.

v.

Madepalli Suramma and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1461 of 1916, Decided on 15th November 1917, against decree of Addl. Temporary Sub-Judge, Rajahmundry, in Appeal Suit No. 4 of 1916.

(a) Civil P. C (1908), Sch. 2, para. 14 (c)—Error of law does not invalidate award.

An award cannot be set aside under Cl. (c), para. 14, Sch. 2 on the ground that the arbitrators have given an erroneous decision on a point of law. [P 297 C 2]

(b) Civil P. C. (1908), Sch. 2, para. 14 (c)—Perverse misapplication of law or rule comes under Cl. (c) — Possibility of Court taking different view is no ground to vitiate award where honestly given.

Clause (c), para. 14, Sch. 2, should be confined to cases like those where the arbitrator perversely and manifestly misapplies a rule of succession or applies to the parties a rule by which they are not bound. Where the arbitrator has applied his mind honestly and has arrived at a decision to the best of his ability, the fact that the Judge might take a different view is not a ground for holding that the award is illegal on its face. [P 297 C 2]

(c) Civil P. C. (1908), Sch. 2, para. 14 (c)—Award granting life interest in one-fourth share, subject to its becoming absolute on marriage to person congenitally blind is held not invalid under Cl. (c).

Where a reference was made to arbitrator as to the right of inheritance of the plaintiff who was alleged by the defendants to be congenitally blind and the arbitrators awarded to plaintiff a life-interest in a fourth share in the properties subject to its becoming an absolute interest in case the plaintiff married:

Held: that the award was not liable to be set aside under para. 14 (c), Sch. 2, Civil P. C. [P 297 C 2]

B. Narasimha Row—for Appellant.

P. Somasundaram—for Respondents.

Judgment.—Plaintiff sues for a share in the family properties. The defence is that he was born blind and that consequently he is not entitled to any share under the Hindu law. A number of issues were raised, including the one on the question whether the plaintiff was congenitally blind. After the settlement of issues the parties agreed to refer the disputes to certain arbitrators. The agreement to refer is very general in its terms and apparently all questions of fact and law were referred to arbitrators. Upon the reference the arbitrators decided that the plaintiff was entitled to a life-interest in a fourth share in the properties subject to its becoming an absolute interest in case the plaintiff married.

On the submission of this award objections were taken by the plaintiff, on the ground that it was illegal on the face of it and the Court should not accept it. Both the Courts below have upheld this contention and have set aside the award. In second appeal the learned vakils have argued the case very elaborately; we have come to the conclusion that the Courts below are wrong. S. 14, Sch. 2, Civil P. C., sets out the grounds on which an award may be set aside; Cl. (a) refers to the arbitrators not deciding what has been referred to them and to deciding matters not within their jurisdiction; Cl. (b) refers to an indefinite award; and Cl. (c) to an award whose illegality is patent upon the face of it. In the present case the complaint is that the award is illegal as it apparently proceeded on the ground that the plaintiff, though not born blind, is not entitled to his full rights in the family. It may be observed in passing that the rights of the plaintiff were not

beyond question until the recent decision of the Judicial Committee in *Mt. Guajeshwar Kunwar* v. *Durga Prashad Singh* (1). The arbitrators were of opinion whether rightly or wrongly that the plaintiff should not have anything more than a life interest in the properties. Now the point is whether this conclusion is so patently illegal as to come within the mischief of Cl. (c), S. 14.

A large number of English decisions were quoted by Mr. Somasundaram for the respondents. They all assume that where an error of law appears on the face of the award the error can be remedied by Courts. The various dicta to be found on the subject all refer to the decision in *Hodgkinson* v. *Fernie* (2) as first enunciating this proposition. On examining that case we find this statement of the law in the judgment of Wallis, J., one of the ablest Common Law Judges of his time. If we may say so with respect, we share the doubt expressed by the learned Judge regarding the practicability and the soundness of enforcing the ancient principle referred to by him. Moreover the later decisions, to which we shall presently refer, and the Civil Procedure Code do not appear to have accepted the proposition that an erroneous view of law appearing on the face of the award vitiates it.

In *King and Duveen, In re* (3), Channel, J., said that if, on a question of law referred to the decision of an arbitrator he has given an erroneous decision, it should not be questioned by the Court. In *Muhammad Newaz Khan* v. *Alam Khan* (4) the Judicial Committee have laid down the same principle. In *Ghulam Khan* v. *Muhammad Hassan* (5) they say expressly that an arbitrator has jurisdiction to decide both on facts and on law and that the Courts have no right to sit in judgment over his views. In *Adams* v. *Great North of Scotland Ry. Co.* (6) the same view was held, see also *Dinabandhu Jana* v. *Chintamoni Jana* (7). As regards the decision in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Rys. Co.* (8) what was said by Lord Haldane in the House of Lords was that, if the result of an arbitration was induced by a wrong direction as to law given by a Court, the appellate Court is not powerless and the Court below is not entitled to shelter itself under the award. It is true that the decision of a Division Bench in *Landauer* v. *Asser* (9) supports the contention of the learned vakil for the respondents. But that case stands by itself and, although there are dicta of a very general character in the English reports, in no case except in the case in *Landauer* v. *Asser* (9) was an award set aside on the ground that the arbitrator had given an erroneous decision on law

Coming to the Civil Procedure Code we think that Cl. (c), S. 14 should be confined to cases like those where the arbitrator perversely and manifestly mis-applies a rule of succession or applies to the parties a rule by which they are not bound ; we are not to be supposed to have exhausted the category of the cases which may come under the clause, but we do think that where the arbitrator has applied his mind honestly and has arrived at a decision to the best of his ability, the fact that a Judge might take a different view is not a ground for holding that the award is illegal on its face. We must reverse the decrees of the Courts below and remand the suit to the Court of first instance for its being heard on the other objections taken to the award. Costs will abide the result.

S.N./R.K. *Appeal allowed.*

1. A I R 1917 P C 146=42 I C 849=44 I A 229=45 Cal 17 (P C).
2. (1857) 3 C B (n s) 189.
3. (1913) 2 K B 32.
4. (1891) 18 Cal 414=18 I A 73=70 P R 1891 (P C).
5. (1902) 29 Cal 167=29 I A 51=25 P R 1902 (P C).
6. (1891) A C 31.
7. (1915) 26 I C 697.
8. (1912) A C 673.
9. (1905) 2 K B 184.

* A. I. R. 1918 Madras 297

SADASIVA AIYAR AND PHILLIPS, JJ.

Vasudeva Mudaliar — Defendant — Appellant.

v.

M. A. Velappa Nadar — Plaintiff — Respondent.

Second Appeal No. 102 of 1916, Decided on 3rd September 1917, against decree of Tempy. Sub-Judge, Ramnad, in A. S. No. 3 of 1915.

(a) Contract Act (9 of 1872), Ss. 62, 63 and 73—Contract to supply cotton within *A* jurisdiction—On default accounts made and balance made payable by supply of cotton within *B* jurisdiction—Balance to be realized by sale of the cotton—On failure

suit for amount and interest in *B* jurisdiction —Interest cannot be claimed as compensation under S. 73—New agreement was novation under S. 62 and suit in *B* Court was proper.

Plaintiff and defendant 2 were partners. Defendant 1 received Rs. 2,500 as an advance from defendant 2, promising to supply cotton at Palladam within the jurisdiction of the Tirupur Munsif's Court. As defendant 1 failed to supply the cotton or to return the advance plaintiff and defendant 1 looked into the accounts, and defendant 1's liability was fixed at Rs. 2,000 and it was agreed that this liability should be discharged by defendant 1 sending cotton to Virudupatti within the jurisdiction of the Satur Munsif's Court, to be sold by the plaintiff's man who should realize the Rs 2,000 due by defendant 1 from the sale-proceeds. Plaintiff filed a suit in the Satur District Munsif's Court on defendant's default and also claimed interest by way of damages:

Held: that interest could not be claimed as compensation under S. 73, Contract Act. [P 300 C 1]

Per *Sadasiva Aiyar, J.*—The new agreement to pay the amount due at Virudupatti was a novation of the original contract within the meaining of S. 62, Contract Act and the Satur Munsif's Court had jurisdiction to try the suit. [P 299 C 2]

Per *Phillips, J.*—The agreement was itself a new one and in supersession of the old one and was not a mere agreement to pay a debt at a place other than that mentioned in the original agreement and the cause of action therefore arose within the jurisdiction of the Court of the District Munsif of Satur. [P 300 C 1]

(b) Civil P.C. (1908), Ss. 20 and 21—Question of jurisdiction involved — Whether failure of justice has to be shown for interference. (*Quaere*).

Quaere.—Whether, even where the question is one affecting jurisdiction, failure of justice must be shown to justify the interference of an appellate Court under S. 21. [P 299 C 2]

***(c) Contract Act (9 of 1872), S. 62—Novation changing place of performance—Fresh consideration is not necessary.**

Per *Sadasiva Aiyar, J.* — A new contract changing the place of performance falls under S. 62 and no independent consideration is necessary to validate the same: 14 *M. I. A.* 86 and 30 *Mad.* 438, *Dist.* [P 299 C 1]

(d) Contract Act (9 of 1872), S. 73—Where interest as compensation cannot be claimed stated.

Per *Phillips, J.*—Where no interest is provided for in the agreement of parties and when it is not a case of damages for breach of contract, interest cannot be claimed as compensation under S. 73. *A. I. R.* 1916 *P. C.* 46, *Dist.* [P 300 C 1]

T. R. Venkatarama Sastry—for Appellant.

T. M. Krishnasamy Aiyar—for Respondent.

Sadasiva Aiyar, J.—The facts are shortly as follows. Defendant 1 obtained Rs. 2,500 at Palladam within the jurisdiction of the District Munsif's Court of Tirupur in the Coimbatore District (defendant 1 also residing in that district) promising to supply cotton to defendant 2 at Palladam itself. Defendant 2 had a partner (plaintiff) living at Virudupatti within the jurisdiction of the District Munsif's Court of Satur in the Ramnad District. Defendant 2's duty was to advance partnership moneys to customers and receive cotton at Palladam from the customers to whom advances had been made and to send on the cotton to Virudupatti. Towards the Rs. 2,500 advanced, defendant 1 gave six pothies of cotton worth Rs. 525 at Palladam, but the six pothies were returned to him at Palladam itself as he himself promised to send it on direct to Virudpatti instead of defendant 2 sending it on to Virudupatti. This was on 10th October 1910. A sum of Rs. 1-15-6 besides this Rs. 2,500 seems also to have been due by defendant 1 to the plaintiff's firm. Defendant 1 did not send the six pothies to Virudupatti nor did he supply cotton for the remaining Rs. 1,975. So he owed Rs. 2,501-15-6 on accounts to the partnership firm, out of which he paid to defendant 2 Rs. 501-15-6. sometime afterwards and owed a balance of Rs. 2,000 in April 1911.

The plaintiff and defendant 1 met at Virudupatti on 14th April 1911, looked into accounts and found Rs. 2,000 due by defendant 1 to the firm of the plaintiff and defendant 2. Defendant 1 then promised to pay the Rs. 2,000 to the plaintiff at Virudupatti through defendant 1's customer P. W. 2. The suit was brought in the Satur District Munsif's Court on this promise made on 14th April 1911 by defendant 1 to pay at Virudupatti the Rs. 2,000. A preliminary question of jurisdiction was raised by Mr. Venkatarama Sastriar arguing for defendant 1 (appellant). The argument was that, because the contract as first entered into was to supply cotton to defendant 2 at Palladum, the cause of action arose at Palladam within the jurisdiction of the District Munsif's Court of Tirupur in October 1910 and that therefore no new cause of action could arise at Virudupatti merely by reason of the subsequent promise made at Virudupatti to pay the sum of Rs, 2,000 due under the contract at Virudupatti and hence the Satur District Munsif's Court had no jurisdiction. Reliance is placed for this contention on

Bunseedhur v. *Government of Bengal* (1) and *Seshagiri Row* v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk* (2).

The case of *Bunseedhur* v. *Government of Bengal* (1) was decided in 1871 before the Contract Act came into force. As regards *Seshagiri Row* v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk* (2), the Government Act, S. 62, has not been referred to in that case. The facts there were that according to the original contract payment was to be made by the defendant living in Hyderabad for work done at Hyderabad for the defendant by the plaintiff. The plaintiff alleged that after the work had been done, the defendant agreed to pay in Madras the remuneration due to the plaintiff. A great mass of witnesses, whom the Court would have had to examine in that case, were residents of Hyderabad and the balance of convenience was in favour of the suit being tried in Hyderabad. Moore, J., dismissed the application under Art. 12, Letters Patent for leave to institute a suit in the Madras High Court Original Side on account of the above reasons of convenience. The learned Chief Justice and Miller, J., while upholding the order of Moore, J., on that ground also added the dictum that there was no consideration for the promise to pay in Madras, that there was therefore no new legal contract to pay at Madras in substitution of the original contract and hence no part of the cause of action arose within the jurisdiction. As I said, Contract Act, S. 62, is not referred to in the judgment. That section says:

"If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

Of course, this section is subject to the provision of the Evidence Act (S. 92) forbidding the admission of oral evidence to contradict or vary written agreements but where the original contract and the subsequent contract are both oral, I do not see that S. 62, Contract Act, requires any further consideration for the validity of the substituted contract than the putting an end to the obligation under the original contract. It has been held that under S. 63 of the same Contract Act no consideration is necessary for extending the time for performance or for accepting any satisfaction by the promisee, though under the English law the question of consideration comes in respect of the matters mentioned in S. 63, Contract Act: see Leake on Contract, pp. 623-24. If there is a new oral contract to have the place of performance changed, I think, it falls under S. 62 and no independent consideration is necessary to validate the same. I therefore respectfully dissent from the dictum in *Seshagiri Row* v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk* (2), the decision in which can be supported on the other grounds mentioned in it. The English case of *Baird* v. *Bell* (3) is irrelevant, as we are governed by the Statute law enacted in the Contract Act. In the above view it is unnecessary for me to consider whether the new S. 21 in the Civil Procedure Code of 1908 cures the defect of territorial jurisdiction assuming such a defect to exist. I might, however, shortly state that the argument of Mr. Venkatarama Sastriar that S. 21 only applies to cases referred to in S. 18, Cl. 2, is not acceptable to me as at present advised. S. 21 follows Ss. 16 to 20, of which S. 16, 17, 19 and 20 refer to territorial causes of action generally. There is also an observation in *Sethrucherla Rama Chhaddra* v. *Maharaja of Jeypore* (4) upholding my above view. S. 99 (corresponding to old S. 578) uses the negative words,

"that no decree shall be reversed on account of irregularities not affecting the jurisdiction of the Court,"

but this cannot, I think, override the plain language of S. 21 that even when the question is one affecting the jurisdiction, failure of justice must be shown to justify the interference of an appellate Court. However, as I said, it is unnecessary for me to express a final opinion on this point in this case. The next question argued for the appellant was that the defendant was not afforded sufficient opportunity to adduce all his evidence in respect of the discharge by payment to defendant 2, and though there is an affidavit in support of this contention, it is met by a counter affidavit on the respondent's side. This contention is, therefore, also rejected. On the question of interest, the case of *Hamira Bibi* v. *Zubaida Bibi* (5) quoted

1. (1870) 14 M I A 86=2 Suth 448=2 Sar 689.
2. 30 (1907) Mad 438.
3. (1898) A C 420.
4. (1916) 34 I C 411.
5. A I R 1916 P C 46=36 I C 87=43 I A 294=38 All 581 (P C).

for the respondent was a case of dower-debt governed by Muhammadan Law and the equitable principles recognised in the Mohamadan law were applied by the Privy Council on the question of awarding compensation in the shape of interest. I, therefore, agree with my learned brother that the claim for interest should be disallowed and that in other respects the appeal should be dismissed with costs.

Phillips, J.—The agreement set out in the plaint has been found by the learned Subordinate Judge to be true and is as follows: It was found that the defendant 1 owed the firm in which plaintiff and defendant 2 were partners Rs. 1,976-15-6 and had also to supply 6 pothies of cotton. It was then agreed that defendant 1's total liability should be Rs. 2,500. Plaintiff acceped defendant 1's contention that he had paid Rs. 500 to defendant 2 and it was then agreed that the defendant 1 should pay the balance of Rs. 2,000 by sending cotton to Virudupatti to be sold by plaintiff's witness 2, who should then pay plaintiff Rs. 2,000. It appears to me that this was a new agreement entered into between defendant 1 and plaintiff on behalf of his firm, and was in supersession of the old agreement between the parties, and was not a mere promise to pay a debt at a place other than that mentioned in the original agreement. In this view the decision in *Seshagiri Row* v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk* (2) is inapplicable to this case, nor is it necessary to decide whether S. 21, Civil P. C., is applicable as the District Munsif had jurisdiction to try the suit. After considering the affidavits now filed, I do not think that any evidence was shut out by the District Munsif and consequently defendant 1 is not entitled to adduce further evidence. On the question of interest, I do not think the Subordinate Judge is right. No interest can be claimed under the Interest Act and it was held in *Kamalammal* v. *Peeru Meera Levvai Rowthen* (6) that interest in such cases cannot be claimed by way of damages under S. 73 Contract Act.

In *Hamira Bibi* v. *Zubaida Bibi* (5) interest was allowed by way of damages on equitable considerations in that case in which the circumstances were peculiar, and I do not think that the Judicial Committee intended to dissent from their prior decision in *Ganesh Bakhsh* v. *Harihar Bakhsh* (7) where it was held that the Interest Act applied, when it was not a case of damages for breach of contract. Following *Kamalammal* v. *Peeru Meera Levvai Rowthen* (6) I disallow the claim for interest till date of suit, but, in other respects, the appeal is dismissed with costs.

S.N /R.K. *Appeal dismissed.*

6. (1897) 20 Mad 481.

7. (1904) 26 All 299=3 I A 116=8 Sar 628 (P C).

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* A. I. R. 1918 Madras 300

SADASIVA AIYAR AND KUMA RASWAMI SASTRI, JJ.

Ammalu Ammal— Plaintiff — Appellant.

v.

Namagiri Ammal and *others*— Defendants—Respondents.

Second Appeal No. 1494 of 1915, Decided on 27th April 1917, against decree of Dist. Judge, Madura, D/- 19th April 1915.

***(a) Executor—Power to borrow—Suit on pro-note executed by executor in individual capacity for payment of legacies due—Estate of testator cannot be directly proceeded against—Creditors had right of subrogation—Debt evidenced by note—Suit can be based on note and not loan.**

An executrix borrowed from the plaintiff a certain sum for the purpose of paying off certain legacies due from the estate of the testator and executed a promissory note to which she affixed her signature without adding any description or qualification as executrix and which contained no indication that the executrix wanted to charge the estate with payment except the fact that the debt was contracted for the purpose of carrying out the directions contained in the will. In a suit by the plaintiff to recover the money direct from the estate of the testator:

Held: that the creditor could not proceed direct against the estate of the testator and that his remedy was to be subrogated to the rights of the executrix against the estate. [P 306 C 2]

Even assuming that a suit could lie on the debt apart from the promissory note, as the plaint did not state that the executrix and her heirs were entitled to take or retain any sum from the estate as indemnity and did not pray that the plaintiff in execution was entitled to proceed against the properties of the testator in the hands of his heirs direct to the extent of such indemnity, an inquiry into the indebtedness of the estate to the executrix or its liability to indemnify her could not be ordered in the present suit. [P 308 C 1, 2]

The plaintiff would be entitled to be subrogated to the executrix's right of indemnity against the estate, and the question whether the executrix still possesses the right of indemnity or has lost and if so, to what extent, could be gone into in

the very suit instituted on the promissory note, and if it is found that to any extent the executrix is entitled to be indemnified from the estate to that extent the plaintiff could be given a decree direct against the estate [P 307 C 1, 2]

*** (b) Pronote—Note and loan contemporaneous—There cannot be claim only on loan — Contract Act S. 62.**

Per *Sadasiva Aiyar, J.*— Where the loan was practically contemporaneous with and was, when made, intended to be evidenced by the promissory note there can be a claim only on the note and not on the loan. [P 308 C 1]

(c) Promissory note— Liability—Execution by trustee or manager— Intention must be clear limiting liability.

Per *Kumaraswami Sastri, J.*—A person executing a pro-note will be personally bound thereby unless there is clear indication that he does not intend to incur any personal liability but limits recourse of the payee or holder to the person whom or the estate which he represents either as trustee, executor, guardian or agent. [P 303 C 1]

(d) Civil P. C. (5 of 1908), O. 7, R. 7— Relief should not be refused if it can be properly granted—Practice Relief.

A party claiming a larger relief ought not to be denied relief which can properly be granted unless the ground on which the lesser relief can be granted is inconsistent with the case of the plaintiff as set out in the pleadings or would lead to the determination of issues which would embarrass the defendants or necessitate the addition of parties. [P 307 C 1]

A just claim ought not to be defeated by technical considerations based on the plaintiff having asked for more than he is legally entitled to, especially in cases where owing to the conflict of authorities and the want of precedents, the law is not quite clear. [P 307 C 1]

*** (e) Executor—Bona fide contracts in due course of administration— Decree de bonis proprius—Contracts or debts by executor after testator's death—Estate cannot be directly proceeded against—Creditor has only right of subrogation.**

Where an executor or administrator has been dealing with the assets or making contracts bona fide in the due course of adminstration as executor or administrator and a creditor brings a suit on a contract entered into by the executor:

(1) Ordinarily decree de bonis testatoris will be passed in all cases where the testator is personally liable or the contract of the executor arises out of a contract with or something done by the testator, and in all other cases the only decree that will be passed is a decree de bonis proprius.

(2) The executor will in the absence of an express stipulation, be personally liable on all contracts entered into or debts incurred subequent to the death of the testator.

(3) Creditors cannot have any direct remedy against the testator's estate or proceed in execution against the assets except in cases where a specific charge is validly created or the debts are incurred in pursuance of directions to carry on a trade or busin ss or where a specific trust is created for a specific purpose and debts are incurred in the due carrying out of the trust.

(4) An executor who has incurred liabilities or spent moneys in the due course of adminstration is entitled to the right of exoneration indemnity or retainer as against the estate,

(5) A creditor who has no legal claim against estate is entitled in equity to enforce on his own behalf the aforesaid rights of the executor while he also retains his legal claim against the executor personally.

(6) The right to be so subrogated is subject to any defence which would be available against the executor and is confined to the assets which the executor could have resorted to for an indemnity,

(7) The mere fact that a debt was incurred in the due course of administration and that the estate was benefited or enriched by the loan would make no difference and would give the creditor no direct re-course. [P 303 C 1, 2]

(*Case law on the subjeet considered and discussed.*).

A. Krishnasami Aiyar—for Appellant.

C. S. Venkatachariar and *V. K. Srinivasa Aiyangar*—for Respondents.

Kumaraswami Sastri, J. — The plaintiff who is the appellant sued to recover Rs. 4,534-13-3 alleged to be due on a promissory note executed by the deceased Kothai Ammal, the widow and executrix under the will of one Narasimhachari, who died leaving another widow, two daughters and a daughter's son (defendants 1 to 4 respectively). The case for the plaintiff is that the promissory note sued on was executed in respect of moneys borrowed by the executrix to pay the legacy due to defendant 3 and that defendants 1 to 4 who have taken the testator.s property and defendants 2 to 4 who have succeeded to Kothai Ammal's properties are liable. Various defences were raised but it is only necessary to consider the plea that the executrix had no power or necessity to borrow so as to bind the estate of the testator and the plaintiff can only proceed against Kothai Ammal's heirs and the assets in their hands. The Subordinate Judge held that under the terms of the will the proceeds of the life policy referred to in para. 8 of the will) were specified as the fund out of which the legacy was to be paid that there was no necessity to borrow and that the estate of the testator was not bound to satisfy the amount due on the promissory note. He passed a decree against Kothai Ammal's legal representatives. On appeal the District Judge confirmed the decree on the ground that plaintiff did not prove any necessity for the loan.

It is argued for the appellant that both Courts were wrong in viewing the case

solely from the standpoint of necessity, that the powers of an executor to borrow moneys for the purposes of administration of the estate are wider than those of an administrator, that the indication of a fund in the will out of which the legacy was to be paid does not prevent it from being otherwise discharged if the fund is not immediately available and that so long as the executor borrows money bona fide in the due course of administration he is entitled to a right of retainer which can be availed of by the creditor whose loan has been applied to the payment of sums payable out of the estate. It is also argued that the creditor has a direct right to proceed against the estate as he cannot be in a worse position than the creditor who has lent moneys to the managing member of a joint family or to a trustee of a temple or the guardian of a minor for necessary and binding purposes.

Before dealing with the above contentions it is necessary to refer to the important clauses in the will and certain proceedings prior to the execution of the promissory note sued on. Para. 3 of the will directs the executrix to deliver at once to the testator's daughter Ranganayaki (defendant 3) the share in the Arasaven village which the testator had acquired for her benefit and pay her Rs. 3,000. In Paras. 2, 4 and 7 the testator directs payment of Rs. 1,000 to his grandson Govindarajan (defendant 4) Rs. 50,000 to his widow (defendant 1) in case the testator left no sons (a contingency which happened and entitled her to the bequest) and Rs. 4,000 to his daughter-in-law. Cl. 8 directs the executrix to get from the Oriental Life Assurance Company the sum of Rs. 8,000 payable in respect of the life policy taken out by the testator and to pay his debts and the legacies specified above. It is clear on the face of it that all the legacies could not be paid out of the insurance moneys even if there were no debts to be paid and that the executrix must have had recourse to other properties of the testator in order to pay them. I may add that Exs. D and E show that testator had debts to pay and that a decree for Rs. 11,558 odd was passed against the executrix and all the present defendants.

Soon after the testator's death, Namagiri Ammal (defendant 1) filed Original Suit No. 14 of 1909 for her share under the will and the executrix contested the suit inter alia on the ground that the legacy to her was only Rs 5,000, the sum Rs. 50,000 being a fraudulent alteration in the will. A razinamah Ex. C was filed which provided for payment of a certain sum to Namagiri Ammal (plaintiff in the suit), for collection by the executrix of debts due to the estate and the amount due on the life policy and the payment by her of the debts due by the estate including the legacy of Rs. 3,000 payable to Ranganayaki; the plaintiff being indemnified against non-payment by the executrix.

Some stress has been laid on the words "defendant 1 alone shall pay all debts, etc." It is clear that, reading it with the other clauses of the razinamah, the intention was not to transfer to the executrix personal liability for all the testator's debts and legacies so as to absolve the estate from payment of the same, but to prevent it being said subsequently by the other parties that the co-widow (the plaintiff in that suit) by reason of her having taken the properties given to her for her share was liable to pay anything or that the properties she took should in any way be charged with or made liable for payment of their claims. It is not suggested that the razinamah was not a bona fide and proper adjustment of the differences between the executrix and her co-widow. After the razinamah Ranganayaki Ammal, the daughter of the testator (defendant 3) was pressing for payment of the legacy and threatened legal proceedings. Defendant 1 at that time was not able to recover the sum due on the policy. The terms of Cl. 3 of the will were specific and directed that Rs. 3,000 was to be paid at once and having regard to the fact that the legacy would have been payable even if the policy moneys became irrecoverable, the situation was not as clear as the Subordinate Judge thinks it was.

The executrix, who was threatened with a suit for the legacy, borrowed Rs. 3,500 and executed the pro note sued upon on 9th December 1909. It recites that the sum of Rs. 3,000 was borrowed for the purpose of paying Ranganayaki who was entitled to the same both under the will and the razinamah (above referred to) and Rs. 500 to discharge the othi referred to in the will. It was signed by Kothaiammal without any description or qualification and so far as the note is

concerned, except for the recital that the debt was contracted for purposes of carrying out the directions contained in the will, there is nothing to exclude or to limit the personal liability of the executant or to indicate that she charged the estate with payment. It is well settled that a person executing a negotiable instrument will be personally bound thereby, unless there is clear indication that he does not intend to incur any personal liability but limits recourse of the payee or holder to the person whom or the estate which he represents either as trustee, executor, guardian or agent. There may be a difference of opinion as to the words or recitals necessary for so limiting liability; but the principle is clear. I need only refer to *Koneti Naicker* v. *Jatu Gopala Aiyar* (1) and *Sundarasa Gurukkal* v. *Sambasiva Aiyar* (2). In the case of executors the view taken by Harington, J., in *Watling* v. *Lewis* (3) that the words "as such trustees but not so as to create any personal liability on the part of either of them" were void and repugnant as there was a covenant to pay an indemnity, was not followed in *Robinson's Settlement, In re, Gant* v. *Hobbs* (4), where it was held following *Williams* v. *Hathaway* (5) and *Gordon* v. *Campbell* (6), that the words "as such trustees and not otherwise" did not render them personally liable. In the present case it is clear that the executrix for the purpose of paying the legacy due to the testator's daughter borrowed moneys on the promissory-note sued on without limiting her liability charging the estate or any part thereof with payment of the sum borrowed. The question is how far and subject to what limitation can the creditor proceed to realise his debt by proceeding against the estate in case the personal liability is insufficient.

Where an executor or an administrator has been dealing with the assets or making contracts bona fide in the due course of administration in his character as executor, or administrator, the question whether on contracts personally entered into by him he should be sued in his character as legal representative so as to enable the creditor to pursue his remedies directly against the estate or in his personal character, the creditor being afterwards left to work out his rights by being subrogated tc the executor's right of retainer or indemnity, has been dealt with in numerous cases.

The authorities which I shall refer to show that (1) ordinarily a decree de bonis testatoris will be passed in all cases where the testator is personally liable or the contract of the executor arises out of a contract with or something done by the testator and that in all other cases the only decree that will be passed is a detree de bonis proprius ; (2) an exe cutor will in the absence of an express stipulation be personally liable on all contracts entered into or debts incurred subsequent to the death of the testator ; (3) creditors cannot have any direct remedy against the testator's estate or proceed in execution against the assets, except in cases where a specific charge is validly created or the debts are incurred in pursuance of directions to carry on a trade or business or where a specific trust is created for a specific purpose and debts are incurred in the due carrying out of the trust ; (4) an executor who has incurred liabilities or spent moneys in the due course of administration is entitled to the right of exoneration, indemnity or retainer as against the estate: (5) a creditor who has no legal claim against the estate is entitled in equity to enforce on his own behalf the aforesaid rights of the executor while he also retains his legal claim against the executor personally ; (6) the right to be subrogated is subject to any defence which would be available against the executor and is confined to the assets which the executor could have resorted to for an indemnity ; (7) the mere fact that a debt was incurred by the executor in the due course of administration and that the estate was benefited or enriched by the loan would make no difference and would give the creditor no direct recourse.

In *Garland, Ex parte* (7) it was held that where an executor carries on business after the death of the testator, he is entitled to be indemnified out of the assets which are authorized to be or can be otherwise properly applied for the purpose of the business and that in such cases creditors are entitled to stand in the place of the executor or admistrator and

1. (1913) 38 Mad 482=21 I C 417.
2. (1915) 28 I C 93.
3. (1911) 1 Ch 414.
4. (1912) 1 Ch 717.
5. (1877) 6 Ch D 514.
6. (1842) 1 Bell App 428.
7. (1804) 10 Ves Jun 110.

to claim that the fund out of which he is entitled to indemnity shall be applied in payment of their debt. A similar view was taken in *Dowse* v. *Gorton* (8), where it was held that the creditor of the executor or trustee is entitled to the benefit of the indemnity which the executor or trustee is entitled to, in cases where any part of the estate is authorized to be applied for the purpose of carrying out the business specified in the will. In *Raybould* In re, *Raybould* v. *Turner* (9) the principle in *Dowse* v. *Gorton* (8) was extended to damages which a trustee has to pay. The following observations of Byrne, J., put the matter very clearly :

Benett v. *Wyndham* (10) goes to show that if a trustee in the course of the ordinary management of his testator's estate either by himself or his agent does some act whereby some third person is injured and that third person recovers damages against the trustee in an action, the trustee, if he has acted with due diligence reasonably, is entitled to be indemnified out of his testator's estate. When once the trustee is entitled to be thus indemnified out of his trust estate, I cannot myself see why the person who has recovered judgment against the trustee should not have the benefit of this right to indemnity and ge direct against the trust estate or ass ts, as the case may be just, as an ordinary credito es of a business carried on by a trustee or eexecutor has been allowed to do."

In *Fairland* v. *Percy* (11) Letters of Administration as a creditor in equity were granted to a person who had contracted with an executor authorized to carry on business, on the ground that where business is carried on by an executor under a will which directs that it might be carried on which the assets left by the testator, creditors of the business who have had transactions with the executor have in addition to the personal remedies against the executor the right in equity to claim against the estate of the testator to the same extent that he authorised it to be used in the business. In *Shorey, In re, Smith* v. *Shorey* (12) a creditor of the executor was held to be entitled to a decree for the administration of the testator's estate when the executor was authorised to carry on business. In *Davies, Banks & Co.* v. *Beavan, Beavan In re,* (13) the right of subrogation was allowed to a creditor who paid off debts incurred by the guardian for necessaries supplied to the lunatic. Neville, J., observed a follows:

"It appears to me that no legal right arises as a result of the lending in favour of the lender; but I think an equity arises and that that equity is to stand in the shoes of those creditors who being creditors for necessaries supplied for the maintenance of the lunatic have been paid out of the money ad- vanced by the lender."

Where, however there is no authority given to the executor or administrator to carry on any trade or business, debts incurred by the executor are treated only as the executor's personal debts and the creditors to whom the debts are owing have been given no direct remedy against the testator's estate either by proving against the estate or taking the asset in execution.

In *Farhall* v. *Farhall* (14) James, L. J., was of opinion that neither authority nor principle was in favour of the view that an executor can by borrowing money enable the person who lent it to stand as a creditor to the estate even though the moneys were borrowed for the purpose of the estate Mellish, L. J. took it to be settled law that

"upon a contract of borrowing made by an executor after the death of the testator the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator."

In *Strickland* v. *Sumons* (15), Selborne, L. J., observed that

"there is no principle or authority for saying that if a trustee makes himself personally liable for goods the creditor thereby obtains a lien on the trust property or can have equitable execution against the trust estate in respect of a judgment against a trustee."

In *Evans, In re, Evans* v. *Evans* (16), Cotton and Lindley, L. J., were of opinion that the creditor cannot have any direct claim against the estate or be entitled to anything higher than a right to be subrogated to the rights of the administrator to the indemnity. In *Labouchere* v. *Tupper* (17) a similar view was taken by the Privy Council and it was held that an executor of a trader carrying on the trade after his death was personally liable for all the debts contracted in the trade and that the propriety of his conduct as between himself and the beneficiaries did not give the creditors the right to be treated as creditors of the testator or give them a charge on the assets. It is no doubt true that Bayley, J., in

8. (1891) A C 190.
9. (1900) 1 Ch 199.
10. (1862) 4 De G F & J 259.
11. (1875) 3 P D 217.
12. (1899) 79 L T 349.
13. (1912) 1 Ch 196.
14. (1872) 7 Ch A 123.
15. (1884) 26 Ch D 245.
16. (1887) 34 Ch D 597.
17. (1857) 11 Moore P C 198.

Ashby v. *Ashby* (18) pointed out the hardship that might arise in individual cases and Lord Tenterdon, C. J., expressed an opinion that if the matter were res integra, it may be as well to hold that the lender may elect to treat the receipt of money as an act done by the executor in his character as executor and to take his chance whether he will be paid out of the assets or not; and that in *Farhall* v. *Farhall* (19) Bacon, V. C., inclined to the view that *Ashby* v. *Ashby* (18) and other cases recognised the rule that a demand may exist against the executor both de bonis testatoris and de bonis proprius and that there may be a right to proceed against the goods of the testator by reason of transactions with the executor but in *Farhall* v. *Farhall* (14) the decision of Bacon, V. C., was reversed by Mellish and Cotton L. J J., with the observations already referred to by me and the remarks of Byles, J., were explained as being confined to cases where the matter arose out of a contract with or something done by the testator.

Some Courts in the United States of America have been of the view that creditors ought to be allowed to recover against the estate to the extent to which it has been benefited or enriched by a debt which has been properly incurred in the due course of administration, but the rule has not found favour in other states which follow the rule laid down by the English decisions referred to by me.

There is a great deal to be said in favour of the view that direct recourse ought to be given, at least to the extent to which the estate has been enriched, where debts borrowed in the due course of administration benefit the estate but the question is settled by authority, both English and Indian. Turning to cases in India Sale, J., in *Romanath Paul* v. *Kanai Lal Dey* (20) following *Farhall* v. *Farhall* (14) held that apart from any special power given by a will to an executor, money borrowed by him on a promissory note for the benefit of the estate is not a charge on the estate. In *Shard*, in the matter of (21) the same learned Judge, following *Johnson, In re, Shearman* v. *Robinson* (22), *Strictland* v. *Symons* (15) and *Raybould, In re, Raybould* v. *Turner* (9) held that the mere fact that the trustee rendered himself personally liable in carrying out the trust would not give the creditors the right to proceed against the trust property. In *Bridge* v. *Madden* (23) the decision in *Shaed*, in the matter of (21) was approved of and it was held that the creditor who supplied goods to a trustee authorized to carry on business is entitled to the trustee's right of indemnity if the trustee has not through his default lost the right. In *Byramji Rustomji* v. *Heerabai* (24) Seott, C. J., observed that

"it was clear that on a claim for money lent to executors the are liable personally and a judgment cannot be directed against the asset of the testator."

The creditor was only subrogated to the right of the executor and was not allowed to attach the property belonging to the estate, though he lent money to pay off debt due by the testator. In *Swaminatha Aiyar* v. *Srinivasa Aiyar* (25), Abdur Rahim and Spencer, JJ., following *Johnson, In re Shearman* v. *Robinson* (22); *Strickland* v. *Symons* (15), *Shard* in the matter of (21), held that a creditor who lent money to a trustee was not ordinarily entitled to have his debts realized out of trust properties but was only entitled to be subrogated to the trustee's right of indemnity against the trust. In *Sanka Krishnamurthi* v. *Bank of Burma* (26), Wallis, C. J., in dealing with cases where business was carried on behalf of a minor, referred to *Labouchere* v. *Tupper* (17), in *Johnson In re Shearman* v. *Robinson* (22) and *Evans, In re, Evans* v. *Evans* (16) and was of opinion that the creditors were only entitled to be subrogated to the guardian's rights of indemnity and lost the right to proceed against the assets embarked on the business, when the guardian owing to misconduct lost the right to be indemnified. My attention has been called by Mr. Krishnasami Iyer to cases where persons who lent moneys to (1) the guardian of a minor, (2) the managing member of an undivided family and (3) the head of the religious endowment were allowed direct recourse against the estate of the minor and the trust property. In *Padma Kri-*

18. (1827) 7 B and C 444.
19. (1871) 12 Eq 98.
20. (1903) 7 C W N. 104
21. (1901) 28 Cal 574.
22. (1880) 15 Ch D 548.
23. (1904) 31 Cal 1084.
24 (1909)2 I C 161.
25. (1917) 38 I C 172.
26. (1911) 35 Mad 692=11 I C 79.

shna Chettiar v. *Nagamani Ammal* (27) it was held by Seshagiri Aiyar and Napier, JJ., that a negotiable instrument executed by the guardian of a minor for purposes binding on him is enforceable against the minor's estate, and in *Nataraja Naicken* v. *Ayyasami Pillai* (28). Ayling and Seshagiri Aiyar, JJ., held that a promissory note executed by one brother in respect of a loan contracted for necessary purposes binds the other brothers also and treated *Thaith Ottathil Kutti Ammu* v. *Purushotham Doss Raggi Seth* (29) as overruled by the decision of the Privy Council in *Karmali Abdulla Allarkhia* v. *Bora Karimji* (30). Both the decisions proceed upon special principles of Hindu law and the position of the guardian of a Hindu minor or the managing member of an undivided family affords no striking analogy to that of an executor under a Will, on whom the whole estate of the testator vests by virtue of S. 4, Probate and Administration Act and who completely represents it.

As regards heads of religious endowments, the authorities are not uniform. In *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mahomed Rowthan* (31) it was held that mutt properties were liable in the hands of its holder for debts contracted by his predecessor-in-title for necessary purposes even though no express charge was created. and a similar view was taken in *Pandara Sannathi* v. *Karutha Ravuthan* (32). But in *Swaminatha Aiyer* v. *Srinivasa Aiyer* (25) it was held that the creditor was only entitled to be subrogated and could not have his debts realized out of trust properties and Abdur-Rahim and Spencer, JJ., were not prepared to follow *Srimath Daivasikamini Pandarasannidhi* v. *Noor Mahomed Routhan* (31), if it laid down a contrary view. There is also a considerable divergence of opinion as to the exact position of the head of a religious endowment and the analogy which is to be applied in dealing with debts contracted by him. In some cases the analogy applied was that of a manager of an infant heir and in others the widow in possession of her husband's estate. [See *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mahomed Routhan* (31), *In the matter of two Second Grade Pleaders* (33) *Zamindar of Kapileswarapuram* v. *Secy. of State* (34), *Hossein Ali Khan* v. *Mahanta Bhagaban Das* (35)]. The Full Bench decision in *Kailasam Pillay* v. *Nataraja Tambiran* (36) to the effect that the position of the head of a mutt should be determined in each case on the conditions of the grant or usage of his mutt and that it cannot be predicated of the head of a mutt that he is either a life tenant or trustee, makes it difficult to treat the decision in a particular case as of general application as regards trustees of secular trusts in the absence of knowledge of the facts of each particular case. No case has been cited where direct recourse was allowed to an executor or secular trustee falling under the Trusts Act and so far as I can see the authority of the English and Indian decisions referred to by me has not been questioned in any of the Madras decisions.

I am of opinion that the plaintiff in the present case is entitled to be subrogated to the rights of the executrix, as the loan evidenced by the promissory note was contracted to pay the legacy directed in the Will to be paid to defendant 3 and to discharge the balance on the othi referred to in the Will. It is clear that the executrix would have been entitled to payment of Rs. 3,500 out of the estate if she had paid the legacy and discharged the othi out of her funds and it makes no difference that she borrowed the money from another, so long as the rights of the creditors are made subject to the state of accounts between the executor and the estate. Both the lower Courts have not dealt with the claim of the plaintiff against the estate from the right standpoint and have failed to deal with the plaintiff's right to be subrogated to the executor's right of repayment out of the estate.

It has been argued on the strength of *Swaminatha Aiyar* v. *Srinivasa Aiyar* (25) that the plaintiff is not entitled to

27. (1915) 39 Mad 915 =30 I C 574.
28. (1917) 38 I C 339.
29. (1910) 8 I C 851.
30. A I R 1914 P C 132=26 I C 915=39 Bom 261=49 I A 48 (P C).
31. (1908) 31 Mad 47.
32. (1911) 9 I C 150.
33. (1910) 34 Mad 29=6 I C 313.
34. A I R 1915 Mad 619=26 I C 590=37 Mad 355*n*.
35. (1907) 34 Cal 249.
36. (1910) 33 Mad 265=5 I C 4 (F B).

relief on this footing, as he did not ask to be subrogated but claimed direct re-course. I am of opinion that the fact that the plaintiff claimed the larger right to proceed against the assets of the testator as if he was a person entitled to the right of direct recourse, would not prevent the Court from granting a lesser relief by subrogating him to the executor. I do not think the learned Judges intended to lay down a hard and fast rule that in no case should the Court grant the lesser relief by subrogating the plaintiff to the rights of a trustee when he claims the right of direct recourse. If the decision is capable of such a construction I would respectfully dissent from it. The case may however be distinguished on the ground that there was, as observed by the learned Judges, nothing in the plaint to show that the temple was liable, whereas in the presentcase the plaintiff distinctly sought to make the estate of the deceased in the hands of the defendants liable (see prayer 3 of the plaint). His mistake was to claim direct recourse and not satisfy himself by getting the lesser right of being subrogated to the executor. It is a well recognized rule that a party claiming a larger relief ought not to be denied relief which can properly be granted, unless the ground on which the lessar relief can be granted is inconsistent with the case of the plaintiff as set out in the pleadings or would lead to the determination of issues which would embarrass the defendants or necessitate the addition of parties. Sometimes when the claim of the plaintiffs is unconscionable, Courts have declined to stretch a point in his favour, but a just claim ought not to be defeated by technical considerations based on the plaintiff having asked for more then he is legally entitled to, especilly in cases where owing to the conflict of authorities and the want of precedents, the law is not quite clear.

There is so far as I can see, nothing in the various decisions referred to by me or in the provisions of the Civil Procedure Code which prevents the question from being enquired into and determined as an issue in the suit. It is no doubt open to the party to move by Judge's summons in cases where the rules of the original side apply as was done in *Bridge* v. *Madden* (23), or to file a separate administration suit after judgment obtained against the executor personally or to apply for letters of Administrator de bonis non in case where the executor dies without having fully administered the estate. These remarks do not exclude the right of having the matter adjudicated in the suit itself and the policy of the Civil Procedure Code is to prevent a multiplicity of suits and to avoid the leaving for determination in proceedings subsequent to the decree of matters which may be conveniently decided in the suit. The doctrine of subrogation is an equitable doctrine, the basis of which is the doing of "complete, essential and perfect justice without technicalities as to form or procedure" except where substantial hardship will arise to the defendants. Turning to the merits, they are all in plaintiff's favour. There can be no doubt that the money was lent to pay a legacy due and the residuary estate has been enriched to the extent. The executrix is dead and all persons claiming under the will or in any way interested in the estate are parties to the suit. It is probable that a separate suit will be met by the plea of limitation and any additional trouble that the parties may be put to can be easily compensated by costs. If the executrix did not 'lose her right of indemnity there is a bsolutely no reason why the legatees and heirs of the testator should profit at the expense of the plaintiff.

I do not think that the fact that the suit is based on a promissory note makes any difference. The plaintiff is only seeking to work out the rights of the executant of the promissory note and the fact that the working out of the right would make others liable does not contravene any of the provisions of the Negotiable Instruments Act. Subrogation does not necessarily rest on contract or privity. In *Sanka Krishnamurthi* v. *Bank of Burma* (26), which was a suit on a negotiable instrument executed by the guardian of a minor, Wallis, C. J., was of opinion that the right of the creditor to proceed against the minor's estate was based on the doctrine of subrogation. I would set aside the decree of the lower Court, in so far as it dismisses the claim of the plaintiff to proceed against the defendants by reason of their being in possession of the estate of Narasimhachari, and remand the suit to the Subordinate Judge to decide the question whether Kothaiammal the executrix has lost

her right to re-imbursement out of the estate in respect of the sum of Rs. 3,500 borrowed by her on the promissory note sued on if, any, and if so, to what extent. If it is found that she has the right, plaintiff will to that extent be entitled to proceed against the estate. Costs in the lower Court and appeal will abide and follow the reasult.

Sadasiva Aiyar, J.—I have had the great advantage of a study of the very instructive opinion (if I may be permitted to say so) just now pronounced by my learned brother before preparing my own opinion. The suit was brought on the promissory note executed by the executrix and not on the debt evidenced by it. On the question whether, when the promissory note and the debt are contemporaneous, you can sue on the debt apart from the promissory note, there is a difference of opinion in this Court, and speaking for myself, I adhere to the opinion which I expressed in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (37) that where the loan is practically contemporaneous with and was when made intended to be evidenced by the promissory note, the claim could only be made on the note. Where the claim is so made on the promissory note which is a negotiable instrument and where the trustee or the executor does not sign as trustee or executor, the authorities are in my opinion, clear that there can only be a personal decree against the executant or if the executant is dead, against his or her legal heirs and there cannot be a decree against the trust estate or the testator's heirs.

Assuming, however that the creditor can sue on the debt (apart from the note) even in such a case the authorities see *Strickland* v. *Symons* (15), *Johnson, In re*; *Shearman* v. *Robinson* (22), Shard, In the matter of (21), *Evans, In re, Evans* v. *Evans* (16) show that the creditor cannot have any direct claim against the testator's estate and that he cannot have anything higher than a claim to be subrogated to the right of the executor to retain or receive amounts from the estate necessary to indemnify the executor against loss. This claim to be subrogated is however of no value if the executor had no such right to retain or receive any amounts from the estate; in other words, if it could be shown that the executor has to account to the estate for a sum not less than that in respect of which he has right to be indemnified. Now how and when is this relief to be obtained by the creditor? The procedure of the English Courts of Equity is not the procedure by which Indian Courts are to be guided. I am not very familiar with the English procedure either of the Common Law Courts or of the Equity Courts in suits or execution proceedings. It appears from the decision in *Evans In re, Evans* v. *Evans* (16) that the creditors in that case wanted to proceed against the intestate's properties for a debt incurred by his administratrix after his death in connection with a business which the intestate had carried on. They proceeded by application in the administration action brought by the intestate's infant child and in which action, the assets of the estate were being administered. But the present suit is not an administration action; there is no administration suit or decree before us and this suit cannot be treated as an application in an administration action. In *Raybould, In re, Raybould* v. *Turner* (9) the remedy of proceeding against the estate on the basis of the trustee's right of indemnity was sought after the passing of a personal decree against the trustee by taking out in the Chancery Division a fresh "summons for the purpose of enforcing" the claim against the testator's estate. Here we are asked to give a decree in the first instance against the heirs of the testator.

As regards *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mahmed Routhan* (31) (which was not a suit on a negotiable instrument), it has been dissented from in *Swami natha Aiyar* v. *Srinivasa Aiyar* (25). That case can also be distinguished (as pointed out by my learned brother) on the ground that it related to a religious trust and not to a secular trust. As regards the cases in *Padma Krishna Chettiar* v. *Nagamani Ammal* (27) and *Nataraja Naicken* v. *Ayyasami Pillai* (28), I do not think it necessary to express a final opinion as to correctness of both or either of them, as the decisions therein depended upon the application of the principles of the Hindu Law of joint family and of guardianship, which the learned Judges who decided those cases considered to be applicable to even suits on negotiable instruments.

37 A I R 1914 Mad 657=21 I C 864=38 Mad 660.

The question whether a partner is liable on negotiable instruments executed by another partner for the needs of the partnership is also governed by different considerations based on the law of partnership as a branch of Mercantile Jurisprudence. *See Karmali Abdulla Allarkhia* v. *Bora Karimji* (30).

The plaint in the present case does not state that the executrix and her heirs were entitled to take or retain any sum from the estate as indemnity and does not pray for a declaration that the plaintiff in execution is entitled to proceed against the properties of the late Narasimhachary in the hands of his heirs direct to the extent of such indemnity. In *Swaminatha Aiyar* v. *Srinviasa Aiyar* (25) the learned Judges, when requested by the appellant in a similar case to order an inquiry as to whether the trustee was entitled to recover any money from the trust estate by way of indemnity and to make the trust estate liable for the plaintiff's debt to that extent, observed as follows;

"But there was no allegation whatever in the plaint nor was any question raised by the issue that the temple was indebted to defendant 1. We do not think that it would be the right course in this suit to order any such inquiry as has been suggested. It may be that Mr. Anantakrishna Aiyar's client has a remedy by a suit properly framed against the trust property if, as a matter of fact, the trust property is liable to defendant 1 on a proper account being taken."

The learned Judges accordingly dismissed the second appeal with costs. I think these observations apply aptly to the present case also, where the plaint does not say that Kothai Ammal had any claims against her husband's estate and does not pray that by reason of her right to indemnity, Narasimha Chary's heirs should be made liable to the plaintiff for that indemnity amount to the extent of the assets of that estate in their hands. The only basis alleged in the plaint for the claim against Narasimha Chary's heirs is that Kothai Ammal was his executrix and she borrowed from the plaintiff under the promissory note to pay up a legatee under Narasimha Chary's will. Those allegations are insufficient, according to the authorities, to justify the passing of a decree against the estate or heirs of Narasimha Chary.

Of course, if there is any debt due to Kothai Ammal and her heirs by the heirs of Narasimha Chary, there are the provisions of the Civil Procedure Code for attaching those amounts in execution of the decree now passed against the heirs of Kothai Ammal. But an inquiry just now into the indebtedness of the estate to Kothai Ammal or its liability to indemnify Kothai Ammal seems to me to be opposed to the authorities and not to be warranted by the allegations made in the plaint as the basis of the plaintiff's claim. I regret therefore that I have the misfortune to differ from my learned brother as regards the final order to be passed in this appeal. I would have been glad if I could distinguish this case from *Swaminatha Aiyar* v. *Srinivasa Aiyar* (25), where Abdur Rahim and Spencer, JJ., refused to allow in second appeal the question of the plaintiff's right to be subrogated to the indemnity of the trustee to be raised or decided in the suit out of which that second appeal arose. I however find myself unable to do so.

The plaintiff could, if he wanted his claim to be satisfied from Narasimha Chary's estate (and not to be a claim against Kothai Ammal personally), have made Kothai Ammal sign the promissory note as executrix or obtained a charge from her on that estate. If he wanted to be subrogated to her right to indemnity and to have the extent of it ascertained, he should have framed his plaint in the present suit accordingly (assuming that the Indian procedure allows such a claim against Narasimha Chary's heir to be joined to and tried in the same suit brought on the promissory note against Kothai Ammal's heirs). It may be argued that the decision in *Swaminatha Aiyar* v. *Srinivasa Aiyar* (25) in refusing to allow the plaintiff's claim to be subrogated to the trustee's right took a rather technical view of the pleadings. But several difficult questions have arisen in this case, (a) as to the extent of the right of subrogation of the personal creditors of the executor or trustee in India, (b) as to whether such right can be claimed in a suit on a negotiable instrument executed by the trustee or executor in his personal capacity, (c) as to the nature of the proceedings in which the existence and the extent of the right of subrogation should be tried and ascertained (it may be that some new rules of procedure might have to be invented by the Indian Courts in the mofussil to have the question tried and decided, as the matter is

left in a rather nebulous state by the Indian decisions).

It appeared to me therefore that it is very desirable if all these questions could be considered by a Full Bench, it might be so considered, and as it is likely that there would be a Letters Patent Appeal from my decision dismissing the sscond appeal (which prevails under S. 98, Civil P. C)., I have thought it best tc follow what I consider to be the principles of the decision in *Swaminatha Aiyar* v. *Srinivasa Aiyar* (25) and to dismiss therefore this second appeal with costs (only one set).

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 310

SESHAGIRI AIYAR AND NAPIER, JJ.

Vadlur Chinna Nagi Reddy — Plaintiff - Appellant.

v.

Devineni Venkatramaniah and *another*—Defendants—Respondents.

Second Appeal No. 1226 of 1916, Decided on 21st November 1917, against the decree of Temporary Sub- Judge, Bellary, in Appeal Suit No. 87 of 1916.

(a) Madras Revenue Recovery Act (1864), S. 59— Notice of sale on defaulter is not necessary and does not affect jurisdiction— It amounts to irregularity in exercise of jurisdiction within S. 115 Civil P. C. and would vitiate sale —But no declaration can be obtained if suit not brought within time fixed by S. 59 —Civil P. C. (1908), S. 115.

Failure to serve notice of sale on a defaulter under Madras Act 2 of 1864 does not affect the jurisdiction of the Collector to sell the property for arrears due to Government. 12 *Mad* 168 (*F B*) *Foll.* [P 310 C 2]

An omission to serve notice will amount to an illegality or irregularity in the exercise of jurisdiction by the Collector within the meaning of S. 115, Civil P. C,. and would vitiate his proceedings; but that is not enough to enable the party aggrieved to obtain a declaration that the sale is not binding on him, if he does not sue within the period specified in S. 59 of the Act. *A I R* 1916 *P C*, *C* 141; 30 *I C* 355; 27 *Mad* 94 and, 27 *Mad* 483 (*F B*), *Dist.* [P 310 C 2]

(b) Civil P. C. (1908), S. 115—Absence of sale notice—Subsequent proceedings if with knowledge are not without jurisdiction.

The fact that the sale was without notice will not enable the defaulter whose property was sold to ignore subsequent proceedings taken to his knowledge as having been taken without jurisdiction. 34 *Cal* 811(*F B*) and 34 *Cal* 470, *Dist.* [P 311 C 1]

A. Krishnasamy Iyer and *K. G. Babu Row*—for Appellant.

T. Prakasam P. Narayan Murthi and *C. Rama Row*—for Respondents.

Judgment—The property in suit belonged to defendant 2. He obtained a loan under the Agricultural Improvements Act from Government in 1897. That loan was payable by instalments; while some of the instalments still remained unpaid, he sold the land to the plaintiff in 1902; owing to the default in the payment of one of the instalments, the land was put up to sale by the Government and was purchased by defendant 1. Plaintiff sues for a declaration that the revenue sale is not binding on him. It is found that no notice of the sale which was held in 1910 was served on defendant 2 or the plaintiff; but that, when defendant 1 took proceedings under Act 2 of 1864 to obtain possession, plaintiff, who had notice of the application, objected to the delivery on the ground that the sale was not binding on him; this was in November 1912. The suit was instituted on 9th June 1913, more than six months after the order for possession. The Subordinate Judge held that the sale was invalid, as there was no demand on defendant 2 to pay the instalment and also because no notice of the sale was served on him. He, however, held that as the proceedings to obtain possession were taken to the knowledge of the plaintiff more than 6 months before the suit, the suit was barred by limitation under S. 59. Act 2 of 1864.

We think he has come to the right conclusion. The learned vakil for the appellant contended that the sale was without jurisdiction, inasmuch as no notice of it was given to the plaintiff. In a very similar case it was held by a Full Bench of this Court in *Venkata* v. *Chengadu* (1) that failure to serve notice did not affect the jurisdiction of the Collector to sell the property. Under the Revenue Recovery Act there are some requisites which go to the root of the jurisdiction. As pointed out by Muthuswami Aiyar, J., in *Venkata* v. *Chengadu* (1), if there are no arrears, or if the land on which the arrear is due is not included in the holding of the alleged defaulter, any proceeding taken against such a person would be ultra vires. These are the essential conditions, compliance with which alone can invest the Collector with jurisdiction to take proceedings under the Act. If they are not complied with, the sale would be without jurisdiction There are other conditions which

1. (1889) 12 Mad 168 (F B).

the Act enjoins upon the Collector which are not conditions precedent. In conducting the sale certain formalities have to be observed. If they are not conformed to, the Collector, to borrow the language of S. 115, Civil P. C., will be acting illegally or irregularly in the exercise of his jurisdiction. No doubt such an illegal exercise of jurisdiction would vitiate the proceedings. But that is not enough to enable the plaintiff to obtain a declaration that the sale is not binding on him, if he does not sue within the period fixed by the Act. The proceedings taken being intra vires unless the suit is brought within 6 months to set the sale aside on the ground of irregularity or illegality, the plaintiff's suit will be barred.

We are unable to agree with Mr. Babu Rao that the sale was without jurisdiction, because of want of notice. The view taken by the Full Bench of this Court in *Venkata* v. *Chengadu* (1) is against such contention and we are not prepared to hold that that case is opposed to any subsequent decision of this Court and of the Judicial Committee. The case of *Secy. of State* v. *Radha Kishore Manikya* (2), which was strongly relied on, related to the sale of waste lands; instead of proclaiming that the waste lands were situated in the District A, it was proclaimed that they were in District B; and when subsequently lands in District A were sold under such a proclamation, it was held that the sale was without jurisdiction. That was a case where the Revenue Officer had no jurisdiction to act in respect of the lands in District A. He violated the observance of a condition precedent. In *Mysore Balakrishna Rao* v. *Secy. of State* (3) properties belonging to an individual were declared to be included in a reserved forest without any notice to him. Before taking action under the Act, the Government was bound to inform the person in possession that the property was going to be reserved. As regards the cases under the Rent Recovery Act in *Dorasamy Pillai* v. *Muthusamy Mooppan* (4) and *Zamindar of Ettayapuram* v. *Sankarappa Reddiar* (5), it is enough to say that in none of these was it held that the proceedings were without jurisdiction.

There is another point on which this appeal can be disposed of. Granting that the sale was invalid, the plaintiff was aware of the proceedings taken under the Act 6 months before the suit. It cannot be argued that the plaintiff was not aggrieved by the step taken to obtain possession. It was a step taken under colour of the Act and was calculated to injuriously affect the plaintiff's rights. The fact that the sale was without notice will not enable the plaintiff to ignore subsequent proceedings taken to his knowledge as having been taken without jurisdiction. In this view the decision in *Purna Chandra Chatterjee* v. *Dinabandhu Mukerjee* (6) and in *Rameswar Singh* v. *Secy. of State* (7) are distinguishable from the present case. We think the decision of the Subordinate Judge is right and dismiss the second appeal with costs.

S.N./R.K. *Appeal dismissed.*

2. A. I. R. 1916 P C 141=38 I C 379=43 I A 303=44 Cal 328 (P C).
3. (1915) 39 Mad. 494=30 I C 355.
4. (1904) 27 Mad 94.
5. (1904) 27 Mad 483 (F B).
6. (1907) 34 Cal. 811 (F B).
7. (1910) 34 Cal 470.

A. I. R. 1918 Madras 311

SESHAGIRI AIYAR AND NAPIER, JJ.

Perumal Mudaliar and *another*—Appellants.

v.

Sendanatha Mudaliar—Respondent.

Second Appeal No. 1406 of 1916, and Civil Revn. Petn. No. 800 of 1915, Decided on 6th November 1917, against decree of Dist. Judge, Tinnevelly, in Appeal Suit No. 448 of 1915.

(a) Contract Act (1872), S. 2 (d)—What can amount to consideration stated—No benefit to promisee is necessary.

The consideration required to support a promise may consist of any damage or any suspension or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, though no actual benefit accrues to the promisee. 14 *Cal.* 64; 36 *All.* 268 *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) and 1 *Q. B.* 256, *Foll.* [P 312 C 1]

(b) Hindu Law—Debt — Son's liability—Pious obligation—Promissory note for promise by father — Father repudiating — Son cannot be made liable.

A promissory note given by a Hindu on a promise made by his father cannot be enforced against him as a pious obligation if the promise was repudiated by the father or is otherwise not enforceable. [P 312 C 1]

E. S. Chidambaram Pillay and *O. N. Marthandam Pillay*—for Appellants.

M. D. Deva Doss—for Respondent.

Judgment.—We are unable to uphold the judgment of the learned District Judge. He is apparently of opinion that the promissory note given by the plaintiff can be supported on the theory that the promise by the father is binding on the son as pious obligation. If the father himself could have repudiated the promise, the son cannot be placed in a worse position. Therefore the real question is whether the original promise by the father is enforceable. Notwithstanding the adverse criticism of Sir Frederick Pollock on *Kedar Nath Battacharji* v. *Gorie Mahomed* (1), we are not prepared to differ from the statement of the law therein contained. The fact that a similar promise in England may not be enforced by the Courts of law is not conclusive of the question, as definition of consideration in the Indian Contract Act is wider and more comprehensive than is accepted in the English Courts. *Kedar Nath Bhattacharji* v. *Gorie Mahomed* (1) has been accepted as good law in *Abdul Aziz* v. *Masum Ali* (2) and we are prepared to follow these rulings. But before applying them the necessary facts have to be ascertained. It may be, as argued by Mr. Deva Doss, that the defendant was himself induced to pay money towards the charitable purposes on the faith of the plaintiff's promise. In that case according to the definition of the term, consideration, the plaintiff's promise will be enforceable. The definition taken by Leake from the well known case of *Carlill* v. *Carbolic Smoke Ball Co.* (3) will be equally applicable to such a promise. This is what Leake says:

"The consideration required to support a promise has been defined as consisting of any damage, or any suspension or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, although no actual benefit accrues to the party undertaking."

It may also be found that the daily services has been performed by the defendant, relying on the promise of the plaintiff. The learned Counsel for the respondent has stated that his client has paid interest believing that the promised subscription will come in. If that detriment has been suffered the promise of the plaintiff will be enforceable. The District Judge has not expressed any opinion on these questions of fact. We must reverse his decree and direct him to dispose of the appeal in the light of the above observations. The decree of the Subordinate Judge in Small Cause suit No. 1575 of 1913 must also be reversed, because that case cannot be disposed of independently. We transfer the Small Cause suit to the District Judge. He will dispose of that suit in accordance with his conclusions in the appeal. Costs in both the second appeal and the civil revision petition will abide the result.

S.N./R.K. *Appeal allowed.*

1. (1887) 14 Cal 64.
2. A I R 1914 All 22=23 I C 600=36 All 268.
3. (1893) 1 Q B 256.

A. I. R. 1918 Madras 312

BAKEWELL AND PHILLIPS, JJ.

Karuppa Goundan—Appellants.

v.

Narayana Chettiar—Respondent.

Second Appeals Nos. 1788 to 1799 of 1916, Decided on 7th August 1917.

(a) Madras Estates Land Act (1 of 1908)—S. 11, Act 8 of 1865 not re-enacted—Still presumption is that faisal rate is proper rent.

Though the provisions of S. 11 of the repealed Madras Act 8 of 1865 are not re-enacted in the Madras Estates Land Act there is a presumption that the faisal rate fixed by Government is the proper rent that can be levied on the land.

[P 313 C 1; P 314 C 1]

(b) Madras Estates Land Act (1 of 1908), S. 26—Contract for favourable rate except in cases under S. 26 (1) will not bind successor-in-interest.

A contract between a landholder and a tenant for payment of a favourable rate of rent will not, except in cases specified in S. 26 (1), bind the successor-in-title of the landholder who can enforce the faisal rate or the rate in force prior to such contract. [P 313 C 1, 2]

(c) Madras Estates Land Act (1 of 1908), S. 26 (3)—Decision holding contract for reduced rent enforceable is not res judicata against successor-in-interest of landlord by virtue of Cl. (3) which gives him right to enhance rent.

Per *Phillips, J.*—A decision of Court negativing a landholder's right to levy faisal rate and upholding a contract between him and his tenant for payment of reduced rent will not be res judicata in a suit by the landholder's successors to enforce the original rate, as under S. 26 (3), a special privilege is conferred on the successor to a landholder, not possessed by the original landholder himself, i. e., the right to enhance an unduly low rate of rent agreed to by the latter. [P 313 C 2; P 314 C 1]

(d) Civil P. C. (5 of 1908), S. 11—Decision to operate as res judicata must be against persons holding absolute title — Madras Estates Land Act (1 of 1908), S. 26.

Per *Bakewell, J.*—The prior decision will not operate as res judicata, unless it is shown that the plaintiffs in that suit had an absolute interest in the property, in order that they might be held to be the predecessors-in-title of the land

holder seeking to enforce the original rate in the subsequent suit. [P 314 C 1]

A. Krishnaswami Aiyar and *C. Narasimhachariar*—for Appellants.

S. Srinivasa Aiyangar and *Desikachariar*—for Respondent.

Phillips, J.—This is a rent suit and the point for determination is the amount of rent payable by plaintiff to defendant. Prior to 1859 a faisal rate was fixed on the land by Government, but admittedly plaintiff has for many years, certainly for more than 35 and possibly for 40 years, been paying a lower rate called in the muchilika the jamabandi rate. In the muchilika the faisal rate is also mentioned and the road cess payable is calculated on it. It has not been proved that the jamabandi rate was in force prior to 1859 and consequently under S. 11, Act 8 of 1865, the proper rate payable on the land would be the faisal rate. This provision of the Rent Recovery Act (1865) is not reproduced in the Estates Land Act, 1908, and it is contended for the appellant-plaintiff that there is now no presumption that the faisal rate is the proper rate. Although there is no such presumption raised by the Statute, yet I think that the existence of a faisal rate is a very strong piece of evidence as to what the proper rate should be. The faisal rate is fixed by Government as the fair rental of the land, and upon the faisal rates the peshkush and cesses are calculated and consequently the faisal rate should ordinarily be taken as the proper rent that can be levied on the land, and we see that in *Palani* v. *Paramasiva* (1) it was held that a purchaser at a revenue sale was prima facie entitled to demand the faisal rate, although the tenants pleaded a contract with the former landholder at a lower rate. In the present case we find the faisal rate specifically mentioned in the pattas and muchilikas, and the road cess payable by the tenant is calculated upon it. Notwithstanding the omission from the Estates Land Act of the provision in S. 11, Act 8 of 1865, I would hold that the faisal rate is the proper rate of rent for the land. This being so, is defendant entitled to charge that rate in spite of the contract between plaintiff and defendant's predecessor to charge lower rate? Under S. 26 (3), Estates Land Act:

"Except as provided by sub-S. (1) no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder if such rate is lower than the lawful rate payable by the raiyat before the date of the grant upon the land or upon land of similar description and with similar advantages in the neighbourhood."

Unless therefore the lower rate has been granted to the tenant for some reason specified in Cl. (1) of the section, the lower rate is not binding on defendant. Plaintiff has failed to show that the lower rate was granted for any of the reasons specified in Cl. (1) and even if any presumption could be drawn that such reasons existed when the rent was originally reduced, plaintiff has failed to show that such reasons still exist. I therefore hold that the lower rate is not binding on defendant. In some of the appeals connected with this one, a question of res judicata arises. There were formerly two mittadars of the suit estate, one of whom died. The surviving mittadar and the heir of the deceased mittadar filed suits in 1889 claiming rent at the faisal rate and in Second Appeal No. 400 of 1891 this Court made the following order:

"The plaint does not allege that the cowle rates were terminated and that plaintiffs are now entitled under the original agreement to levy the faisal rates. The suit is not framed nor have issues been taken on any such cause of action. The plaintiffs simply claimed the faisal rates. The defendants answered that by contract presumable from uniform payment for 50 years they were entitled to pay other rates. Both Courts have found that there is an implied contract to that effect. The appeal fails and we dismiss it with costs."

From this it would appear that the then plaintiffs were not allowed to charge faisal rates, because a contract to pay lower rates had been found to exist by both the lower Courts. The question whether the then plaintiffs were entitled to enhance the existing favourable rate was not considered, because no such claim had been put forward in the plaint. The question is whether this decision as to the rate leviable is binding on the present defendant, and the answer depends upon whether the then plaintiffs were the predecessors-in-interest of the defendant. Undoubtedly as mittadars, they were predecessors in-interest of the present mittadar, but under S 26 (3), Estates Land Act, a special privilege is conferred on the successor to a landholder, not possessed by the original landholder himself, i. e., the right to enhance an unduly low

1. (1890) 13 Mad 479.

rate of rent agreed to by the latter. In respect of this right of enhancement, defendant's claim is peculiar to himself and it cannot be said that the prior mittadars are persons "under whom defendant claims, litigating under the same title." It is further contended that the plaintiffs in the suit of 1889 were the successors-in-interest of the landholders who granted the lower rate, and consequently defendant is in the same position as they were. The answer to this is that one of the former plaintiffs was himself a party to the favourable grant, and consequently could not claim the benefit of any privilege conferred by S. 26 (3). I would therefore hold that the question is not res judicata. In view of the above I would dismiss the appeal with costs. Second Appeals Nos. 1789 to 1799 follow.

Bakewell, J.—I agree that the faisal rate must be presumed to be the proper rent and that the appellants have failed to rebut this presumption. With regard to the question of res judicata, I think that the appellant should have shown that the plaintiffs in the previous suit had an absolute interest in the property in order that they might be held to be the predecessors-in-title of the present defendant. It is quite possible that those persons, the then landholders, had only a limited interest and that under S. 26 (3), Madras Estates Land Act, a grant by them would not be binding upon the persons entitled to the rents after the lifetime of the landholder. In that case the present defendant would derive title from the successor of the landholders and would not be bound by the grant made by the latter. The appeal is therefore dismissed with costs.

S.N./R.K. *Appeal dismissed.*

** A. I. R. 1918 Madras 314

SESHAGIRI AIYAR AND NAPIER, JJ.

Karnam Chowdappa and *another* — Plaintiffs—Appellants.

vs.

Karnam Narasamma and *others* — Defendants—Respondents.

Second Appeal No. 1510 of 1916, Decided on 15th November 1917, from decree of Temporary Sub. Judge, Bellary, in Appeal Suit No. 41 of 1916.

**** Hindu Widows' Remarriage Act (15 of 1856), S. 2—S. 2 does not apply to widows not Hindus at remarriage — Property once vested in Hindu widow, her conversion to another religion and her remarriage thereafter does not divest.**

S. 2, Act 15 of 1856, does not apply to the case of a widow who has been converted to another religion and while in the second religion marries a husband. [P 315 C 2]

The word "widow" in the section applies only to such widows who continue to be Hindu at the time of remarriage. [P 315 C 1]

Therefore, where the property of her deceased husband has once vested in a Hindu widow, her subsequent conversion to another religion and re-marriage thereafter will not divest it 35 *All* 466 *Foll*; 19 *Cal* 289 (*FB*), *Appl.* [P 315 C 2]

B. Somayya—for Appellants.

Sultan Mohideen—for Respondents.

Judgment.—The suit is by a reversioner for a declaration that the alienation made by defendant 1, is invalid beyond her lifetime. The defendant 1's husband, Ramachandrapppa, died 30 years ago. His widow, defendant 1, married a Mahomedan in 1884. There is evidence to support the conclusion of the lower Courts that she was a convert to Muhammadanism before she married her present husband and we must accept that finding. On this finding the question is whether the defendant 1 has been in possession of the property for 30 years since her husband's death, and whether the plaintiff's suit is barred by limitation. The Courts below have come to the conclusion that it is so barred because, from the moment of her marriage, her possession was adverse to the plaintiff, but we are unable to agree with them.

There are two Acts to be considered in this connection. The first is Act 21 of 1856, known as the Caste Disabilities Removal Act. By that Act a person who is a convert to another religion does *not* lose his rights in the estate which he or she inherited while that person belonged to some other religion. The effect of that Act is to remove a disability which conversion was supposed to have imposed under the common law of the country. That is the Act which really governs this case. The second Act to which our attention was drawn is Act 15 of 1856. By its preamble and by the tenor of its provisions it is clear that that Act applies only to cases where a Hindu widow remarries as such, because the preamble distinctly says:

"Whereas many Hindus believe that this imputed legal incapacity (referring to the remarriage of widows) although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administer-

ed by the Courts of Justice shall no longer prevent the Hindus who may be so minded from adopting a different custom in accordance with the dictates of their own conscience; and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare, it is enacted etc."

It is clear from this that the Act was intended solely to apply to cases where a Hindu widow had remarried while she still remained a Hindu. Therefore, S. 2 Act, which speaks of her being regarded as dead on her remarriage, can have no application to the case of a person who has been converted to another religion and while in the second religion marries a husband. S. 2 was introduced to placate those who pleaded that it was a sacrilege to the memory of the deceased husband that his widow who has sullied his bed by remarrying should be allowed to enjoy his property. Our attention has been drawn to the decision of the Full Bench in *Matungini Gupta* v. *Ram Rutton Roy* (1). In that case four Judges of the High Court including the Chief Justice took the view that S. 2, Act 15 of 1856, prevented a Hindu widow, who had become a Brahmo, from inheriting her husband's estate. The learned Chief Justice who delivered the judgment of the Court says:

"S. 2 includes all widows who are within the scope of the Act, that is to say, all persons who, being Hindus, become widows, and it must follow from this that if any such widow marries she is deprived by S. 2 of the estate which she inherited from her Hindu husband."

Princep J., dissented, and in our opinion the word "widow" in S. 2 applies only to those who continue to be Hindus at the time of remarriage. We may point out that in the order of reference pronounced by three Judges—Wilson J. Banerjee J. and Princep J.—Banerjee J, took the view that S. 2 would not apply to all widows. The learned Judge was further of opinion that a Hindu widow who remarried would be disentitled to inherit the property of her husband not because of Act 15 of 1856 but by the precepts of Hindu law. He says that Hindu text writers allowed a Hindu widow to inherit her husband's property on the principle that she was the surviving half of her deceased husband and that inheritance should cease when she has become the better half of some other person. It may be anomalous that while a Hindu widow who re marries is not entitled to the entire estate of her husband, if she is converted and then married, she should be allowed to continue in possession of the property. But the Legislature has not intervened in this matter and we are not at liberty to import considerations of this nature in construing the Act.

1. (1892) 19 Cal 289 (FB).

The view which we take is in accordance with the decision in *Abdul Aziz Khan* v. *Nirma* (2). As pointed out in that case, Act 15 of 1856 has no bearing upon a case where the widow who marries is not a Hindu at the time of marriage. We entirely agree with this proposition. As regards the view taken by Banerjee J. in *Matungini Gupta* v. *Ram Rutton Roy* (1), if the matter were not concluded by the authority of the Privy Council we would hold with him that, under Hindu law, a woman who has been false to her husband's bed by conversion and by remarriage should not be allowed to inherit the property of her husband. But the decision of the Privy Council in *Moniram Kolita* v. *Keri Kolitani* (3) concludes this matter. There it was held that where property is once vested in a woman her subsequent unchastity would not divest her of the estate. The principle of that decision applies to the present case. At the highest this woman, who was originally a Brahmin widow and has since married a Mahomedan, can only be said to have been false to the bed of her husband. If the property had vested in her before she became a convert to Muhammadanism, the subsequent marriage cannot deprive her of the estate which she had inherited from her Hindu husband. We, therefore hold that the decision of the Court below is wrong, and we reverse their decision. On the other questions the case will be remanded to the Court below for disposal on the merits. Costs will abide the result.

S.N./R.K. *Case remanded.*

2. (1913) 35 All 466=20 I C 335.
3. (1880) 5 Cal 776=7 I A 115 (P C).

A. I. R. 1918 Madras 316

SESHAGIRI AIYAR AND NAPIER, JJ.

Ramaswami Reddi—Plaintiff—Appellant.

v.

Genga Reddi and *others*—Defendants—Respondents.

Second Appeal No. 1531 of 1916, Decided on 28th November 1917, against decree of Dist. Judge, Chingleput, in Appeal Suit No. 214 of 1915.

Civil P. C. (5 of 1908), O 6, R. 17—Amendment should be allowed if no surprise is caused or no evidence is shut out—It should not be allowed when nature of suit is changed or on ground of delay—Multiplicity is to be avoided and interests of justice should be satisfied—Amendment can be allowed when change is caused by appellate decision in corresponding suit.

Amendments of pleadings should be allowed when asked for by a party, provided the opposite party is not taken by surprise or precluded from adducing evidence or raising the necessary issues. Where, however, a party is agitating only a technical claim or the character of the suit is likely to be altered or where there is inordinate delay in asking for amendment, the Court would be justified in refusing to grant an amendment. The main considerations to be borne in mind are that multiplicity of suits should be avoided and the interests of substantial justice should be advanced. *Weldon* v. *Neal*, (1887) 19 *Q. B. D.* 394 and 24 *I. C.* 195, *Dist.* [P 316 C 2]

Plaintiff sued for recovery of 2 out of 5 shares in one plot or in the alternative 2 out of 12 shares in that and another plot. Mesne profits were reserved for a separate action. The trial Court decreed only the first prayer, but on appeal the District Judge granted the second prayer. Before the appeal was heard, plaintiff had filed a suit to recover mesne profits in respect of the property decreed to him. After the disposal of the appeal, he applied for amendment of the plaint by substituting a claim for mesne profits of 2 out of 12 shares in both plots:

Held: that the amendment should be allowed. [P 317 C 2]

C. Narasimhachariar—for Appellant.

T. M. Krishnaswami Aiyar—for Respondents.

Judgment.—The present plaintiff 1 brought a suit against the defendants to recover 2 out of 5 shares in one plot of property. He also asked in the alternative that he should be given 2 out of 12 shares in that and another plot of property. The District Munsif gave him a decree for 2 out of 5 shares in the first plot. Thereupon the defendant preferred an appeal to the District Court. Before the appeal was heard, the plaintiff sued to recover mesne profits in respect of the property decreed to him by the District Munsif, as he had reserved his right to sue for such mesne profits. In appeal the District Judge modified the decree of the Munsif and gave the plaintiff 2 out of 12 shares in both the plots. Thereupon the plaintiff presented a petition to the District Munsif to allow him to amend the plaint by inserting a claim for mesne profits on 2 out of 12 shares in both the plots. This amendment was disallowed to by the District Munsif, as he held that the nature of the amendment was such as change the character of the suit. His view was upheld in appeal; and this second appeal has been preferred against that judgment. We are unable to agree with the Courts below.

We agree with the statement of law contained in the judgment of Oldfield and Krishnan, JJ., reported as *Gatiganti Subbarayudu* v. *Arumilli Surayya* (1), where they point out that on a question of the propriety of allowing amendments, each case will have to be decided on the facts presented to the Court. In the present case, the amendment prayed for will not alter the nature of the suit, nor will there be an addition of a new cause of action. The principle to be borne in mind by Courts below is that provided the opposite party is not taken by surprise, nor precluded from adducing evidence nor from raising the necessary issues, the amendment should ordinarily be allowed. In the present case, on the date of the application for amendment, the suit was at the very initial stage of the proceedings. No issue had been raised and no evidence had been let in, and therefore the District Munsif ought, in the circumstances, to have allowed the amendment. At the same time, we wish to point out that where the plaintiff is agitating only a technical claim or where the character of the suit is likely to be altered, or where there has been an inordinate delay in asking for amendment, the Court will be justified in refusing to grant an amendment. The main considerations to be borne in mind are that multiplicity of suits should be avoided and the interests of substantial justice should be advanced.

As regards the cases quoted at the Bar, Mr. Krishnaswami Aiyar strongly relied upon the observation of Lord Esher in *Weldon* v. *Neal* (2). In that case the amendment necessitated the adding of a new cause of action as was pointed out by the learned Master of the Rolls More-

1. (1915) 37 I C 914.
2. (1887) 19 Q B D 394.

over, it has to be borne in mind that in England pleadings are drafted with greater care than in this country. In an early case before the Judicial Committee of the Privy Council reported as *Mohummud Zahoor Ali Khan* v. *Mt. Thakooranee Rutta Koer* (3), it was pointed out that Courts should have regard to the loose way in which pleadings are prepared in India and should, as far as possible, allow amendment of the pleadings, in order to avoid a claim being barred by the Statute of Limitation. This is quite consistent with the view taken in *Weldon* v. *Neal* (2), and we are certainly bound to follow this dictum of the Judicial Committee in preference to the decision of the Master of the Rolls in *Weldon* v. *Neal* (2).

Mr. Krishnaswami Aiyar also relied upon certain observations of the present learned Chief Justice in *Kumara Venkata Perumal Raja Bahadur Varu* v. *Velayuda Reddi* (4). If we may say so, with respect, upon the facts presented to the Court in that case, we would not have been prepared to allow the amendment. In that case an attempt was made to get property not included in the application to be sold after 12 years from the date of the presentation of the first application. That was a case of gross carelessness and of great delay. Therefore the observations in *Kumara Venkata Perumal Raja Bahadur Varu* v. *Velayuda Reddi* (4) do not conclude this case. On the other hand, in that same case, Sadasiva Aiyar J. took a different view of R. 17, O. 6, Civil P. C. In *Varadiah* v. *Raja Kumara Venkata Perumal* (5) the same learned Judge was a party to allowing amendment under similar circumstances. A case almost on all fours with the present case is *Sevugan Chetty* v. *Krishna Aiyangar* (6), where Benson and Spencer, JJ., allowed an amendment on grounds similar to the present case. This case was commented on by Oldfield and Krishnan, JJ., in *Gatiganti Subbarayudu* v. *Arumilli Surayya* (1), but they did not disapprove of the decision, although they pointed out that it was a case which had reached the high water mark in respect of allowing amendments. In the case before them, the learned Judges pointed out that the amendment sought for would not only change the nature of the suit but would be diametrically opposed to it as originally presented, and that there was great delay in the presentation of the application for amendment. We think, in the circumstances of this case and having regard to the facts that the case of the defendants would not be changed and that there has been no delay in the presentation of the application for amendment, the Courts below should have allowed the amendment of the plaint.

We therefore reverse the decrees of the Courts below and grant the plaintiff liberty to amend the plaint. It was due to the precipitate action of the plaintiff that there was necessity for this amendment and, in the circumstances, we think he should be directed to pay the costs of the respondents hitherto incurred in all the Courts. Further costs will be provided for in the revised decree.

S.N./R.K. *Appeal allowed.*

3. (1866) 11 M I A 468=9 W R 9 (P C).
4. A I R 1915 Mad 449=24 I C 195.
5. A I R 1914 Mad 663=21 I C 782.
6. (1912) 36 Mad 378=13 I C 268.

A. I. R. 1918 Madras 317

SESHAGIRI AIYAR AND NAPIER, JJ.

Tittu Gopalachariar and *others* — Plaintiffs—Appellants.

v.

Maiyappa Chetty and *others*—Defendants—Respondents.

Second Appeal No. 1170 of 1916, Decided on 14th November 1917, against decree of Dist. Judge, Madura, in A. S. No. 258 of 1914.

(a) Paper Currency Act (2 of 1910), S. 26—Bill or note payable to bearer on presentation does not offend S. 26.

A bill or note which is payable to the bearer who brings it to the place of payment on the order of the payee, does not offend against S. 26, and is an on demand note. The note is receivable in evidence and is one made in accordance with law: 40 *Mad.* 585 and 42 *I. C.* 706, *Expl.* [P 318 C 1]

(b) Negotiable Instruments Act (26 of 1881), S. 19—"On demand" note defined.

A note which does not fix any date for payment is an "on demand" note. Also a note will be construed as an "on demand" note if it is so expressed. [P 318 C 2]

(c) Paper Currency Act (2 of 1910), S. 26—Principle underlying is that privilege should not be usurped by private persons.

Per *Seshagiri Aiyar, J.*—The principle underlying S. 26 is that private persons should not be permitted to usurp the privileges of the Government, for the latter alone have the right to get a note negotiated by bare presentation. The language of an ordinary currency note should not be copied by private parties. [P 318 C 1]

(d) Negotiable Instruments Act (26 of 1881), S. 19—Bill of exchange remains pay-

able "on demand" though not presented on proper date.

Per *Napier, J.*—A bill of exchange is nonetheless payable on demand for the fact that the demand cannot be made on the day when the bill is drawn. [P 318 C 2]

K. V. Krishnasamy Ayyar—for Appellants.

K. R. Gurusamy Ayyar and *A. Subbarama Aiyar*—for Respondents.

Seshagiri Aiyar, J.—The suit has been disposed of by the lower Courts on the pleadings and on the construction of the note annexed to the plaint. The learned District Judge says that as

"it is a physical impossibility for it (the note) to have been paid on the day it was drawn,"

it was not a promissory note. The learned vakil for the respondents said that he would not rest his case on this view of the District Judge. If I understand the learned Judge rightly, unless the payee and the drawer are face to face with each other, no promissory note can be made payable on demand. Whether it takes seven days to go to Penang or 24 hours from the place of execution to the place of payment, cannot matter if the view of the District Judge is correct that an "on demand" is payable eo instanti and should be paid the moment payment is claimed. No authority is cited by the learned Judge for this proposition and neither I nor the learned vakils are able to find any. The real question is, what is the nature of the document. The translation made by the interpreter shows that the note is payable to the bearer who brings it to the place of payment on the order of the payee. It is clear therefore that there must be an endorsement by the payee. If this is the correct view of the document, it does not offend against S. 26, Paper Currency Act. The principle underlying that section is that private persons should not be permitted to usurp the privileges of the Government. For they alone have the right to get a note negotiated by bare presentation. The language of an ordinary currency note is what the legislature intended should not be copied by private parties. In *Chidambaram Chettiar* v. *Ayyasami Thevan* (1), and in *Nachimuthu Chetty* v. *Andiappa Pillai* (2) the language of the note was such that there was no necessity for an endorsement before payment can be demanded by the bearer of it, who is not the payee under it.

Mr. Gurusamy Ayyar then argued that the note postpones the payment of the amount due thereunder and is, therefore obnoxious to S. 19, Negotiable Instruments Act. In the first place, I am unable to accept this construction of the note. What it provides for is, for postponing the date on which interest shall accrue due on the note. I am not prepared to say that even the payment of interest is put off. A comparison of the English Bill of Exchange Act, S. 10, with S. 19 of the Indian Act, shows that a note which does not fix any date for payment is an "on demand" note. Also a note will be construed as an "on demand" note, if it is so expressed. This is the clear meaning of S. 10 of the English Act. Mr. Gurusamy Ayyar contended that even though a note may be made expressly payable on demand, if the time for the payment of interest or principal or both is put off, then the document is not a promissory note. The omission in the Indian Act to provide for cases of notes expressed to be payable on demand must be attributed not to any intention to depart from the English rule of law, but to the view that if the expression is there, the legislature need not provide for it specially. Looking at the document from any point of view, the conclusion of the Courts below is wrong and we must reverse the decree of both the Courts below and remand the suit for disposal on the merits. Costs will abide the result.

Napier, J.—The objection raised by the District Judge is absolutely without any foundation. A bill of exchange is nonetheless payable on demand for the fact that the demand cannot be made on the day when the bill is drawn. There has been some discussion on the meaning of the document. The District Munsif and the translation department translated it in a way which appellant's vakil contended was not correct. It has now been translated by the principal interpreter and my learned brother is satisfied that the translation is accurate. On the words, as we have them now, it is clear that the payment of the bill is not postponed to a future date and that it is not payable to any holder without endorsement. It therefore does not require an ad valorem stamp and does not offend against S. 26, Paper Currency Act, the effect of which

1. (1916) 40 Mad 585=36 I C 741.
2. (1917) 42 I C 706.

is explained in *Chidambaram Chettiar* v. *Ayyasami Thevan* (1). The document is, therefore, both receivable in evidence and one made in accordance with law. The case will be remitted to the Court of the District Munsif for disposal. Costs will abide the result.

S.N./R.K. *Case remanded.*

A. I. R. 1918 Madras 319

SESHAGIRI AIYAR AND NAPIER, JJ.

Abi Dhunimsa Bibi Ammal—Plaintiff—Appellant.

v.

Muhammad Fathi Udini Sahib and *others*—Defendants—Respondents.

Second Appeal No. 1277 of 1916, Decided on 6th December 1917. from decree of Dist. Judge, South Arcot, in Appeal Suit No. 211 of 1915.

(a) Mahomedan Law—Dower—Relinquishment—Minor can repudiate after attaining majority under Majority Act.

The relinquishment of dower by a Mahomedan minor does not bind her when she attains age according to the Majority Act. [P 320 C 1]

(b) Mahomedan Law—Minority and guardianship — Injunction against minor's act operate till he attains majority under law of land.

The injunction of Mahomedan law which prohibits acts being done by a minor to his prejudice must be taken to operate till the age at which the minor attains majority under the ordinary law of the land. [P 321 C 1]

(c) Majority Act (1875)—Scope — It does not deprive rights otherwise claimable.

The Majority Act should not be construed so as to deprive a person of rights which he would otherwise be entitled to. [P 320 C 2]

(d) Majority Act (1875), S. 2—Minor relinguishing her rights to dower cannot be said 'to act' within S. 2.

A Mahomedan female cannot be said 'to act' in the matter of dower within the meaning of S. 2 when she gives up her rights to it : 22 *Bom.* 430, *Dist.* [P 320 C 1]

(e) Mahomedan Law — Dower — Unpaid dower is debt—Widow in possession has lien over property for dower debt.

Dower, under Mahomedan law, is in the nature of a debt, being a recompense for the matrimonial restraint. The wife has a lien over the property of her husband in her possession for unpaid dower and she ranks pari pasu with other creditors in the distribution of her husband's estate. [P 319 C 2 ; P 320 C 1]

(f) Majority Act (1875), S. 2 — S. 2 only allowed persons to act in religious acts and ceremonies which person was otherwise entitled to do.

When the legislature by S. 2, permitted a person to act in the matter of dower it only intended to allow that person who was not otherwise competent under the ordinary law to act in that matter to initiate the religious acts or ceremony which under the personal law he or she was capable of initiating. The legal consequences flowing from this primary act were not intended to be controlled by the section. [P 320 C 2]

T. R. Venkatarama Sastriar—for Appellant.

N. Rajagopalachariar — for Respondents.

Judgment.—This is a suit by a Mahomedan lady for dower. The defence is that when her husband was on his deathbed and she was only 15 years of age she relinquished her right in the dower. The question for consideration is whether this relinquishment debars the plaintiff from suing to recover it. The District Munsif found that the dower was released, but the release was brought about by undue influence and fraud and that, consequently, plaintiff was entitled to recover it. The learned District Judge has written an interesting judgment in which, while accepting the conclusion of the District Munsif that there was a release of the dower, he differs from the lower Court on the question of fraud and finds that the release is binding upon the plaintiff.

The question is not covered by any authority and is one of some importance. It has to be decided on first principles. Under the Mahomedan law, a dower, as pointed out by Abdur Rahim, J., in his book on Mahomedan Jurisprudence:

"is a sum of money or other form of property to which the wife becomes entitled by marriage; it is not a consideration proceeding from the husband for the contract of marriage, but is an obligation imposed by the law as a mark of respect for the wife."

In Hamilton's Hedaya, Chap. 15, S. 1, the right to dower is said to have been founded upon the text "Let him support her according to his abilities." It is pointed out in this treatise :

"that when a woman surrenders herself to the custody of her husband it is incumbent upon the latter thenceforth to provide her with food, clothing and lodging because such is the precept both in the Koran and in the traditions and also because maintenance is a recompense for the matrimonial restraint."

The author is apparently of opinion that the fixing of dower is a recompense for the surrender. It is stated in Mahomedan law books that even though no dower may have been fixed on the date of the marriage, the wife is entitled to some dower from the estate of the husband. That is the nature and origin of the dower or mahar in Mahomedan law.

The character of the obligation to pay the dower is as a debt. The moment that dower is settled, it passes from the domain of a moral precept into an en-

forceable debt. It has been held that the wife has a lien over the property of her husband in her possession for unpaid dower. It has also been held that she would rank pari pasu with other creditors in the distribution of the estate of her husband : see *Meer Meher Ally* v. *Mt. Amanee* (1) and *Syud Imdad Hossein* v. *Mt. Hosseinee Buksh* (2). Mr. Tyabji in his Principles of Mahomedan Law discusses the case and says that the widow's claim for dower due from the estate of her deceased husband ranks equally and rateably with the claims of other creditors.

Having now arrived at a conclusion as regards the nature and character of dower, the next question is whether a minor can give up her rights to it. There cannot be much doubt that where a Mahomedan female attains an age, which according to Mahomedan law is the age of majority, she can release her rights to dower. In the present case the plaintiff was a major according to Mahomedan law. But as regards general contractual obligations the Contract Act has superseded the Laws of Hindus and of Mahomedans. If this question were not complicated by the exception contained in the Majority Act to which we shall presently refer, there could be no doubt the renunciation of the dower by plaintiff could not bind her.

Now the question is whether S. 2, Act 9 of 1875 has made any difference in this respect. That section lays down that nothing in the Majority Act shall affect the capacity of any person 'to act in the matter of dower." It was contended by Mr. Rajagopalachariar for the respondent that in releasing the right to dower the plaintiff was acting in the matter of the dower. There is some justification for this contention in the language employed by the learned Judge of the Bombay High Court in *Bai Shirinbai* v. *Kharshedji* (3). That was a case relating to Parsees and the question there was whether a Parsee minor suing to have a marriage declared void was acting in the matter of marriage. The learned Judges seemed inclined to hold that the plaintiff brought herself within the meaning of S. 2, Majority Act. In our opinion the construction placed upon the word 'act' seems far-fetched. As Mr. Venkatarama Sastriar for the appellant contended, the word 'act' has been used as a comprehensive verb to control the steps to be taken in four specified classes of cases : marriage, dower, divorce and adoption. It is not very apt as applied to dower, although it is full of meaning as applied to the other three classes. It must be remembered that the primary object of the Majority Act was to reserve liberty to the Indian subjects of the sovereign to exercise their rights in matters specially pertaining to religion or religious usages. No attempt was made in the Majority Act to indicate the legal rights which might flow upon the exercise of these rights. The object was to confer a privilege and not endanger ordinary civil rights. Civil and contractual rights might flow upon the exercise of such rights. The ordinary law was intended to take its course in respect of these correlative rights. Therefore in our opinion, when the legislature permitted a person to act in the matter of dower it only intended to allow that person, who was not otherwise competent under the ordinary law, to act in that matter to initiate the religious acts or ceremony which under the personal law of the subject he or she was capable of initiating. In our opinion the legal consequences flowing from this primary act were not intended to be controlled by S. 2, Majority Act.

One other consideration to be borne in mind is this. The Majority Act should not be so construed as to deprive a person of rights which he is otherwise entitled to. What was intended to be a beneficent legislation should not be construed as operating to deprive the ordinary rights of a person. Under the Mahomedan law as pointed out by Abdur Rahim, J., in his book:

"generally speaking only such acts and transactions of a minor will be upheld as are of benefit to him and whatever is injurious to his interests will be disallowed."

He says again:

"but an infant with or without permission of his guardian cannot do any act which is absolutely injurious to his interests, such as divorcing his wife or making a gift or wakf of his property or lending his money. Similarly, a bequest of an infant is void because it is laid down that it is better for a man that he should leave his heirs rich rather than they should beg of people."

No doubt, this prohibition against the act of an infant is removed when he or she attains majority as understood by

1. (1869) 11 W R 212.
2. (1870) 2 N W P H C R 327.
3. (1898) 22 Bom 430.

Mahomedan lawyers. But the question still remains whether when the British Government enacted a uniform rule as to the age of majority, it was intended to deprive minors belonging to the Hindu or Mahomedan communities from enjoying the privilege of that legislatien by operation of S. 2, Majority Act. In our opinion the injunction of Mahomedan law which prohibits injurious acts being done by a minor to his prejudice must be taken to have been preserved till the age at which he or she attains majority under the ordinarily law of the land.

There is one other passage in Rahim, J's book which is rather significant. He says:

"an infant, even if possessed of understanding, is however under no obligation with respect to what is regarded in law as a benevolent act, having a semblance of penalty; he is also not liable to penalties which are in the nature of private rights like retaliation."

This passage has some bearing upon the finding of the learned District Judge. The act of renunciation by the plaintiff is said to have occurred under the following circumstances. Her deceased husband was suffering from cholera. He was a pious man and was anxious that he should be relieved of all obligations contracted by him prior to his death, as he believed that if he died an undischarged debtor he would not be able to attain salvation. It was apparently to ease the mind of her husband in this behalf, that the plaintiff is said to have cried out that she released her rights of dower. That is undoubtedly a benevolent act intended to secure religious benefit to her husband. In the passage, which we have cited from Mr. Rahim's book, such a benevolent renunciation would be regarded as not binding upon a person even though he or she be good of understanding. We are not sure whether the learned author intended to lay down that, where the age of majority according to the Mahomedan law had been attained, such a renunciation would still be not binding. But apart from that question, in our opinion, such a purely gratuituous act on the part of the minor should not bind her when she attains the age of majority. As we pointed out at the beginning, the moment that the marriage is contracted the dower due to her becomes a debt and before a debt can be relinquished the person must be of age according to the law of the land. In our opinion the plaintiff was not acting in the matter of dower when she said that she gave up her rights to it. We are therefore of opinion that the decision of the District Judge should be reversed and that of the District Munsif restored with costs in this and in the lower appellate Court.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 321

SADASIVA AIYAR AND PHILLIPS, JJ.

Medisetti Venkatasami — Plaintiff — Appellant.

v.

Kunchalla Chidambaram and *others*— Defendants—Respondents.

Second Appeal No. 888 of 1916, Decided on 8th August 1917, against decree of Addl. Temporary Sub Judge, Guntur, in A. S. No. 163 of 1915.

Civil P. C. (5 of 1908), S. 47 — Party against whom suit dismissed even without decision of question between him and other remains party and suit by him is barred.

A defendant, whose name appears in the decree without having been struck off previously from the record, is a party with respect to whom the probibition of a separate suit enacted in S. 47, Civil P. C., applies, notwithstanding that he has been exonerated by the decree passed in the suit without an adjudication on the controversial questions between him and the plaintiff : 40 *Mad* 964, *not Foll* ; 23 *Mad* 361 (*F B*), *Foll.* [P 322 C 1]

P. Somasundaram for *V. Subramaniam Pantulu*—for Appellant.

P. Venkataramana Rao — for Respondents.

Judgment. — An important question of law as to interpretation of S. 47, Civil P. C., (with the new explanation added by the Code of 1908) is involved in this appeal. The contention of Mr. Venkataramana Rao for the respondents is that the case, *Krishnappa Mudaly* v. *Periaswamy Mudaly* (1), relied on by the appellant is opposed to the Full Bench decision in *Ramaswami Sastrulu* v. *Kameswaramma* (2) and to the plain language of the explanation to S. 47, Civil P. C., and ought not to be followed. We agree with Mr. Venkataramana Rao's contention, and we do not think that the anomaly pointed out at p. 123 (Col. 1), 21 Madras Law Times Report is a sufficient reason for overriding the plain legislative provision, which was apparently introduced in the new Code for the express purpose of enacting as law the views expressed in the decisions of the

1. (1917) 40 Mad 964=38 I C 297.
2. (1900) 23 Mad 361 (F B).

Bombay and Madras High Courts on the old S. 244 (corresponding to the present S. 47) and embodied in the Full Bench decision in *Ramaswami Sastrulu* v. *Kameswaramma* (2), and of overruling by statutory enactment the decisions contra of the other High Courts on the question, whether a defendant whose name appears in the decree without having been struck off previously from the record is a party with respect to whom the prohibition of a separate suit enacted in S. 47 (old S. 244) applies, notwithstanding that he had been exonerated by the decree passed in the suit without an adjudication on the controversial questions between him and the plaintiff. The second appeal is therefore dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 322

COUTTS-TROTTER, J.

P. Thiruvarangiah—Plaintiff.

v.

D. K. Pania & Co.—Defendants.

Civil Suit No. 423 of 1916, Decided on 14th August 1917.

(a) Contract, C. I. F.—Meaning of, stated.

A c. i. f. contract is a sale of documents and not of goods, as what is intended to be delivered to the ultimate purchaser are the documents of title to the goods: *Arnhold Karberg* and *Co.* v. *Blythe, Green, Jourdian* and *Co.*, (1916) 1 *K B* 495, *Foll.* [P 323 C 1]

(b) Contract Act (1872), S. 56 — Goods shipped on enemy vessel—War breaking out before arrival of steamer at destination—Bill of lading at delivery containing illegal and unenforceable contract—Contract is void and suit for breach does not lie.

Plaintiff agreed to purchase in April 1914 certain cases of Belgium glass from defendants, agents of an Australian firm. The contracts were c. i. f., c. i , Madras and were shipped on board a German ship at Antwerp. While the vessel was on her voyage, war broke out between Great Britain and Germany. The ship was condemned as a prize at Colombo, but she was allowed by the Government to proceed and discharge her cargo at her distination, the Government undertaking to give delivery to British subjecte who were entitled to receive delivery of the cargo on board the ship. In a suit by plaintiff for breach of contract by the defendant, on the failure of the latter to deliver the goods:

Held: that as the bill of lading at the time of delivery contained a contract that was illegal and unenforceable, its tender was bad and that, on the outbreak of the war, the contract became void and incapable of performance: *Arnhold Karberg* and *Co.* v. *Blythe, Green, Jourdain* and *Co.*, (1916) 1 *K B* 495; *Arnhold Karberg* and *Co.* v. *Blythe, Green, Jourdain* and *Co.*, (1915) 2 *K B* 379; 40 *I C* 383 and 37 *I C* 644, *Foll.*

[P 323 C 2]

C. P. Ramaswami Aiyar, S. Ponnusami Aiyar and *K. Narayanaswami Aiyar*—for Plaintiff.

V. V. Srinivasa Aiyangar, V. S. Govindachari and *V. S. Kallabiran Aiyangar*—for Defendants.

Judgment. — This is an action for damages for breach of three contracts between the parties dated 24th April, 27th April and 30th April 1914, under which the plaintiff agrees to purchase a certain number of cases of Belgium window glass. Those goods were shipped—we do not know the exact date, but as the invoices were made out on 23rd July 1914 and the bills of exchange were dated 29th July, the probability is that they were shipped between those dates, and it is conceded for the purpose of this case that they were shipped before the outbreak of war between Great Britain and Germany on 3rd August. The contracts were c. i. f , c. i., Madras, and they were shipped on board a German ship the "Spitzfels" at Antwerp. While she was on her voyage, war broke out; I am told that she was ultimately captured, and was brought to Colombo where the ship was condemned as a prize, but she was allowed to proceed to such ports in the British Empire as she had cargo consigned for and to discharge that cargo there; and arrangements were ultimately made—I do not think it is material to go in detail into what they were—whereby the Government of this country undertook to give delivery to British subjects who were entitled to receive delivery of the cargo on board the ship. The result of all that was that on the arrival of the ship in May 1916 at Madras, the defendant, had he been minded to do so, was in a position to hand over these cases of glass to the plaintiff and take the price for them. That is conceded. The question is whether he was under any obligation to do so. There has been some discussion recently as to whether or no it would be correct to speak of a c. i. f. contract in the language of Scrutton, J., as "a sale of documents and not of goods." Bankes, L. J., in *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdian Co.* (1) says:

"I am not able to agree with that view of the contract—that it is a sale of documents relating to the goods. I prefer to look upon it as a contract for the sale of goods, to be performed by the delivery of documents, and what those docu-

1. (1916) 1 K B 495.

ments are must depend upon the terms of the contract itself."

That seems to me a distinction so subtle as really to be immaterial. The point is that under a c. i. f. contract what is expected and intended to be delivered to the ultimate purchaser, is the documents of title to the goods. No doubt it is a sale of goods, it says so; but at the same time it is intended to be performed not by the delivery of goods but by the delivery of the documents of litle to the goods. Now what are those documents? They are, first, the bill of lading relating to the goods, it being the duty of the vendor under his contract to ship the goods and get the bill of lading in respect of them from the ship's agents, then there must be a policy of insurance in an approved form, and lastly there must be invoice; and in most mercantile contracts all those documents are generally forwarded along with bills of exchange, which are to be accepted or paid by the vendee in return for the other documents. What are the essentials of the bills of lading that must be tendered in order to fulfil the contract? They must, I think, be bills of lading which do not contain an illegal or unenforcable contract. That seems to me to be the effect of the decision in *Arnhold Karberg & Co.* v. *Blythe Green, Joardain & Co.* (1) and in the Court below the very instructive judgment of Scrutton, J., in *Arnhold Karberg & Co.* v. *Blythe, Green, Joardain & Co.* (2). That case decided that where a seller tendered to buyer documents under a c. i. f., contract, which included a bill of lading in a German ship, the tender was bad not because the putting of the goods on board the ship was not at the time it was done perfectly in accordance with the contract, but because the event of the outbreak of war having rendered that contract illegal, to force that by way of tender on the buyer was equivalent to saying "under the terms of your contract I shall make you trade with the enemy." That is what it comes to.

It has never been doubted, since it was pointed out by Willes, J., in *Esposito* v. *Bowden* (3), that to enter into a contract of affreightment with an alien enemy is trading with the enemy and on the outbreak of war such contracts become void and incapable of performance. I am content to rest this judgment upon those general considerations and I think I should have been quite satisfied to rest it on the authority of the case in the Court of appeal in England, but I am fortified in the conclusion to which I have come in that this case is admittedly indistinguishable from the case of *Madhoram Hurdeodass* v. *G. C. Sett* (4), which is a decision of Sanderson, C. J., who is a lawyer of great experience in commercial Courts in England and of Mookerjee, J. Although their judgment is not binding on me, I should naturally treat it with great respect and I not only do so but I respectfully agree with them. Practically, the same conclusion has also been come to in Bombay in a very exhaustive judgment by Beaman, J., in *Marshall & Co.* v. *Naginchand Phulchand* (5). I think even if I did entertain any doubt upon it, in a question of this sort it is extremely desirable that the Courts of the Empire, because commercial transactions of this kind extend all over the Empire, should speak with one voice and I should not dissent from the judgments of the Bombay and Calcutta High Courts, which I believe to be in entire agreement with the principles laid down by the English Court of appeal. I must therefore on this ground alone give judgment for the defendant with costs.

S. N./R.K. *Suit dismissed.*

2. (1915) 2 K B 379.
3. (1857) 7 El and Bl 763.
4. (1917) 40 I C 383.
5. (1917) 37 I C 644.

A. I. R. 1918 Madras 323

AYLING AND SESHAGIRI AIYAR, JJ.

Natesa Iyer—Defendant—Appellant.

v.

Subramania Iyer and *others*—Plaintiff—Respondents.

Civil Appeals Nos. 212 and 277 of 1916, Decided on 21st December 1917, against decree of Sub-Judge, Kumbakonam, in Original Suit No. 33 of 1914.

(a) Hindu Law — Partition—Father and sons—Son's consent is unnecessary — One son consenting and other dissenting, partition must be deemed to be done by father in his capacity as father.

Under Hindu Law a father can effect a partition between himself and his sons with or without their consent: 2 *Mad.* 317; 36 *I. C.* 507 and 40 *I. C.* 205, *Foll.* [P 325 C 2]

When a Hindu father effects a division with the consent of one of his sons, the other sons dissenting, he must be deemed to have effected the partition in exercise of his power as father. [P 326 C 1]

(b) Hindu Law — Partition — Father and son — Partition deed registered by father under S. 35, Registration Act—Subsequent bequest by him of his share is binding on other sons—Partition is effective—Registration Act (16 of 1908), S. 35.

Where the father effects a partition between himself and his sons and registers the partition deed under S. 35, Registration Act, and afterwards devises the items that fall to his share to one of his sons, the other sons cannot claim a division by metes and bounds but must accept the items allotted to them. [P 326 C 1]

Such a deed of partition is receivable in evidence as evidencing a contract by some only of the intended executants who signed the deed, and it can be looked into to ascertain the intention of the executants. [P 325 C 2]

(c) Hindu Law—Will—Bequest of specific properties cannot be used as evidence of allotment of them when testator was only tenant in common.

A testamentary disposition of specific properties cannot be utilized for proving the bequest of the share to be allotted to the deceased, in case it is found that the testator was not entitled to the specific properties but only to a share as a tenant-in-common. [P 325 C 1, 2]

G. S. Ramachandra Aiyar—for Appellant.

T. V. Muthukrishna Aiyar and *S. R. Muthuswami Aiyar*—for Respondents.

Judgment.—The plaintiff, defendants 1 and 2 are the sons of one Mahalinga Sivan. The father and sons entered into a partition of their properties in the year 1911 and signed a deed in that behalf. When it was sought to register it, defendant 1 refused to consent to the registration on the ground that some of the schedules to the deed were inserted without his knowledge. Thereupon, the father and the plaintiff applied for registration under S. 35, Registration Act, and the document was registered. The father died subsequently, having subsequent to the registration made a will of the properties allotted to him in the partition deed in favour of defendant 1. In the present suit the plaintiff alleges that the deed of partition is void and of no effect, that the will of the father is inoperative, and that he is entitled to his share on the footing that the family is undivided. The Subordinate Judge held that the parties became divided in status by the deed of partition. There are two appeals before us: one by the plaintiff contesting the finding as to division and claiming a share in certain moveables, and the other by defendant 1 disputing the conclusion of the Subordinate Judge that certain properties were not his self-acquisitions.

The appeal of the plaintiff was argued first, as the points raised went to the root of the case. Mr. G. S Ramachandra Aiyar in an exhaustive argument contended that the partition deed, Ex. B, did not effect a severance of status. His chief contention was that the document quoad the immovable property was not receivable in evidence. In answer to the suggestion that the document contained a declaration of intention by his client and the father that they resolved to get themselves separated from defendant 1, the learned vakil argued that as the document was intended to express a declaration consented to by all the parties, it was ineffective to evidence a unilateral declaration; and he cited *Sivasami Chetti* v. *Sevugan Chetti* (1) in support of his position. As pointed out in *Ullattil Kalathil Nethiri Menon* v. *Mullapulli Gopalan Nair* (2), there is no irrebuttable presumption that a document intended to be executed by more than one person should not be construed as evidencing a contract by some only of the intended executants who have signed the deed. In the present case, despite the disclaimer by defendant 1, the plaintiff and his father insisted on giving effect to the arrangement to which they were parties. We are unable to hold therefore that the document cannot be looked into to ascertain the intention of the executants. In this view it is unnecessary to consider how far the decisions of this Court in *Pothi Naicken* v. *Nagama Naicker* (3) and *Ayyakutti Mankondan* v. *Periasami Koundan* (4) are reconcilable with the pronouncement of the Judicial Committee in *Girja Bai* v. *Sadashiv Dhundiraj* (5). In the latter case, the Privy Council seems to suggest that although an unregistered deed of partition may not serve to operate as a conveyance of the shares allotted, it would be evidence of a severance of status.

The case before us is stronger than the one before the Judicial Committee, where the document was registered at the instance of two of the executants. Under S. 35, Registration Act, such registration is sufficient to affect the interest of the consenting parties. In the Registration

1. (1902) 25 Mad 389.
2. (1915) 39 Mad 597=30 I C 713.
3. (1916) 32 I C 486.
4. (1915) 31 I C 615.
5. A I R 1916 P C 104=37 I C 321=43 I A 151 (P C).

Act, 1877, there was a prohibition in general terms against the registration of a document where the executants denied execution. It was contended, under that Act, that if any one of the executants denied execution the document should not be registered at all. In *Muhammad Ewaz* v. *Brij Lal* (6) to which our attention was drawn by the learned vakil for the respondent, the Privy Council referred to S. 24 of the Act as indicating that the document may be registered at different times, and held that the words in the Registration Act should be read distributively and that so far as the parties asking for registration are concerned, they are entitled to it although others may not consent to it. Since this decision was passed, the legislature amended S. 35 by inserting the words "as to the person so denying appearing or dead." Thus legislative sanction has been given to the pronouncement in *Muhammad Ewaz* v. *Brij Lal* (6).

Mr. Ramachandra Aiyar put forward an ingenious contention that although the Registering Officer was bound to register the deed, it was a nullity quoad the property comprised in it was concerned. His argument was that as the origin of the document was in consent, its partial registration was not capable of carrying out any division between the parties. We are unable to agree with him. If we accept his contention, we must hold that the legislature introduced a provision which is not only ineffective, but may easily prove mischievous. *Muhammad Ewaz* v. *Brij Lal* (6) itself points out that the document is receivable in evidence under S. 49, Registration Act. This conclusion would have been enough to dispose of the appeal, had the case not been complicated by the specific bequest made by the father to defendant 1. The father regarded himself as divided from his sons in respect of the specific properties allotted to him in the schedule and willed them away in favour of defendant 1. Although Mr. Ramchandra Aiyar did not seriously contest the suggestion that this will may be taken as operating upon the share of the father and not on the specific properties, we are not prepared, as at present advised, to assent to the proposition that a testamentary disposition of specific properties may be utilised for proving the bequest of the share to be allotted to the deceased, in case it is found that the testator is not entitled to the specific properties, but only to a share as a tenant-in-common. The analogy of a mortgage of specific properties attaching to the share of a coparcener ascertained in partition was referred to, but we do not like to rest the present case upon that analogy. Therefore, although we have come to the conclusion that the father and sons became tenants-in common from the date of the registration of Ex. B, we think that unless there was an allotment of shares, the plaintiff will be entitled to have his share given to him by a division by metes and bounds. But, we think, that step has become unnecessary, in view of the consideration which we shall presently set out.

It is settled law now that a father can effect a partition between himself and his sons with or without their consent. *Kandasami* v. *Doraisami Ayyar* (7), which enunciates this rule of Hindu law, has been accepted in *Murgayya* v. *Palaniyandi* (8) and in *Aiyavier* v. *Subramania Iyer* (9). What happened in the present case amounts to the effecting of a division by the father between himself and his sons by the exercise of the powers conferred on him. No doubt, originally the partition was intended to be by consent, but when the father found that one of his sons was recalcitrant, he insisted on the partition being given effect to and asked the Registrar to register it. This is tantamount to imposing his will on his sons with a view to effect a division of the ancestral properties. Mr. Ramchandra Aiyar contended that as the father did not expressly declare that he was exercising his prerogative, it would be reading a great deal too much into his conduct, if we hold that the partition was brought about by his superior will against the protest of defendant 1. We see no force in this contention. The Judicial Committee pointed out in *Bijraj Nopani* v. *Sreemutty Pura Sundari Dasee* (10) that where an act is done which is not wholly valid upon the capacity expressly named, but is justifiable

6. (1875) 1 All 465=4 I A 166 (P C).

7 (1878) 2 Mad 317.
8. (1916) 36 I C 507.
9. (1917) 40 I C 205.
10. A I R 1914 P C 92=24 I C 296=41 I A 189=42 Cal 56 (P C).

upon a latent capacity which was not specifically referred to the transaction would be upheld as having been brought about in the latter capacity. Applying that principle, we must hold that when the father notwithstanding the demur of defendant 1 insisted on the registration of the partition deed, he exercised the power given to him by the Hindu law to effect a partition against the will of his sons.

In this view, the properties willed away by the father rightly vested in defendant 1, and the plaintiff can be compelled to accept the properties allotted to him. The fact that he was a consenting party to the registration makes his position worse. We therefore hold that the plaintiff is not entitled to claim a division by metes and bounds. We now proceed to deal with the appeals in so far as they deal with specific items. As regards ground 13, we see no reason to differ from the Subordinate Judge; there is a clause in the partition deed that properties bona fide omitted should not be claimed by the parties thereto. The plaintiff has alleged no ground of surprise or fraud; consequently he is not entitled to the property covered by this ground of appeal. Ground 15 refers to the omission of defendant 1 to collect the full amount of a certain debt. It is not argued that defendant 1 acted maliciously.

He seems to have acted in the best interest of the family, and we think the Subordinate Judge is right in refusing to give plaintiff any decree against defendant 1 in this respect. As regards ground 23, it is to be noticed that the claim was made in the plaint (see Sch. E to the plaint). A sum of Rs. 1,200 was set apart to be spent by the father in taking proceedings to collect outstandings. The plaintiff is entitled to any sum that may remain unspent out of the said Rs. 1,200. There must be an enquiry by the Subordinate Judge as to how much of the Rs. 1,200 was utilised by the father for taking proceedings against debtors. As regards item 7, Sch. D-2, it is conceded by the learned vakil for the respondent that there must be a declaration that the amount of this decree is recoverable solely by the plaintiff. As regards item 2, Sch. D-2, the case of the plaintiff is that that sum was collected by the father; there is the evidence of P. Ws. 1 and 2 to support the plaintiff. Defendant 1 in his deposition does not deny that item 2 was collected by the father; but it has been pointed out that the amount was collected during the lifetime of the father and that no demand was made by the plaintiff for his share from the father. Under these circumstances we are not prepared to say that the money, even if collected by the father, has been traced to the possession of defendant 1. As regards moveables, the Subordinate Judge is clearly wrong in shutting out evidence. His view that the recital that the moveables were already divided is a term of the document is clearly erroneous. It is unfortunate that we should be obliged to remand the case for further enquiry on that ground; but we are unable to resist the contention of the appellant that he is entitled to show that notwithstanding the recital in the document the moveables belonging to the family were not wholly divided. We must therefore ask the Subordinate Judge to return a finding on fresh evidence whether any moveables belonging to the family were left undivided. If so, what their value is and who is in possession of them.

As regards the memorandum of objection by defendant 2, although he may not strictly be entitled to a decree in this suit, having regard to the fact that this litigation should not be protracted any further, we think it necessary that there should be a finding as regards item 37, Sch. 2. Issue 10 claims in the alternative either the particular item or its value if it has been realised before. We must therefore ask for a finding upon that issue specifically from the Subordinate Judge on the evidence on record. Now we turn to the appeal of defendant 1. We think the Subordinate Judge has given very good reasons for disallowing the items claimed by defendant 1 in this appeal. The most material property is contained in Sch. A-3. In the partition deed it is stated that a sum of about Rs. 15,000 odd was due to the family under a decree, that the father should, if he collects the amount, pay the share of the sons or if he purchases the mortgaged property, he should divide that property among the sons.

The father, instead of himself purchasing the mortgaged properties, had them conveyed in the name of defendant 1. Defendant 1 says that he is only liable to give the plaintiff a share of the

decree amount, and that the plaintiff is not entitled to any share of the properties purchased by him. His argument was twofold. In the first place, the father did not purchase but he purchased. Consequently, the condition in the partition deed is not operative against him. In the second place, the learned vakil for the appellant contended that an option was reserved to the father to purchase the property and if he did not exercise the option and allowed defendant 1 to purchase, the plaintiff can have no cause of action against the latter. We feel no hesitation in holding that the father connived at defendant 1 becoming the purchaser. He had made a Will of his properties in favour of defendant 1 and was greatly attached to him. In our opinion the conduct of the father amounts to a fraud upon his powers. Where an authority is given to a particular individual to be exercised for the benefit of a number of persons and the owner of the authority fraudulently exercises it in favour of one of them, and that one is aware of the full significance of the power, he should not be entitled to take advantage of the benefit secured by fraud to which he had consented.

In Farwell on Powers it is stated that even where the person in whose favour the fraud was committed was unaware of the fraud, he must not be allowed to take advantage of it. The case is stronger where the party benefiting by the fraud is fully aware of the motive operating upon the donee of the power: see 23 Halsbury, p. 16, Ss. 111—113, and Farwell on Powers, pp. 77 et seq. We think the Subordinate Judge is right in holding that the plaintiff is entitled to a share of Sch. A-3 properties purchased by defendant 1. We also agree with the Subordinate Judge in holding that it has not been proved that anything more than Rs. 3,750 was paid in addition to the amount due under the mortgage decree. He has given excellent reasons for his conclusion and we see no reason for differing from him.

We also agree with the Subordinate Judge in his finding upon Issue 10-B. The evidence let in on behalf of defendant 1 that the difference between the amount due from the Thambiran and the sum of Rs. 3,000 odd due from Visvanathier was reserved by the father for adjusting inequalities in the partition is absolutely worthless. We must therefore uphold the decree of the Subordinate Judge in this behalf. The decree of the Subordinate Judge requires slight modification. The decree should declare that the plaintiff is entitled to proceed against the assets of the deceased father Mahalinga Sivan in the hands of defendants 1 and 3 instead of making defendant 1 alone liable for the amount and the other sums decreed against him. We also think that no good grounds have been shown for awarding interest against defendant 1 at the rate of 12 per cent. There is no issue as to whether any interest was due at all. We think on the whole, that interest should run from June 1913 at the rate of six per cent. on the sums awarded to the plaintiff against defendant 1. Subject to this modification we dismiss Appeal No. 212 with costs. The findings in Appeal No. 277 should be submitted within 2 months from this date and 7 days will be allowed for filing objections. In compliance with the order dated 13th August 1917 contained in the judgment herein, the Subordinate Judge of Kumbakonam submitted the following

Finding.—In this case I have been asked by the High Court to receive evidence and submit a finding on the following issue:

"Whether any moveables belonging to the family were left undivided and if so what their value is and who is in possession of them."

I have also been asked to submit a finding upon the evidence on record, on the following issue:

"Was item 37, Sch. D due at time of division or has it been realized even before ?"

As regards issue 2, I have stated in para. 26 of my judgment that it was for plaintiff to prove that item 37, Sch. D, was an outstanding debt on the date of Ex. B and that upon the evidence given by him I was not at all satisfied that the amount was outstanding and that plaintiff and defendant 2 were entitled to a share in it. The vakil for the plaintiff stated that he was not interested in this item and that the matter was one between defendants 1 and 2. Defendant 2 who appeared in person stated that he accepted the finding already recorded by me and referred to above and the vakil for defendant 1 also stated that the finding already recorded was acceptable to him. So far as the question of division of moveables goes,

For the reasons above given and for the reasons already given by me in paras. 12, 15 and 37 of my judgment I find this issue against plaintiff and in the negative. Although there is no reference in the order the judgment upon which the order is based wants me

"to hold an inquiry as to how much of Rs. 1,200, which was set apart for the purpose of being spent by the father for taking proceedings against debtors was spent."

The vakil for defendant 1 contended that I was to be guided by the order and not by the judgment and the vakil for the plaintiff stated that he wanted time to get the order amended in terms of the judgment. The vakil for defendant 1 then stated that he had no objection to have the question determined when the final decree was passed in case the High Court wanted this to be done. To this course the vakil for the plaintiff agreed.

(The Appeal No. 277 of 1916 and the memorandum of objections filed by respondent 2, coming on for final hearing after the return of the finding of the lower Court upon the issue referred to by this Court for trial, the Court delivered the following)

Judgment.—The finding of the Subordinate Judge as regards moveables is amply supported by the evidence referred to by him. We see no reason to differ from him. We also agree with his suggestion that the right of the parties to the whole or such portion of the Rs. 1,200 not utilised by the father should be adjusted in passing the final decree; subject to this reservation and to the modification as regards item 7, Sch. D-2 contained in the judgment; the appeal is dismissed with costs of respondent 1. We see no reason to doubt the correctness of the Subordinate Judge's statement in the finding that the parties agreed to accept his previous finding regarding item 37, Sch. D. We dismiss the memorandum of objections in the above appeal with the costs of respondent 1.

S.N./R.K. *Appeals dismissed.*

A. I. R. 1918 Madras 328

WALLIS, C. J. AND PHILLIPS, J.

Ranga Row and *another*—Appellants.

v.

Ramathilakamma—Respondent.

Original Side Appeal No. 50 of 1915, Decided on 13th March 1916.

Easements Act (5 of 1882), S. 4—Right to open or shut windows can be acquired under S. 4—Interference in such right by eaves of defendant's roof can be prevented by order to lower the eaves—Plaintiff has such right to swing shutters on another's land.

The right to open and shut windows and shutters into adjoining land can be acquired as an easement within the meaning of S. 4, Easements Act. [P 329 C 2]

Where defendant built his house opposite to the window of the plaintiff's house which had been in existence for 30 years, with the result that the eaves of the defendant's roof rose above the level of the plaintiff's window and the shutters of the latter could not be shut and opened as usual:

Held: (1) that the plaintiff had an easement to swing on the shutters of his widow into the defendant's land. [P 329 C 2]

(2) That it was competent for the Court to issue an injunction to the defendant to lower the roof of his house so as to enable the plaintiff to shut and open the widow freely. [P 329 C 2]

V. C. Seshachariar, *C. Venkatasubbaramiah* and *M. Raghavachari* — for Appellants.

K. Ramanath Shenai and *C. Vijaraghavalu Naidu*—for Respondent.

Judgment.—This is a suit for a declaration that the plaintiff is entitled to an easement of light and air and for an injunction restraining the defendants from interfering, in certain respects, with the enjoyment by the plaintiff of her house and window. The facts as found by the learned Judge (and we see no reason to differ from his conclusions) are as follows: The plaintiff's house adjoins this defendants' house to the north and in the plaintiff's southern wall there is a window, which has been in existence for nearly 30 years. The defendants have recently rebuilt the portion of their house opposite to this window, with the result that the eaves of the roof are now above the level of the plaintiff's window sill and the shutters of the plaintiff's window which open outwards cannot now be shut and opened as usual, because the defendants' roof obstructs their movement.

The defendants have also constructed a channel to catch the rain water from their roof, which runs on the same level as the plaintiff's window sill and encroaches on plaintiff's wall and finally discharges into the plaintiff's courtyard. The water from this channel also overflows at times through the window into the plaintiff's bedroom. In the room opposite the plaintiff's window the defendants have constructed two chimneys,

one 1½ foot and one 5 or 6 feet from the window and the smoke from them goes into the plaintiff's room. The learned Judge has accordingly granted the declaration prayed for and an injunction ordering the defendants: (a) to remove the two chimneys cpposite to the said window and adjacent to it; (b) to lower the roof of the house and ground No. 8, Ramanuja Iyer Street, George town, Madras, opposite to the said window, so as to enable the plaintiff to open and close the widow doors freely to the width of the said window by one foot; (c) to re-align the channel in such a manner as to prevent the rain water from flowing into the plaintiff's room or into any portion of the plaintiff's house, and (d) to remove two inches along the whole drain which encroaches on the wall of the plaintiff's said house.

There is no appeal as regards (d), and as regards (c) we need only say that defendants have failed to prove that thay have any right to discharge water on to plaintiff's premises and consequently the plaintlff is entitled to an injunction restraining them from doing so.

The two orders to which objection is chiefly taken are (a) and (b). It has been found that defendants have not caused any serious diminution of light and air, but the smoke from the two chimneys pollutes the air passing into the plaintiff's house. As one of the chimneys discharges directly into the plaintiff's window from a distance of 1½ feet, it is clear that a substantial nuisance must be caused, and of this we have evidence on the plaintiff's side. The chimneys have been newly constructed and the appropriate relief is to order their removal as being a nuisance to the plaintiff. Objection is taken to order (b) on the ground that the plaintiff, having only an casement of light and air, can have no right to open the shutters of her windows outwards and that such a right cannot be acquired as an easement. It is not suggested that the outer shutters have not been in existence ever since the window was made and consequently if any right can be acquired, plaintiff has acquired such right by prescription. It is contended on behalf of defendants that a right to open and shut windows cannot be held to be an easement, but Mr. Seshachariar is unable to quote any authority in support of his contention. The right appears to be an easement within the meaning of S. 4, Easements Act, for it is a right which the plaintiff, as owner of her house and site, has as such, for the beneficial enjoyment of that land to do something, i. e., to swing the shutters npon certain other land not her own. A similar right, i. e., the right to hang clothes on a line above another person's yard was regarded as an easement in *Drewell* v. *Towler* (1) and in America the same right of swinging shutters over a passage way was also regarded as an easement (Jones on Easements, S. 10). This being so, wo agree with the learned Judge that the plaintiff has acquired such an easement. It would be impossible to make an accurate estimate of the pecuniary damage sustained by the plaintiff in respect of the several injuries caused by the defendants and consequently an injunction is the only appropriate remedy. Defendants cannot complain of any hardship, for they disregarded the plaintiff's notice in writing given before the erection of their roof and even denied all the plaintiff's rights. The appeal is accordingly dismissed with costs.

S.N./R.K. *Appeal dismissed.*

1. (1832) 3 B & Ad 735.

A. I. R. 1918 Madras 329

ABDUR RAHIM AND BAKEWELL, JJ.

Yelikepalli Venkaya and *another* —Defendants—Appellants.

v.

Venkataramayya Apparao and *another* —Plaintiffs—Respondents.

Second Appeals Nos. 761 to 763 of 1916, Decided on 16th August 1917, from decree of Sub-Judge, Bezwada, in Appeal Suits Nos. 109 to 111 of 1915.

(a) Madras Estates Land Act (1908), S 153, proviso—Proviso does not affect question of jurisdiction.

The proviso to S. 153 only deals with the ground of iiability to ejectment and does not affect the question of jurisdiction which is dealt with by the section itself. [P 330 C 1]

(b) Madras Estates Land Act (1908), S. 163—Expiry of lease of occupier of raiyati land does not make him trespasser.

Section 163 exempts from the operation of the Act persons who have not come into possession of raiyati land by legal transfer or admission as raiyat by the land-holder. The mere fact that a lease under which a man occupies raiyati land has expired, does not make him a trespasser within the meaning of the section. [P 330 C 1, 2]

(c) Madras Estates Land Act (1908), S. 153—Lease commencing before passing of Act and expiring after—Ejectment of non-occu-

pancy tenant from old waste—Suit should be brought in Revenue Court.

A suit, to eject a non-occupancy tenant of old waste, who held under a lease which commenced before but expired after the passing of the Act, should be brought in the Revenue Court: *A. I. R.* 1915 *Mad.* 705, *Dist.* [P 330 C 1, 2]

V. Ramadoss—for Appellants.

T. Ramachandra Rao—for Respondents.

Judgment.—This is a suit in ejectment against a person who is admittedly a non-occupancy tenant of land described as old waste within the meaning of the Estates Land Act. He had a lease before the passing of the Act which expired after the Act came into force. The question that arises is whether the suit must be brought in the Court of the Collector or in the ordinary civil Court. This question of jurisdiction has been dealt with in a number of cases in this Court and the great preponderance of view is in favour of interpretation of S. 153 to the effect that the proviso to that section does not affect the question of jurisdiction which is dealt with by the section itself. That is to say, S. 153 lays down that a suit to eject a non-occupancy raiyat shall be brought before the Colleetor, and the proviso which has been added by the subsequent Act 4 of 1909 to that section only lays down that, as regards a non-occupancy raiyat whose lease commenced before the commencement of the Act, the question regarding his liability to ejectment on the ground of the expiry of that lease is not affected by anything in S. 153. That, as pointed out by Oldfield, J., in *Sankara Venkataratnam* v. *Varadaraja Appa Rao* (1), deals only with the ground of liability to ejectment and does not affect the question of jurisdiction, which is dealt with in the earlier part of that section. S. 9 of the Act says that no landholder shall, as such, be entitled to eject a raiyat from his holding or any part thereof otherwise than in accordance with the provisions of this Act, that is to say, by a suit instituted in a Revenue Court.

This seems to be quite comprehensive, but the learned pleader for the respondent argues that the position of the defendant in this suit is that of a trespasser, as contemplated in S. 163 of the Act. But S. 163, as has been pointed out in more than one ruling of this Court, exempts from the operation of the Act persons who have not come into possession of a raiyati land by legal transfer or by admission as raiyati by the land-holder. The mere fact that a lease under which a man occupies raiyat land has expired, does not, as we read that section, make him a trespasser within the meaning of that section. The above view of the law has been adopted in a series of cases *Vuppuluri Atchayya* v. *Sir Kanchumarti Venkata Seetarama Chandra Rao* (2) by Sankaran Nair and Sadasiva Aiyar, JJ., *Choganti Atchaparazu* v. *Raja Yelugoti Kristna Yachandrulavaru* (3) by Benson and Sundara Aiyar, JJ., *President, District Board, Tanjore* v. *Kannuswami Thondaman* (4) by Oldfield and Sadasiva Aiyar, JJ., and in *Ardajeri Rama Reddi* v. *Karpi Sivaga* (5) and *Sankara Venkataratnam* v. *Varadaraja Appa Rao* (1) by Oldfield, J. Dissent has, no doubt, been expressed from that view by Spencer, J., in *Ponnuswamy Padayachi* v. *Karupudayan* (6), but it does not appear that in view of the facts found in that case it was necessary to deal with this question. Tyabji, J., differed from Oldfield, J., in the case in *Sankara Venkataratnam* v. *Varadaraja Appa Rao* (1). But we find that the learned Judge in an earlier case in *Aradajeri Rama Reddi* v. *Karpi Sivaga* (5) expressed a contrary view. The great preponderance of authority is undoubtedly in support of the contention of the appellant that jurisdiction in a case like this is in the Revenue Court, and not in the ordinary civil Court. No doubt the proviso to S. 153 might, at first sight, be taken to mean that the cases mentioned there were taken out altogether from S. 153 but that, as explained by Oldfield, J., is not the effect of the proviso.

We reverse the decisions of both the Courts and direct that the plaint be returned to the plainliff to be presented to the proper Court. The appellants are eutitled to their costs throughout. Second Appeals Nos. 762 and 763 follow.

S.N./R.K. *Appeals allowed.*

1. (1915) 28 I C 252.
2. (1916) 39 Mad 195=18 I C 555.
3. (1915) 38 Mad 163=19 I C 225.
4. (1916) 35 I C 121.
5. (1913) 21 I C 916.
6. A. I. R. 1915 Mad 705=28 Mad 843=24 I. C. 217.

A. I. R. 1918 Madras 331

ABDUR RAHIM AND NAPIER, JJ.

Chundooru Lakshman Setty—Plaintiff —Appellant.

v.

Duggisetty Chenchuramayya and *others* —Defendants— Respondents.

Second Appeal No. 1265 of 1915, Decided on 1st May 1917, from the decree of Dist. Judge, Nellore, in Appeal Suit No. 70 of 1913.

(a) Registration Act (1908), S. 17 (1) (b), (2) (9)—Agreement to relinquish portion of mortgage debt is registrable.

An agreement by which a mortgagee agrees to relinquish a portion of the mortgage debt is one which 'purports to limit or extinguish interest' in immovable property and requires registration: 4 *Bom.* 235 and 42 *Cal.* 546, *Dist.* [P 331 C 2]

(b) Registration Act (1908), S. 17 (b)— Receipt for satisfaction of mortgage debt requires registration.

Per *Napier, J.*—A receipt for money paid in discharge of a mortgage debt is an instrument which operates to extinguish the mortgage within the meaning of S. 17 (b). Extinction by receipt applies to the right, title and interest and thereby makes the amount covered by the security an 'interest' within the meaning of Cl. (b). Where the effect of the document is to 'limit', the same meaning must be applied to the word 'interest' and it must be read as applying to the amount of money secured. [P 332 C 2; P 333 C 1]

Advocate General and *K. Rajah Iyer* —for Appellant.

Krishnaswami Aiyar for *T. V. Venkatarama Aiyar* and *A. Rajagopala Aiyar*—for Respondents.

Abdur Rahim, J.—The only question we have to deal with in this appeal is whether Ex. 5, which is in these words:

"Now if you will pay Rs. 3,000 towards the debt due by you on the two documents we shall receive the money and return the documents,"

is admissible in evidence having regard to the provisions of S. 17, Registration Act. On the date of Ex. 5 more than Rs. 3,000 was due, and the balance which the plaintiff agreed to relinquish under Ex. 5 amounted to more than Rs. 100. We do not think, though the question under consideration has been argued very elaborately before us, that the matter admits of any real doubt. S. 17, Cl. (b), says that

"other non-testamentary instruments which purport or operate to create, declare assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property"

must be registered. The exception which, it is argued, applies to Ex. 5 is dealt with in Cl. (xi), sub-S. 2, which lays down that

"any endorsement on a mortgage deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage"

need not be registered. It seems to me that an agreement by which the mortgagee agrees to relinquish a portion of the debt is one which —"purports to limit or extinguish interest in immovable property." It was argued by the learned vakil for the respondent that, in considering what the interest is, we are not to take into consideration the amount of money payable under the mortgage, but only the security apart from the amount due. Such a construction seems to be opposed to the language of the section, for in Cl. (b) the Legislature says that an instrument has to be registered if the interest or right affected by it is of the value of Rs. 100 or upwards. Now, that would indicate that the interest of a mortgagee cannot be computed without taking into consideration the amonnt for which the property is made security. Then, Cl. 11, sub-S. 2, in exempting from the operation of that clause receipts purporting to extinguish the mortgage, tends to support the same view.

Though Cl. (c) was also referred to in the course of the argument I do not think that it has any application to this case. It seems to me, also, that the question is concluded by authority. In *Abdullah Khan* v. *Basharat Hussain* (1) the question arose with reference to an agreement come to between the mortgagee and the mortgagee as to the mode in which the profits of the property which was usufructuarily mortgaged were to be dealt with, and their Lordships of the Privy Council held that a document like that was inadmissible by reason of the provisions of the Registration Act. It is difficult to see how that case can be distinguished from the present case. I take it that the rukka which introduced a new mode of paying off the mortgage money was held to be inadmissible, on the ground that it was an instrument "purporting to limit or extinguish interest in immovable property' within the meaning of Cl. (b), S. 17. In *Durga Prasad Singh*

1. (1913) 35 All 48=17 I. C. 737=40 I. A. 31 (P. C.).

v. *Rajendra Narayan Bagchi* (2) their Lordships affirmed the judgment of the Calcutta High Court reported as *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (3), in which it was held that a subsequent unregistered agreement for reduction of rent payable under a registered lease was inadmissible for want of registration. In *Tika Ram* v. *Deputy Commissioner of Bara Banki* (4) the agreement which was held by the Judicial Committee to be inadmissible was on the part of the mortgagee to pay a higher rate of interest. It is difficult to understand how agreements of the above character could be substantially distinguished from the agreement in question in this case. The exact point was decided in *Gobhardan Sahi* v. *Jadunath Rai* (5), where it was held that an

"agreement executed by a mortgagee after the date of the mortgage whereby he relinquished a certain part of the principal and all interest, past and future, in the mortgage in lieu of certain services rendered by the mortgagor to the mortgagee was a document which required registration to make it admissible in evidence, and it could not be said to be an acknowledgment of payment within the meaning of the exception contained in S. 17, Cl. (n), Registration Act, 1877, which corresponds to Cl. 11, sub-S. 2 of the present Act."

On the other hand, Mr. Krishnaswami Ayyar for the respondent referred us to two cases, one of which is reported as *Shidlingapa* v. *Chenbasapa* (6). That was a case under the old Registration Act. The question raised there was whether certain receipts for payment of money were inadmissible for want of registration; and it was held that they were not. I do not think that this decision really throws much light upon the question we have to deal with here. There is a decision however in *Kailash Chandra Nath* v. *Sheikh Chhenu* (7) which does support the respondents' contention. The learned Judges say:

"we can find nothing in the law or in any authority which would require such waiver to be registered,"

the waiver alluded to being that of the right to compound interest. We do not find that any of the decisions to which we have referred are alluded to in the judgment or in the summary of the arguments at the Bar. Nor does it appear from the judgment that S. 17, Cl. (b), Registration Act, was discussed, and the learned Judges refer only to S. 92, Evidence Act, which requires that such an agreement must be in writing. I hold therefore that Ex. 5 is inadmissible in evidence. The appeal will be allowed with costs and there will be the usual mortgage decree for the full amount due under Ex. H. Time for payment six months from the date of the decree.

Napier, J.—I entirely agree with my learned brother that this matter is covered by authority of the Privy Council. I would only add a few words on the construction of the section of the Act itself. It would hardly be possible to find words of wider import than we have in Cl. (b), S. 17, sub-S. 1, Registration Act

"which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest."

If words of that extremely wide character are not sufficient to cover a case where a mortgage debt is by agreement of parties largely reduced, it seems to me difficult to find words which will have that effect. Then there is this further reason, namely, that the language of the Cl. (b) actually imports into the consideration of the necessity for registration the question of the value of the interest, for it speaks of the right, title or interest being of the value of Rs. 100 and upwards, and it is a little difficult to see how, if no question with regard to the amount is, as argued by Mr. Krishnaswami Ayyar, a question "affecting any interest," the amount can be a test for limiting the application of the section. There is, to my mind, further, a complete answer to the argument to be found in the amendment introduced by the Act of 1886 and now incorporated in the present Act of 1908. The language of Cl. (b), as I have pointed out, contains the words 'limits or extinguish' and turning to sub-S. 2 which is the amendment, we find this:

"Nothing in Cl. (b) applies to" . . . . . then Cl (xi) "any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage."

Now here clearly we have a case of "extinction;" so a receipt for the money must be an instrument which operates to

2. (1914) 41 Cal 493=21 I C 750=40 I A 223 (P C).
3. (1909) 37 Cal 293=4 I C 713.
4. (1899) 26 Cal 707=26 I A 97 (P C).
5. (1913) 35 All 202=19 I C 449.
6. (1879-80) 4 Bom 235.
7. (1915) 42 Cal 546=30 I C 804.

extinguish within the language of Cl. (b). The same meaning must, of course, be attached to the words "right, title and interest" when you are dealing with the question of limitation as when you are dealing with the question of extinction, and if extinction by receipt applies to the right, title and interest and thereby makes the amount covered by the security an "interest" within the meaning of that clause, it necessarily follows, it seems to me, that where the effect of the documents is to limit," you must also apply the same meaning to the word "interest" and read it as applying to the amount of money secured. One result of holding that the words "limit or extinguish" the interest do not apply to words that limit the amount of money to be recovered in future would be that, whereas under this proviso "any other receipt for payment of money due under a mortgage" is only exempted from registration when it does not purport to extinguish the mortgage, if this view was to be upheld, that limitation and extinction do not apply to the amount of money, it would be absolutely immaterial whether a receipt for the money did or did not purport to extinguish the mortgage, because on that reading of Cl. (b) the document itself would not be necessarily registrable under Cl. (b), so that that portion of sub-S. 2, Cl. (xi) which takes such receipts out of the operation of Cl. (b) and aiso that part which leaves them within it would neither of them have any operation on the reading suggested by Mr. Krishnaswamy Ayyar, as there would be no "interest" to be extinguished and so the whole of Cl. (xi) would be meaningless. I am therefore clear that Cl. (b) must be given the meaning which the cases show has been applied to it, with the result that this agreement falls within its mischief. The appeal must therefore be allowed, with the result as stated in my learned brother's judgment.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 333

WALLIS, C. J. AND AYLING, J.

Suppu Sokayya Bhattar—Appellant.

v.

Suppu Bhattar—Respondent.

Second Appeal No. 485 of 1916, Decided on 11th October 1917, from decree of Dist. Judge, Madura, in Appeal Suit No. 4of 1913.

Transfer of Property Act (1882), S. 101—Hindu reversioner suing for possession—Prior mortgage discharged by defendant — Presumption is that original mortgage is kept alive.

A Hindu widow alienated her husband's properties directing the alienee to discharge a mortgage binding on the estate. During the pendency of a suit for a declaration that the alienation was bad, the alienee mortgaged the properties to pay off the existing incumbrance. The mortgagee brought a suit on his mortgage and purchased the properties in execution:

Held: that it was for the mortgagee's benefit to keep alive the original mortgage both when he advanced the money and when he purchased the properties in execution of his mortgage-decree, The presumption was in favour of the original mortgage being kept alive under S. 101. [P 334 C 1]

K. V. Krishnaswami Aiyar and *C Srinivasachariar* for *S. Varadachariar*—for Appellant.

K. Jaganadha Aiyar and *Subramania Aiyar*—for Respondent.

Judgment.—According to the findings the suit properties were left by the will of Chandrasekhara Bhattar to Raja Bhattar, the last male owner. During his lifetime he effected a settlement Ex. C with Chandrasekhara's widow Thalamuthammal, pursuant to which he paid her rupees 1,750, which sum he raised by mortgaging the suit and other properties under Ex. 1 on 5th June 1881. He died in 1882 and on 9th March 1882 his widow transferred the suit properties to Thalamuthammal on her undertaking to discharge Ex. 1. The plaintiff as next reversioner instituted Original Suit No. 15 of 1882 and obtained a declaration that her alienation was not binding on the reversioners. During the litigation. Thalamuthammal borrowed money from the defendant under Ex. 23 to enable her to discharge Ex. 1, and according to the finding he discharged it. In 1894 he sued on his mortgage Ex. 23, brought the suit properties to sale and purchased the interest of his mortgagor. Thalamuthammal has been in possession according to the finding since 1896. On the death of Rajah Bhattar's widow the plaintiff sued for possession as heir of the last male owner and the lower Courts have given him a decree on paying into Court Rs. 4,016-4-0 for principal Rs. 1,260, plus interest down to the date of the defendant's getting possession on 13th October 1896, Rs. 2,756-4-0 (para 18 of the Subordinate Judge's judgment). Having regard to the fact that at the time when be advanced the money on mortgage of the suit pro-

perties under Ex. 23, the mortgagor's title was being challenged it was obviously for the defendant's benefit to keep alive the mortgage under Ex. 1: *Chama Swami* v. *Padala Anandu* (1), *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (2) and *Whitley* v. *Dellaney* (3). It was equally for his benefit within the meaning of S. 101, T. P. Act to keep it alive when he purchased the equity of redemption in execution of his decree and he must be presumed to have done so: *Arumugasundara* v. *Narasimha Iyer* (4). The appeal is dismissed with Costs.

S.N./R.K. *Appeal dismissed.*

1. (1908) 31 Mad 439.
2. (1902) 29 Cal 154=29 I A 9 (P C).
3. (1914) A C 132.
4. (1915) 29 I C 916

A. I. R. 1918 Madras 334

AYLING AND PHILLIPS, JJ.

A. L. Meango—Counter-petitioner—Appellant.

v.

J. C. Baviah — Petitioner— Respondent.

Appeal No. 105 of 1917, Decided on 27th November 1917, against order of Dist. Judge, South Malabar, in Civil Misc., Appeal No. 855 of 1916.

(a) Civil P. C. (5 of 1908), O. 18, R. 5—Deposition read in next room at distance of 30 feet—Requirements of R. 5 were satisfied.

The provisions of O. 18, R. 5, are adequately complied with if the depositions of witnesses are read over to them in a place within the sight of the presiding Judge and from which the witnesses can draw the attention of the Judge to any mistakes or omissions discovered by them.

[P 334 C 2]

Where therefore the deposition of a witness was read out by the Court clerk in a room next to the Court and at a distance of 30 feet from the Judge's seat:

Held: that the deposition was admissible in evidence and complied with the provisions of O. 18, R. 5: 28 *Mad* 308, *not Foll.* [P 335 C 1]

(b) Evidence Act (1 of 1872), Ss. 80 and 91—Irregularity in recording deposition affects evidenciary value but it does not become inadmissible—Penal Code (45 of 1860), S. 193.

An irregularity in recording a deposition may be considered in determining the value of the document as evidence but it is not a sufficient ground for shutting it out altogether. [P 335 C 2]

Neither S. 80 nor S. 91 renders such documents inadmissible in evidence. If the document is not in all particulars what it purports to be, the presumption permitted by S. 80 would be rebutted. [P 335 C 1]

K. Pandalai—for Appellant.

S. Swaminadhan—for Respondent.

Phillips, J.—This is an application to set aside a sanction to prosecute petitioner-appellant for an offence under S. 193, I. P. C.; but the only point argued is the admissibility in evidence of petitioner's (appellant's) deposition. This deposition was properly recorded by the District Munsif, but was read over to the witness by a clerk in a room next to the Court room at a distance of 30 feet from the Munsif's seat. There were two clerks sitting between the place where the deposition was read and that where the Munsif sits. Under O. 18, R. 5, Civil P. C., a deposition shall be read over in the presence of the Judge and the witness and the first question that arises is whether the deposition before us can be deemed to have been read over "in the presence of the Judge." From the evidence on record it does not appear whether the Munsif could actually see the witness and the clerk while the deposition was being read over; but I am satisfied that the provisions of the rule would be adequately complied with if the deposition were read over in a place within the sight of the presiding Judge and from which the witness could draw the attention of the Judge to any mistakes or omissions discovered by him. The reading over of the deposition is primarily intended for the purpose of securing a correct record, and in order to secure this, the witness is given an opportunity of drawing attention to mistakes. The presence of the Judge is required in order to ensure that such an opportunity is really afforded to the witness. Under the old Civil P. C. of 1882, the deposition had to be read over "in the presence of the parties or their pleaders" as well as of the Judge and the witness. According to Boddam, J., in *Kamatchinathan Chetty* v. *Emperor* (1):

"the vakils are required to be present, that they may call the attention of the witness to any statement appearing in the deposition which may or may not require correction."

The omission of this safeguard in the new Code leads one to suppose that the legislature was satisfied that the presence of the Judge was a sufficient safeguard to ensure the correct record of the deposition, for the witness is the best and really the only person who can say that what he had said has been correctly recorded. When therefore the deposition has been

1. (1905) 28 Mad 308.

read over in such a place that the witness can invoke the aid of the Judge to enable him to make any corrections that may be necessary, I think that the requirements of O. 18, R. 5, Civil P. C., are satisfied. It is clear to my mind that the Judge is not required to do more than exercise a general supervision over the reading over of the deposition, for in many cases the deposition is interpreted to the witness in a language which the Judge does not understand. I am supported in this view by a judgment of this Court reported as *Muthukumara Reddy, In re* (2) to which my learned brother was a party. Assuming however that it has not been proved that the deposition was read over in the manner and circumatances referred to above, we have to consider whether the deposition is or is not admissible in evidence. Sucd a deposition was held to be inadmissible in *Kamatchinathan Chetty* v. *Emperor* (1) and also in *Mohendra Nath Misser* v. *Emperor* (3), but a different view was taken in *Bogra, In re* (4). The view taken in *Kamatchinathan Chetty* v. *Emperor* (1) by Boddam, J., was that the document, though purporting to be a deposition, had been read over and signed without the requirements of the law being complied with and was therefore not a deposition and should not have been admitted as such. In *Mohendra Nath Misser* v. *Emperor* (3) it was held that

"the deposition under S. 91, Evidence Act, was the only evidence admissible in proof of these statements (i e., the statements in the depositions), and under S. 80 of the same Act it is admissible only if it was taken in accordance with law."

With all deference I am unable to see any provision in S. 80 which declares such a document to be inadmissible in evidence, for S. 80 only refers to certain presumptions, which a Court shall make when a document purporting to be a deposition taken in accordance with law is produced before it. If it is proved that such deposition is not in all particulars what it purports to be, the presumption would be rebutted; but I can see no authority in S. 80 for holding that such a document would be wholly inadmissible in evidence. Under S. 91, Evidence Act,

"in all cases in which any matter if required by law to be reduced to the form of a document, no evidence shall be given of such matter except the document itself."

2. (1911) 9 I C 262.
3. (1908) 12 C W N 845.

In this case the statement of the witness has been reduced to the form of a document as required by law, and the document itself has been produced. There appears to be nothing in S. 91 which prohibits the admission of such a document in evidence merely because some of the formalities prescribed by law have been omitted in recording it. Undoubtedly any irregularities in making the record may be considered in determining the value of the document as evidence; but that is not sufficient ground for shutting it out altogether. This was the view taken by Miller, J., in *Bogra, In re* (4). In *Rakhal Chandra Laha* v. *Emperor* (5) a deposition which was read out in the presence of the pleader for only one out of 27 accused persons was held to be admissible in evidence in a prosecution for perjury against the deponent, the ground being that it would undoubtedly have been admissible as against the one accused in whose pleader's presence it was read over. As however it was a deposition in a case against 27 persons, it ought to have been read over in the presence of all under S. 360, Criminal P. C, and the omission to do so would apparently invalidate the deposition according to the view in *Kamatchinathan Chetty* v. *Emperor* (1) and in *Mohendra Nath Misser* v. *Emperor* (3). I think therefore that the case in *Rakhal Chandra Laha* v. *Emperor* (5) goes to support the view taken by Miller, J., in *Bogra, In re* (4). a view with which I respectfully agree. In another case, *Jyotish Chandra Mukerjee* v. *Emperor* (6), the learned Judges, while referring to certain cases presumably *Kamatchinathan Chetty* v. *Emperor* (1) and *Mohendra Nath Misser* v. *Emperor* (3) were careful not to express either assent or dissent and consequently the case is of little value here. I would therefore hold that the petitioner's (appellant's) deposition in this case is admissible in evidence and dismiss the appeal.

Ayling, J.—I agree.

S.N./R.K. *Appeal dismissed.*

4. (1910) 34 Mad 141=7 I C 414=11 Cr L J 482.
5. (1909) 36 Cal 803=2 I C 697.
6. (1909) 36 Cal 955=4 I C 416.

A. I. R. 1918 Madras 336 (1)

BAKEWELL AND PHILLIPS, JJ.

Rapaka Viyyanna — Respondent — Appellant.

v.

Parakala Bajamma—Respondent.

Appeal No. 26 of 1917, Decided on 5th September 1917, against order of Sub-Judge, Kistna, in A. P. No. 64 of 1916.

(a) **Criminal P. C (5 of 1898), S. 195 (6)—District Court is superior to Subordinate Judge within Cl. (6)—It refers to Court and not its jurisdiction.**

A District Court is the authority to which the Court of a Subordinate Judge is subordinate within the meaning of sub-S. 6, sub-S. 195, Criminal P. C. [P 336 C 1, 2]

That section only refers to Courts and makes no distinction between appellate and original jurisdiction : 30 *Mad.* 382, (*F. B.*), *Foll.* [P 336 C 2]

(b) **Criminal P. C. (5 of 1898), S. 195 (6)—Sanction by Subordinate Judge whether in appellate or original jurisdiction — Appeal lies to District Court.**

An appeal lies therefore from orders passed by Subordinate Judges under S. 195 whether in the exercise of original or appellate jurisdiction, to the District Court and not to the High Court. [P 336 C 1]

V. Ramadoss—for Appellant.

Narayanamoorthy—for Respondent.

Judgment.—Under S. 27, Civil Courts Act, the general control over all Civil Courts in any District is vested in the District Judge and the latter is therefore an authority to which the Court of a Subordinate Judge is subordinate within the meaning of the Civil Procedure Code, S. 195 (6). The High Court has general powers of superintendence over all Courts and is a similar authority. Sub-S. (7) of that section deals with the case of several controlling authorities and provides that only the Court to which appeals ordinarily lie from the Court granting sanction shall exercise the power conferred by sub-S. (6). Sub-S. 7 (a) also provides that where such appeals lie to more than one Court the appellate Court of inferior jurisdiction shall be the authority to exercise this power. Appeals lie from the Court of a Subordinate Judge in certain cases to the District Judge and in other cases to the High Court, and S. 13, Civil Courts Act, treats the latter class of cases as an exception to the general rule that appeals lie to the District Judge. Since appeals ordinarily lie to the District Court and the latter is of inferior jurisdiction to the High Court, the District Court is the authority to which the Court of the Subordinate Judge is subordinate within the meaning of sub-S. (6).

It is contended by Mr. Ramadoss that in this case the Subordinate Judge passed the order in the exercise of his appellate jurisdiction and that appeals lie from orders so passed only to the High Court under S. 100, Civil P. C. S. 195, Criminal P. C., however only refers to Courts and makes no distinction between appellate and original jurisdiction, and in *Muthuswami Mudali* v. *Veeni Chetti* (1) it was held that an order of a superior Court passed under S. 195 was not merely an order confirming or reversing the order of a Subordinate Court, but was itself an order granting or refusing sanction. If it were treated as a mere appellate order, S. 195 makes no provision for further applications and it is only by treating the order as an original order that any further application lies under S. 195. We therefore think that this application should have been made to the District Court and accordingly dismiss it.

S.N./R.K. *Application dismissed.*

1. (1907) 30 Mad 382 (F B).

A. I. R. 1918 Madras 336 (2)

WALLIS, C. J. AND OLDFIELD, J.

Raminni Varadia Naidu—Plaintiff—Appellant.

v.

Raminni Thippiah Naidu and *others* —Defendants—Respondents.

Second Appeal No. 946 of 1916, Decided on 3rd October 1917, from decree of Sub-Judge, North Arcot, in Appeal Suit No. 234 of 1915.

Registration Act (1908), Ss. 17 (2) and 49—Petition of compromise is not compulsorily registrable and though unregistered is admissible in evidence.

A petition of compromise presented to Court by the parties to a suit or proceeding affecting immovable property, which has been acted upon by the Court, is not compulsorily registrable and is admissible in evidence, though unregistered. [P 337 C 1]

T. Rangachariar—for Appellant.

S. Srinivasa Aiyangar and *S. Desikachariar*—for Respondents.

Judgment.—This is an appeal from a decree of the Subordinate Judge of North Arcot dismissing the suit brought by the plaintiffs, claiming under persons who were the next reversioners on the death of the widow of the last male owner, one Kitchama. The defence which the Sub-

ordinate Judge has upheld is that the properties, which formed part of the estate of the last male owner and were alienated by his widow in 1882, formed the subject of a compromise in the suit in 1886 by three of the presumptive reversioners at that time against defendants 2 to 4 who were stranger alienees and defendant 5 Jangamiah who was one of the co-reversioners and was himself at the time an alienee from the widow whose alienations were questioned in the suit. That suit was filed on 2nd October 1886. Very shortly afterwards in the next month, by Exs 2 and. 2 (a). the stranger transferees from the widow trasnferred their rights to one of the plaintiffs-reversioners Varadiah, who is the present defendant 1's father. It is suggested that these transfers which are in the identical terms were only transfers of the widow's interest, which the transferees have undoubtedly acquired under the sale-deeds, Exs. 3 and 3 (a), but we cannot take that view. We think that there was an out and out transfer inclusive of the transferee's right to remain in possession during the lifetime of the widow. Subsequent to the transfers in favour of Varadiah and as part of the same transaction a petition, Ex. 1. was presented to the Court on 12th February 1887 regarding the compromise of the suit as between the plaintiffs-reversioners and the alienees from the widow defendants 2 to 5, and asking on this basis for the sole relief of a decree for costs against defendant 1, the widow whose alienation had given rise to all this trouble.

It is said that we cannot look at Ex. 1 because it has not been registered. It was filed in the Court, in our opinion, as a compromise in the suit which was intended to bring the suit to an end and to relieve the Court from the necessity of trying the issues which arose in the case, and the Court ought under S. 375, Civil P. C., 1882, to have recorded it and passed a decree in terms of the compromise. What the Court actually did, is not clear because the records have been destroyed and the entry in the suit register against disposal is nil. It is quite clear, we think, that the Court accepted and acted upon the compromise, and in these circumstances we think that it did not require registration and that it is within the authority of the Privy Council decisions, *Bindesri Naik* v. *Ganga Saran Sahu* (1) and *Pranal Anni* v. *Lakshmi Anni* (2) as explained in *Natesan Chetty* v. *Vengu Nachiar* (3), *Sellappa Koundan* v. *Gurumoorti* (4) and *Manickammal* v. *Rathnamal* (5). This ruling is not in conflict with the decision in *Ravula Parti Chelamanna* v. *Ravula Parti Rama Rao* (6).

This being so, it is contended for the defendants that plaintiff 1, who claims as one of the reversioners of Jangamiah who was defendant 5 in that suit, and also as the transferee from Venkatasami who was one of the plaintiff reversioners, is estopped. It is clear from the terms of the compromise recorded in Ex. 1 that Varadiah. one of the three plaintiff-reversioners, was to keep the properties which he had purchased under Exs. 2 and 2 (a) from the transferees from the widow and that Jangamiah, defendant 5, was to keep the properties which had been alienated to him by the widow and renounced his right to the properties in the possession of the plaintiff reversioner Varadiah. As regards the reversioner Venkatasami he got nothing himself under the compromise, but he was a party to it and we think it was on the basis of his consent that Varadiah entered into the compromise. If he had not been a consenting party it would have been open to Venkatasami to go on with the suit and to have his chance of obtaining the relief prayed for in the suit. In these circumstances we think that the present plaintiff 1 both as representing Jangamian defendant 5 and Venkatasami one of the plaintiffs in that suit, is now estopped from disputing the settlement which was then arrived at. It follows that the judgment of the lower appellate Court is right and the second appeal is dismissed with costs.

S N./R.K. *Appeal dismissed.*

1. (1898) 20 All. 171=25 I A 9 (P C).
2. (1899) 22 Mad 508=26 I A 101 (P C).
3. (1909) 33 Mad. 102=3 I C 701.
4. (1915) 26 I C 790.
5. A I R 1914 Mad 20=22 I C 35.
6. (1911) 36 Mad 146=12 I C 317.

A. I. R. 1918 Madras 337

SPENCER AND KRISHNAN, JJ.

Vanjapuri Goundan—Appellant.

v.

Pachamuthu Goundan—Respondent.

Second Appeal No. 487 of 1916, Decided on 18th September 1917.

(a) **Hindu Law — Partition—Unequivocal expression of intention to separate effects partition—Filing of plaint is such expression.**

A definite and unambiguous indication by one member of a joint family of his intention to separate himself and enjoy his share in severalty will amount to a separation or division of status, and the filing of a plaint for partition is such an indication. [P 339 C 1]

(b) **Hindu Law—Partition—Partition constitutes coparceners tenants-in-common of undivided property.**

After a division of status between two coparceners, they are in the position of tenants-in-common with reference to the property left undivided and, therefore, the party who is in exclusive possession of the property and takes the whole of the rents and profits thereof has to account to the other party for his share of such rents and profits. [P 339 C 1, 2]

(c) **Hindu Law—Partition — Mesne profits —Assignee from divided member is entitled to mesne profits from date of separation—Rule of no mesne profits till decree does not apply to separated family.**

A vendee from a coparcener in a Hindu family, who has become divided in status from the other members and has been excluded from the enjoyment of his share in the property is entitled to an award of profits from the date of such separation. [P 339 C 2]

The rule of law that profits cannot be claimed till after decree applies only to the case of a joint family and not to the case of a divided family with joint property. *A. I. R.* 1915 *Mad.* 453;37 *I. C.* 168; 14 *Cal* 493 (*P. C.*) and 16 *Cal* 397 (*P. C.*),; *Dist.* and *Expl*: [P 339 C 2]

(d) **Hindu Law—Partition—Property purchased will be allotted to share of vendor.**

The Court will always endeavour as far as possible to allot to the purchaser the share he purchased. [P 340 C 1]

(e) **Transfer of Property Act (1882), S. 54 —Vendee will be entitled to recover mesne profits accrued due to vendor.**

Per *Spencer, J.*—Whatever the seller can get by way of income on his share, the purchaser of his right, title and interest can recover. [P 340 C 2]

T. M. Krishnaswami Aiyar—for Appellants.

T. R. Venkatarma Sastriar—for Respondents.

Krishnan, J.—The lower appellate Court has given the plaintiff a decree for the division of survey No. 44/1 into three equal shares with reference to good and bad soil and for delivery to him of one of those shares and has directed defendants 1 and 5 to pay him past profits till the date of suit from the date of demand for partition and also from the date of suit to the date of decree and future mesne profits till the date of delivery of possession or for three years whichever be the shorter period. Defendants 1 and 5 are the appellants before us. The only point argued for them is that the award of profits before the date of decree is wrong in law. No objection has been raised to the rest of the decree. The facts necessary for the disposal of the question raised are these. Plaintiff purchased in 1910 an undivided one-third share in survey No. 44/1 from one Sengoda Goundan, defendant 4, in this case He and the other defendants were originally members of a joint Hindu family and the land survey No. 44/1 was one of their joint properties and was in the possession of defendants 1 and 5. Plaintiff made a demand on them for a partition and delivery to him of the share he purchased and on their failure to comply with it, brought the present suit for a general partition against all the members of the family, praying that 1/3 of survey No 44/1 might be allotted to the share of his vendor and put into his possession with profits from the date of his demand.

The question of plaintiff's claim to the profits before decree was argued by the appellant's vakil on the assumption that defendant 4, the vendor, continued as an undivided coparcener of the other defendants till the date of the decree appealed against, and on this footing he cited the cases of *Maharaja of Bobbili* v. *Venkataramanjulu* (1) and *Kota Balabhadra Patro* v. *Khetra Doss* (2) as also the observations of their Lordships of the Privy Council in *Pirthi Pal* v. *Jowahir Singh* (3) and in *Shankar Baksh* v. *Hardeo Baksh* (4). But the learned vakil for respondent 1 has pointed out to us that defendant 4 was really divided in status from the other members some time before the sale to his client. There is no express finding by the lower Courts on this particular point because the issue as to profits was not "seriously pressed" in the first Court, as the Munsif points out and no question seems to have been raised about it in the appellate Court. As the parties do not seem to be at variance on the question of fact from which the divided status is to be inferred, I think we may act under S. 103, Civil P. C., in the matter and find the fact ourselves and we need not call for a finding. The defendant 4, the

1. A I R 1915 Mad 453=25 I C 585=39 Mad 265.
2. (1917) 37 I C 168.
3. (1887) 14 Cal 493=14 I A 37 (P C).
4. (1889) 16 Cal 397=16 I A 71 (P C).

vendor, stated in his written statement that he was entitled to a third share in all the properties and that:

"for three years there was a Panchayat for dividing and giving him his share though it was not accomplished."

The main contesting defendant, defendant, 5 admitted as D. W. 1. that Sengodan (i. e., defendant 4) had asked him for partition and delivery of his share in the presence of witnesses and that Panchayatdars had also come and asked him on Sengodan's behalf to separate and give away his share. Defendant 9 also admitted in the written statement the allegation made by defendant 4. The case of defendants 1 to 2 and 5 to 8 In their written statement was that defendant 4 had become divided from them long previously, though that has been found against. Defendant 4 and his son defendant 10 recently brought a suit in 1913 for partition by metes and bounds and delivery over to them of their share in the remaining properties and that suit has been decreed. It seems, therefore, clear that defendant 4 did make a demand on his coparceners for partition some three years before the date of this suit and though the properties were not divided by metes and bounds at once he must be taken to have become divided in status from the others on the authority of the Privy Council decision in *Suraj Narain* v. *Iqbal Narain* (5), where their Lordships say that a definite and unambiguous indication by one member of his intention to separate himself and enjoy his share in severalty will amount to a separation or division of status. This proposition was adopted and acted upon in the Full Bench case of *Soundararajam* v. *Arunachalam Chetty* (6), where the filing of a plaint for partition was considered to be such an indication as above stated.

We have therefore to consider the validity of the award of profits in the present case with reference to a sale of his share by a member of a Hindu family who had become separate in status, and not with reference to sale by an undivided member of a joint family as was the case in the two Madras authorities cited for the appellants and referred tc above. These cases are, therefore, clearly distinguishable from the present case. After a division of status between two coparceners there can be no doubt that they are in the position of tenants-in-common with reference to the property left undivided and, therefore, the party who is in exclusive possession of the property and takes the whole of the rents and profits thereof will have to account to the other party for his share of such rents and profits. The plaintiff's alienor, defendant 4, was excluded from the enjoyment of the land and the share of his profits by defendants 1 and 5 who took the whole of the profits, and he was thus entitled to recover his share from them from the date of his exclusion after he became divided in status. The appellant has relied on the observations of the Privy Council in the cases in *Pirthi Pal* v. *Jowahir Singh* (3) and in *Shankar Baksh* v. *Hardeo Baksh* (4). In the former case, though their Lordships say that the provisions of the Code as to mesne profits apply only to suits for land or other property in which plaintiff has a specific interest and not to a suit for partition where he has no specific interest until decree, they point out in the sentence just previous that it is erroneous to treat a claim for an account of the proceeds or profits of a joint estate as a claim for mesne profits as defined in the Code.

In the latter case, while they re-affirm the position that in a suit for partition of a joint family estate profits are not recovered till after decree, they hold that where there is an agreement between the members that each should get a share of the profits, a suit for such share of profits and for partition can be maintained when the enjoyment of that share is in any way disturbed. The observations that profits cannot be claimed till after decree apply only to the case of a joint family and not to a case like the present of a divided family with joint property. Plaintiff's alienor having thus a right to obtain from defendants 1 and 5 his one-third share of the profits of the land in this case, is there any reason why plaintiff who stands in the shoes of that alienor with reference to the share he purchased should not get the same relief, the alienor consenting? I can see none. It was argued that as partition by metes and bounds between the members of a joint family has to be effected by the Court with due regard to the interests of the sharers and to the debts due by the family and other such circumstances, it may happen that the

5. (1913) 35 All 80=18 I C 30=16 O C 129=40 I A 40 (P C).
6. (1916) 39 Mad 136=33 I C 858 (F B)

purchaser of an undivided share in one item of property is unable to get that share allotted to him in a partition suit and that he may even chance to get no land at all but only money compensation or perhaps even nothing at all. This may very well be so in some cases, but of course the Court will always endeavour as far as possible to allot to the purchaser the share he purchased: see the observations of Bhashyam Aiyangar, J., in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (7).

It does not follow, however, as argued by the appellants, that because a difficulty may arise in some cases and the profits awarded in such cases to the purchaser may be smaller than he would otherwise have got or no profits may be awarded to him, in all cases profits should be disallowed. Where as in the present case, the Court has been able to award to the purchaser the very share he purchased and there is no dispute about that award, there is no reason for disallowing his proper share of profits. As regards the amount awarded in the present case for profits before decree there has been no contest before us, so that the distinction between profits and mesne profits is immaterial. For the above reasons, I am of opinion that plaintiff is entitled to the profits before decree as awarded to him and that the second appeal fails and should be dismissed with costs of respondent 1.

Spencer, J.—I am of the same opinion. In *Maharaja of Bobbili* v. *Venkataramanjulu* (1) one of the most telling argument for disallowing mesne profits prior to suit in a suit brought by a purchaser from a member of joint Hindu family was that it would be unfair to require the other members of the family to bear the expenses of the family including the alienating coparcener, and simultaneously to bear the extra burden of allotting a portion of the income of the family properties to meet the alienee's claim. This argument however loses its force when the alienor has already ceased to be a coparcener. From the moment he becomes divided in status he is no longer entitled to be maintained out of the funds of the undivided family, but he is entitled to call for an account from the manager of the income of his share remaining in the hands of the latter, if there is any interval between the division of status and the actual partition, and if, as presumably is the case, he has been excluded from enjoyment of the property since the former event. *Bhivrav* v. *Sitaram* (8). It follows also that whatever the seller can get by way of income on his share, the purchaser of his right, title and interest can recover. The second appeal is dismissed with respondent 1's costs.

S.N./R.K. *Appeal dismissed.*

7. (1902) 25 Mad 690 (F B).

8. (1895) 19 Bom 532.

A. I. R. 1918 Madras 340

KUMARASWAMI SASTRI, J.

Krishnapur Mutt — Plaintiff— Petitioner.

v.

Vicar of Surathal Church—Defendant —Opposit Party.

Civil Revn. Petn. No. 243 of 1917, Decided on 22nd November 1917, against the order of the Dist. Judge, South Canara, in Civil Misc. Appeal No. 25 of 1916.

(a) Civil P. C. (1908), O. 39, R. 2 (3) — Order under R 2 is in nature of punishment for disobedience and not for enforcing injunction—Cl. 3 prevents doing of acts.

Orders passed under R. 2, O. 39, Civil P. C., are not orders enforcing the injunction, but are really orders punishing a party for past disobedience: 34 *I C* 588, *Foll.* [P 341 C 1]

Cl. 3, R. 2, O. 39, applies to injunctions prohibiting the doing of or restraining from doing certain acts. [P 341 C 1]

(b) Civil P. C. (1908), O. 39, Rr. 2 and 4 — Rule 4 does not affect Cl. 3, R. 2.

Cl. 3 is independent of and is not controlled by the provisions of R. 4 of the order. [P341 C1]

(c) Civil P. C. (1908), S. 94 and O. 39 — Both must be read together.

O. 39 must be read with S. 94 and the provision for punishment for disobedience applies to cases falling under either. [P 341 C 1]

B. Sitarama Rao—for Petitioner.

K. P. Lakshmana Rao—for Respondent.

Judgment.—I think that, on the facts found by the District Judge, this is not a case where I should commit Father Coelho, defendant 2, to jail for contempt There was an order of a criminal Court ordering lac trees to be returned to his servant. The Judge, no doubt, rightly finds that it was his duty to see that his servant did not remove the tree in disobedience to the civil Court's injunction, but it is possible that defendant 2 was bona fide under the belief that he need not interfere as his servant had the permission of the criminal Court. Though defendant 2 is technically guilty of contempt, the Court is not bound to commit him to jail. I am of opinion that Cl. 3

R. 2, O. 39, Civil P. C., applies to cases of disobedience, even though the disobedience is of a prohibition to do or abstain from doing a single act. There is no reason to suppose that the legislature intended to leave such disobedience unpunished. The fact that Cl. 4 refers to attachment continuing for one year and directing a sale if the disobedience or breach continues, is not conclusive as sub-S. 3, R. 2 empowers the Court either to attach his property or to commit the defaulter to prison. In *Ottapurakkal Thazath Suppi* v. *Alabi Mashur Koyanna Koya Kunhi Koya* (1) it was held by the Full Bench of this Court that the Court can, in its discretion, order either arrest or attachment of property and is not bound in the first instance to attach.

As pointed out by Srinivasa Aiyangar, J., at P. 913 of 39 *Mad.* such orders are not strictly speaking orders enforcing the order of injunction, but really orders punishing a party for past disobedience. It should also be borne in mind that, in many cases, where a single act or abstention is enjoined, it may be in the power of the defaulting party to purge himself of the consequences of his act by restoring the property or making adequate reparation. In such cases it is difficult to see why the Court should not attach his property in order to compel him to restore the property or to make adequate reparation. I do not think there is anything in the wording of R. 2, Cl. 3, to prevent the Court from committing a party to jail when he disobeys an injunction which contemptates a single act or abstention. It has been argued that the provision as to punishment for disobedience only applies to suits of the nature contemplated by R. 2, O. 39. I am unable to agree with this contention. S. 94, Cl. (c) of the Code is general and empowers the Court to grant a temporary injunction and, in case of disobedience, to commit the person guilty thereof to the civil prison and order that his property be attached and sold: O. 39 must be read with S. 94.

I would be sorry to hold that a person who wilfully disobeys an injunction of Court could escape with impunity, unless there is anything in the Code which compels me to do so. For the reasons already given I do not agree with the District Judge, though I do not think the interest of justice requires that defendant 2 ought to be committed to jail. I think he ought to pay the costs of the proceedings in this Court and the lower Courts.

S.N/.R.K. *Order accordingly.*

1. (1916) 39 Mad 907=34 I C 583.

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* A. I. R. 1918 Madras 341

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

Mylappa Chettiar and *another*—Plaintiffs—Appellants.

v.

British Indian Steam Navigation Co. Ltd. and *others*— Defendants—Respondents.

Civil Appeal No. 352 of 1916, Decided on 21st December 1917, against order of Sub-Judge, Negapatam, in O. S. No. 55 of 1914.

***(a) Carrier—Liability of — Carrier with whom goods booked in absence of contract is liable for loss caused by other carriers—Consignor cannot hold other company with whom he has not directly contracted liable for damage—When two companies contract to work together either or both can be sued for damages.**

In the case of continuous carriers the authorities establish (1) that when goods have to be carried with the aid of different transport agencies in order to arrive at the destination to which they are booked, the carrier with whom the contract is made at one end is, in the absence of any contract limiting his liability to his own transport system, liable for the loss or destruction of the goods on portions beyond his own system or in consequence of acts or default of persons other than his own servants: (2) that in the absence of a contract to the contrary, the consignor cannot hold the company with whom he does not contract liable for damages when all that can be complained of is non-feasance, though such company may be liable in tort for breach of duty arising from the mere fact that it has undertaken the liability of carrying goods or property belonging to another; (3) when there is an agreement between two companies the effect of which is to constitute one company the agent of the other and the traffic is carried for the joint benefit of both the companies, either company may be sued at the option of the consignor.

[P 343 C 1, 2]

(b) Carrier — Term "carrier" defined—Art. 31 is not limited to common carrier—Limitation Act (1908), Art. 31.

The "carrier" in its general sense means a person or company who undertakes to transport the goods of another person from one place to another for hire. Art. 31 is not restricted in its application to common carriers. It applies to carriers who come within the above definition.

[P 343 C 1, 2]

T. R. Venkatarama Sastri—for Appellants.

C. V. Ananthakrishna Aiyar, N. M. Malim Sahib and *T. S. Ramaswami Aiyar*—for Respondents.

Wallis, C. J.—A case somewhat similar to this case came before the Courts in the *British India Steam Navigation Co. Ltd.* v. *Hajee Mahomed Esack and Co.* (1), where it was held that the stipulation for a claim for short delivery being made on the shipowner at Calcutta within a month was not reasonable. This appears to be a sufficient answer to the claim against the British Indian Steam Navigation Company. As regards the Madura Company, defendant 2, who was the agent, Sir Charles Turner, C. J., and Innes, J., observe in the course of their judgment as regards Ramanjulu and Sons, who were in the same position as the Madura Company here, that

"they were the agents of the appellants (the British India Company to retain the goods, receive freight and give delivery. they were also the agents of the respondents (the consignees) to land the goods, but they were not the agents of the appellants to receive claims for compensation for the non delivery of goods.".

This passage recognizes, I think correctly, the existence of a contractual relation between the landing agents and the consignees who paid them for their services. This appears to me to be one of those cases in which privity of contract is readily inferred from the well-known course of business according to which the landing agents are paid by the consignees and from the necessities of the case. Compare the cases referred to by my learned brother in the recent Full Bench case, *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Co.* (2), and also the cases as regards carriage of goods over railways having continuous lines: *Gill* v. *Manchester, Sheffield and Licolnshire Railway Co.* (3), *Great Indian Peninsula Railway Co.* v. *Radhakrishna Khushaldas* (4). The proper inference appears to be that, as in these cases, the final stage of performance including carriage from the ship's side, which at Negapatam is a matter of some miles, and delivery is performed by defendant 2. The suit as against defendant 1 is barred under Art. 31 according to the Full Bench ruling in *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Co.* (2) and I see no reason why defendant 2 should not also be considered a carrier for the purpose of the article. It would be anomalous if a different article were applicable to the shipowner and to the landing agent in respect of what are successive stages in the performance of one transaction: the carriage of the goods and delivery to the consignees. The appeal is dismissed with costs of respondents 1 and 2.

Kumaraswami Sastri, J.—The plaintiff, who was the consignee of certain timber consigned from Rangoon through the British India Steam Navigation Co. under bills of lading setting forth the terms and conditions under which the British India Steam Navigation Co. undertook to carry the goods, sued to recover Rs. 2, 417-12 0 alleged to be due in respect of timber consigned but not delivered. Defendant 2, which is a firm engaged inter alia in landing goods from the steamers of the British India Steam Navigation Co., is sought to be made liable as they are landing agents at Negapatam in respect of all goods that arrive at the port in the vessels belonging to the British India Steam Navigation Co., and levy and receive from plaintiff separate charges for their undertaking to land and deliver goods. Various defences were raised, but it is only necessary to consider the grounds on which the Subordinate Judge dismissed the suit, namely, the question of limitation so far as defendant 1 was concerned and want of privity of of contract as regards defendant 2. The bill of lading provides that

"the Company is to have the option of delivering the goods or any part thereof, into the receiving ship. or landing them at the risk and expense of the shipper or consignee, as for scale of charges to be seen at the agents' office and is also to be at liberty until delivery to store the goods or any part thereof in receiving ship, godown or upon any wharf, the usual charges wherefor being payable by the shipper or consignee. . . . . In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee."

It seems to me that the bill of lading provides that goods are to be conveyed from Burma and landed at Negapatam by two agencies, one carrying the goods up to the port and the other from the ship's tackle to the godowns on the shore and that the agreement limits the liability of the Company to the period when the goods pass from the ship to the landing agent. Mr. M'Conachy of defendant's firm, who is the only witness called in the case, deposes that defendant 2

1. (1881) 3 Mad 107.
2. (1915) 39 Mad 1=30 I C 840 (FB).
3. (1873) 8 Q B 186.
4. (1880) 5 Bom 371.

collects landing charges from the merchants to whom the goods are consigned through defendant 1 company, which has nothing to do with defendant 2's charges though the charges are subject to defendant 1's sanction. He states that defendant 2 company, owns a number of boats and that it is bound to unload goods from all the steamers of defendant 1 Company and has the option of refusing to unload goods of others. He also states that merchants cannot engage the services of any other boat agency to land goods from defendant 1's steamers.

The case is therefore one of continuous carriage of goods, defendant 1 company making arrangements for the carriage though limiting its own liability to one stage for the transit. There can be little doubt that defendant 2 company are carriers, though not common carriers within the meaning of the Carriers Act, 1865. The word "carrier" in its general sense means a person or company who undertakes to transport the goods of another person from one place to another for hire (Wharton Law Lexicon), and defendant 2 falls within the definition. I do not think that defendant 2 company can, on the facts proved in this case, escape liability on the ground of any want of privity between itself and the plaintiff. In the case of continuous carriers the authorities establish: (1) that when the goods have to be carried with the aid of different transport agencies in order to arrive at the destination to which they are booked, the carrier with whom the contract is made at one end is, in the absence of any contract limiting his liability to his own transport system, liable for the loss or destruction on portions beyond his own system or in consequence of acts or default of persons other than his own servants: *Muschamp* v. *Lancaster and Preston Junction Railway Co.* (5), *Bristol and Exeter Railway Co.* v. *Collins* (6), *Foulkes* v. *Metropolitan District Railway Co.* (7) and *Aldridge* v. *Great Western Railway Co.* (8); (2) that in the absence of a contract to the contrary, the consignor could not hold the company with whom he did not contract liable for damages when all that could be complained of was nonfeasance, though such company may be liable in tort for breach of duty arising from the mere fact that it has undertaken the liability of carrying goods or property belonging to another; *Foulkes* v. *Metropolitan District Railway Co.* (7) (3) when there is an agreement between two companies the effect of which is to constitute one company the agent of the other and the traffic is carried for the joint benefit of both the companies, either company may be sued on the option of the consignor. *Gill* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (3), *Great Indian Peninsula Railway Co.* v. *Radhakisan Khushaldas* (4).

If however defendant 2 company are carriers, and I think they are, it is clear that Art. 31, Lim. Act would apply equally to them. It is not necessary for the purpose of Art. 31 that they should be common carriers. Whatever doubt may have existed as to the applicability of Art. 31 in cases of failure to deliver goods where the action was laid ex-contractu, the matter has been set at rest by the Full Bench decision of this Court in *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Co.* (2). It is therefore unnecessary to refer to the various conflicting prior decisions on the point referred to by Mr. Venkatarama Sastri. It was admitted before the Subordinate Judge that if Art. 31 applies, the suit is baared by limitation as the claim arose more than a year before suit. There is nothing in the records to show that there was any acknowledgment of liability so as to take the case out of the Statute of Limitation. I agree with the Chief Justice that the suit is barred and dismiss the appeal with costs of respondents 1 and 2.

S.N./R.K. *Appeal dismissed.*

5. (1841) 3 M and W 421.
6. (1859) 7 H L C 194.
7. (1880) 5 C P D 157.
8. (1864) 15 C B (NS) 582.

A. I. R. 1918 Madras 343

SESHAGIRI AIYAR, J.

Madappa Goundan—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 178 of 1916, and Criminal Revn. Petn. No. 145 of 1916. Decided on 11th August 1916, against order of Subdivl. First Class Magistrate, Salem, in Case No. 18 of 1915.

Penal Code (1860), S. 499, Exceps. 8 and 9 —Petition to forest officer by accused that Village Munsif was illicitly grazing goats in

forest reserve and urging inquiry—Accused held guilty under S. 499—Exceps 8 and 9 held not to apply.

Accused sent petition to the forest authorities saying that the village Munsif was a very rich man and that he had gained over the range officer to his side and had been illicitly grazing goats in the reserve and urging an an inquiry by some officer other than the range officer:

Held: (1) that the accused was guilty of the offence of defamation, inasmuch as the language employed by him was calculated to harm the Village Munsif and lower the range officer in the estimation of his subordinate and the public; (2) that Exceps. 8 and 9 to S. 499, could not apply to the case inasmuch as the accused had acted recklessly and without due care and caution. [P 344 C 1]

C. Madhavan Nair—for Petitioner.

Public Prosecutor—for the Crown.

Order.—Mr. Madhavan Nair has dissected the judgment of the Magistrate with great skill and I may say that portions of the judgment lend themselves to hostile criticizm at the hands of an able advocate; but there is no question that the Magistrate has found that the letter in question was written prima facie with a view to injure the second prosecution witness and that its effect has been to lower the first prosecution witness in the estimation of his subordinates and the public. A reading of the letter leaves no manner of doubt in my mind upon that question. It says in one portion of it that the Village Munsif is a very rich man and that the has gained over the forest officers to his side and has been grazing goats in the reserve. This is followed by the sentence:

"If the Cauvery Range Officer knows of the matter (that is the inquiry), he will inform the guards and will give intimation to the Village Munsif and others."

There can be no doubt that the implication intended in the letter is that the forest officer (first prosecution witness) had been gained over by the Village Munsif and that if an enquiry into the grazing of the goats is to be entrusted to him he will warn the Village Munsif and that there will be no conviction. If that is untrue, the language employed is calculated to lower the first prosecution witness in the estimation of his subordinates and the public. I must therefore take it that the finding of the Magistrate, although he has not stated it clearly, is that the letter was written with intent prima facie to harm the second prosecution witness and that it had the effect of lowering first prosecution witness in the estimation of the public. That satisfies the requirements of S. 499, I. P. C. The question as to whether Exceps. 8 and 9 apply to this case need hardly be considered, if I take the finding of the Magistrate to be that the accused acted recklessly and without due care and caution. Undoubtedly there are sentences in the Magistrate's judgment which indicate that his view was that there were no bona fides in the preferring of this complaint to the District Forest Officer. In these circumstances I think the conviction of the petitioner is right. The petition is dismissed.

S.N./R.K. *Petition dismissed.*

A. I. R. 1918 Madras 344

WALLIS, C. J. AND SADASIVA AIYAR, J.

P. V. Kothandaramaswami Naidu—Defendant—Appellant.

v.

P. M. A. Muthia Chetti—Plaintiff—Respondent.

Original Side Appeal No. 3 of 1917, Decided on 10th December 1917, from judgment of Coutts-Trotter, J., in Civil Suit No. 155 of 1914.

(a) Negotiable Instruments Act (26 of 1881), S. 118—Order of endorsement will be presumed as appears unless otherwise proved— (Per *Wallis, C. J.*)—**Quaere—Endorsement on back by stranger—Whether suit lies.**

In the absence of direct evidence that the endorsements on a negotiable instrument were made in a particular order, the statutory presumption under S. 118 (e) Negotiable Instruments Act, that they were made in the order in which they appear on the in strument, will prevail. [P345 C 1,2]

(b) Negotiable Instruments Act (1881), S. 35—Endorsement by stranger—Whether suit lies—*Quaere.*

Per *Wallis, C. J.*—Whether a suit can be filed on an endorsement made by a stranger on the back of a note, who does not satisfy the definition of an endorser. [P 344 C 2]

T. Rangachariar and *K. C. Desikachariar*—for Appellant.

C. P. Ramasawmy Iyer—for Respondent.

Wallis, C. J.—This appeal raises an interesting question as to whether a suit can be filed on an endorsement made by a stranger on the back of a note, who does not satisfy the definition of an endorser. There is such a usage of law on the continent known as the making of an aval, which is recognised by S. 56, English Bills of Exchange Act, but there is no recognition of it in the Indian Negotiable Instruments Act. It was with reference to the Bills of Exchange Act that we are told in the well-known words of Lord Halsbury in

the *Vagliano* case (1) that the essence of a Code is to be exhaustive. We may apply that principle to the Negotiable Instruments Act, and say that we are not prepared to recognise this backing of bills by strangers. That is the view which I am at present disposed to take, but it is not necessary to express a final opinion on this point, because I think the appeal fails upon another ground. S. 118, Negotiable Instruments Act, provides that the presumption is that the endorsements were made in the same order as the names appear on the back of the bill, and in this case it is the payee's name that appears first and then the name of the alleged endorser. There is evidence also that this was the case, though the evidence is not of a very satisfactory character. On the other hand, the defendants did not go into the box to establish that the endorsements were made in any other order. On the whole, I think that there is no sufficient evidence to rebut the presumption that the endorsements were made in the order in which they occur. If that be so, I think that there is sufficient ground to sue the endorsers of the promissory notes. In the result the appeal fails and must be dismissed with costs.

Sadasiva Aiyar, J.—S. 118, Cl. (e) Negotiable Instruments Act, provides that the presumption shall be made.

"that the endorsements appearing upon a negotiable instrument, were made in the order in which they appear thereon."

In the present case, defendant 2's (appellants') endorsement-signatures in Ex. A series appear below the endorsement signatures of defendant 1, who is the payee in all the promissory notes. No oral evidence was adduced on the appellants' side to rebut this presumption raised by S. 118, Cl. (e). The appellants' learned vakil (Mr. T. Rangachariar) relied on a statement in cross-examination made by the plaintiff as to the order in which the defendants made their endorsement-signatures. But the plaintiff has stated also in his deposition that the promissory notes used to be sent by the defendants through defendant 1's gumasta properly endorsed, and that the plaintiff's gumasta would receive from defendant 1's gumasta. The plaintiff himself evidently does not know much about these matters. Mr. Rangachariar also relied upon an ambiguous statement made by the plaintiff in the plaint Ex. B in the suit on the mortgage instituted by him against defendants 1 and 2. The above, however, are wholly insufficient to rebut the statutory presumption that defendant 1 as payee made the endorsement-signature on the back of the note before defendant 2 and that defendant 2 afterwards made himself liable as the next endorser to the ultimate holder in due course, namely the the plaintiff. On these findings of facts the interesting legal questions strenuously argued by Mr. Rangachariar do not arise. Therefore I agree with my Lord the Chief Justice that the appeal fails and should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

1. (1891) A C 107.

A. I. R. 1918 Madras 345

OLDFIELD AND SPENCER, JJ.

Puthur Tarwad Karnavan and *others* —Defendants—Appellants.

v.

Muthiyallur Kumaran Rarichan and *another*—Plaintiffs—Respondents.

Second Appeal No. 1622 of 1915, Decided on 20th December 1916, against decree of Dist. Judge, South Malabar, in Appeal Suit No. 778 of 1913.

(a) Malabar Law—Landlord and tenant—Anubhavan — Import of, with reference to tenure and specified money or grain rent explained.

Anubhavan may be used with reference to the tenure of land and it will then prima facie import an irredeemable tenure, or it may be used with reference to a specified money or grain rent charged on the land and in that case it will not imply any tenure in favour of the grantee. [P 346 C 2]

(b) Malabar Law—Landlord and tenant—Remuneration, definite quantity of grain.

Where the remuneration mentioned in the deed is a definite quantity of grain out of the produce of the lands, the presumption is that only a rent charge was granted: 30 *Mad.* 203 and 29 *Mad.* 501, *Foll.* [P 346 C 2]

(c) Malabar Law—Landlord and tenant—Grantor reserving to himself definite quantity of produce as rent—Remaining produce to be enjoyed by grantee—Presumption is that land is held under service tenure.

If the grantor reserves to himself a definite quantity of the produce as rent, and the whole of the produce of the lands subject only to the payment of that small rent is to be enjoyed by the grantee, the presumption is that the land itself is held under the service tenure: 27 *Mad.* 202, *Foll* [P 346 C 2]

C. Madhavan Nair—for Appellants.

T. Richmond—for Respondents.

Sadasiva Aiyar, J.—The defendants are the appellants. The suit was brought for redemption of a kanom mortgage of 3rd March 1896. The defence was that the

transaction which is alleged to be a kanom mortgage by the plaintiff is an irredeemable anubhavan tenure affecting the lands. The plaintiffs' contention was that the anubhavan (perpetual enjoyment right) created (or rather renewed) under the document was only a rent charge of 125 paras of paddy on the lands as remuneration for future services and that as the defendants neglected to perform the said services to plaintiff 1 (the mortgagor and the grantor of the anubhavan right) during three years before suit, the defendants had forfeited the right even to the rent charge.

The District Munsif held (a) that the anubhavan right under the document Ex. A of 1896 gave only a rent charge and did not affect the redeemability of the lands; and (b) that it not being shown that the defendants have been called upon by plaintiff 1 to perform any work obligatory under the service tenure of the defendants or that the defendants refused to perform any such work when so called upon, the defendants have not lost their right to the rent charged. He therefore decreed that on payment of the kanom amount and the value of the improvements the plaintiffs shall be entitled to get back the possession of the mortgaged lands subject to the following declaration in favour of the defendants, viz., that defendant 1, as karnavan of the defendants' tarwad, had an annual rent charge on the plaint property for the 125 paras of paddy due to his tarwad. The plaintiffs in their plaint (plaintiff 2 being the melcharthdar) claimed to set off against the kanom and value of improvements Rs. 200, as michavaram for the three years before suit on the contention that the 375 paras of paddy (at 125 paras a year) which the defendants were entitled to appropriate as remuneration for their services in respect of their anubhavan tenure could not be claimed by them. The District Munsif disallowed the plaintiffs' above contention. On appeal the learned District Judge agreed with the learned District Munsif that the "anubhavan" tenure gave only a rent charge on the lands and not the right to perpetual possession of the lands themselves in the defendants' favour. He however held that the defendants had "a duty to perform," the services stipulated in Ex. A, and that it was "admitted that they had not been performing those service for the last 24 years."

He hence directed the plaintiffs to pay for redemption a smaller sum than was mentioned in the District Munsif's decree, the difference being the value of the 375 paras of paddy which the defendants were entitled to appropriate as remuneration if they had performed the services during those three years. As regards the first question, the nature of an anubhavan tenure has been considered in several cases in this Court. In *Mana Vikrama* v. *Karnavan Gopalan Nair* (1), the following passage from *Vythilingam Pillai* v. *Kuthiravattah Nair* (2) is quoted with approval;

> "The point to be borne in mind with regard to anubhavan is that it may be used with reference to tenure of land, and it will then prima facie import an irredeemable tenure, or it may be used with reference to a specified money or grain rent charged on the land, and in that case it will not imply any tenure in favour of the grantee."

The question whether the perpetual grant was of the land itself or of a rent charge in the land must of course, depend upon the construction of each particular deed of grant. Where the remuneration is mentioned in the deed as a definite quantity of grain out of the produce of the land, the strong presumption arises that only a rent charge was granted: see *Mana Vikrama* v. *Karnavan Gopalan Nair* (1). If, on the other hand, the grantor reserves to himself a definite quantity of the produce as rent and the whole of the produce of the lands, subject only to the payment of that small definite rent, is to be enjoyed by the grantee, the presumption is that the land itself is held under the service tenure: see *Theyyan Nair* v. *Zamorin of Calicut* (3). Having given my best consideration to the terms of the document Ex. A in this case, I am of opinion that the lower Courts are right in their view that the remuneration for the service was an annual rent charge of 125 paras of paddy and not the lands themselves. Mr. Madhavan Nair for the appellants strenuously contended that the anubhavan tenure legally attached to the lands themselves, according to the true construction of a long involved sentence found in the first portion of the document Ex. A. But the document has to be read as a whole and the second portion clearly says that it was only the fixed quantity of 125 paras out of the produce which

1. (1907) 30 Mad 203.
2. (1905) 29 Mad 501.
3. (1904) 27 Mad 202.

was the subject of the anubhavan tenure. No doubt a grant should be construed in favour of the grantee and against the grantor in cases of doubt: see *Bhojohari Das Adhikari* v. *Bhagabati Dasi*[4] (4). But taking the document as a whole and having regard to the terms of the prior document, Ex. B, which was merely renewed by Ex. A, I do not feel any such doubt as regards the construction of Ex. A. Mr. Madhavan Nair also relied upon the decision of a Bench of this Court in *Krishna Iyer* v. *Muringa Malayil* (5), in support of his construction of the words of Ex. A, but the construction of the terms of a particular document in a certain case is ordinarily of very little value as regards the construction of another document in a later case, unless the words of the two documents and the nature of the two transactions are identical or almost identical. In the case of *Krishna Iyer* v. *Muringa Malayil* (5) the document was not a kanom document as in this case, but an ordinary anubhavan lease grant and the rent reserved by the grantor perpetually was the round quantity of 150 paras. The learned Judges (Bakewell and Napier, JJ.) who decided that case distinguished the case of *Vythilingam Pillai* v. *Kuthiravattah Nair* (2), on the ground that in that case the document was a kanom document which is prima facie redeemable. In the present case also the document is a kanom document and hence (if other decisions and considerations of other documents are at all relevant) this case is more analogous to the case of *Vythilingam Pillai* v. *Kuthiravattah Nair* (2) than to *Krishna Iyer* v. *Muringal Malayi* (5). I therefore reject this first contention.

As regards the second contention I must say that the judgment of the District Judge on this point is rather unsatisfactory. The plaintiffs themselves stated in their plaint (para. 9) that neglect of the defendants in the management of duties arose only from 1909 and hence the plaintiffs claimed to set off only the michavaram for the three years before suit. I cannot see where the learned District Judge gets an admission by the defendants that the defendants had not been doing any services for the past 24 years. Again, the nature of the those services is described in the document Ex. A as (1) the reading of the pattolai and the doing of other works in the swarupam by the males of the defendant tarwad; and (2) the doing of some menial services by the females of the defendants' tarwad till the end of the deeksha of the succeeding Moppil Nair in plaintiff 1's tarwad, on the death of the preceding Moppil Nair. It seems to have been conceded that no occasion arose for any services to be performed by the females after 1909. The plaintiffs seemed to have relied upon the alleged neglect of the duties to be performed by the males of the defendants' tarwad, viz. the reading of pattolai and the doing of other works. Neither Court has given a distinct finding as to what those duties to be done by the males of the defendants' tarwad are, when they had to be performed and whether occasions arose for their performance in the three years before suit. The District Munsif says

"that defendants state that they had no service at all to perform from 1066 (1890—91) forwards. But that however is beside the point".

The District Judge says

"that the services appear to be mainly secretarial to plaintiff 1 and that the services were to be done to plaintiff 1".

We are unable to decide the second appeal finally till we get findings from the lower appellate Court on the following issues: (1) What are the services to be performed by the males of the defendants' tarwad to plaintiff 1? and on what occasions have they to be performed? Did any such occasions arise during the three years before suit? (2) Were the males of the defendants' family called upon to do any such service and did they neglect to do so? Time will be six weeks for the submission of the finding and ten days for the filing of the memorandum of objections.

Oldfield, J.—I agree and have nothing to add.

(After the return of the finding upon the issues referred the Court delivered the following)

Judgment.—We accept the lower appellate Court's finding. We accordingly modify para. 4 of the lower appellate Court's decree by substituting for the words "stipulated in the kychit" the words "as now found by the District Judge". As there has been no failure to render service, the reference to arrears of rent in the lower appellate Court's decree is unnecessary. The words

4. (1912) 17 I C 494.
5. (1916) 32 I C 982

"and that the amount due to the plaintiffs on account of the rent claimed is Rs. 200 and future rent from 1083 at the rate of 125 paras of paddy a year"

must be expunged from it. The time for redemption is extended to six months from this date. Each party will bear his own costs in this Court.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 348

WALLIS, C. J., BAKEWELL AND KUMARSWAMI SASTRI, JJ.

Srinivasa Ranga Rao Pantulu and *another*—Appellants.

v.

Raja Kumara Venkata Perumal—Respondent.

Letters Patent Appeal No. 266 of 1916, Decided on 19th September 1917, against judgment of Oldfield J., in Civil Misc. Appeal No. 107 of 1912.

(a) Madras Court of Wards Act (1 of 1902), S. 41—Penalty of cessation of interest on unnotified claim is final—S. 41 cannot be construed in restrictive sense.

The penalty provided in the first part of S. 41 as to cessation of interest on unnotified claims is final, the claimant being left to prosecute his legal remedies for the amount already accrued due to him. [P 348 C 2; P 249 C 1]

A restrictive construction should not be put on the highly general provisions of S. 41. [P 349 C 1]

(b) Madras Court of Wards Act (1 of 1902), Ss. 38 and 41—S. 41 does not affect secured creditors or authorize payment of money raised on their securities to others before satisfying their claim.

The latter part of the section postponing unnotified claims to those notified or admitted under S. 38 cannot be construed as depriving secured creditors who have notified their security or as authorizing the application of money raised on their securities otherwise than in satisfaction of their claims. It only prohibits payments to them by the Court of Wards out of the unencumbered funds at its disposal, and does not prohibit the realization of the security and satisfaction out of the proceeds of the secured creditors' claim. [P 349 C 1]

(c) Madras Court of Wards Act (1 of 1902), S. 41—S. 41 applies to voluntary payment—It is no bar to creditor obtaining decree and executing it—It does not affect powers of executing Courts.

The prohibition of payment in the section is confined to the Court of Wards and does not extend to the authorities executing decrees even during the continuance of its superintendence. Creditors, whether they have notified or not, are not prevented from obtaining decrees and executing them. [P 349 C 1]

The provisions of the section do not affect the duties of executing Courts or the functions of the decree-collector under Ss. 321 to 325 (c), Civil P. C. of 1882: 8 *I. C.* 392, *Expl.* [P 349 C 2]

T. Narasimha Aiyangar—for Appellants.

L. Venkataragava Iyer—for Respondent.

Wallis, C J.—In construing the provisions of S. 41, Madras Court of Wards Act 1 of 1902, regard must be had to the scope and object of the amendments introduced into the Madras Court of Wards Regn. 5 of 1804 by Madras Act 4 of 1899 and reproduced without substantial alteration in the Act of 1902. The object was to save the estates of embarrassed proprietors or at least a portion of them for their owners, and it was hoped that with the aid of the additional powers conferred on it, the Court of Wards would be able to provide for the full discharge of the proprietor's debts and liabilities. If not, the creditors were left to their ordinary remedies, which were only interfered with as expressly provided. Among the powers conferred on the Court of Wards and its agent the Collector, specified in the order under S. 19 of the Act, was that of requiring all persons having pecuniary claims on the ward, whether decrees or not, to notify those claims within a specified period, failure to do so being visited with the penalties prescribed by Ss. 41 and 42. With the information thus acquired and with further powers of ousting usufructuary mortgagees from possession and converting them for the time into simple mortgagees and of reviving improvident leases, it was hoped that the Court of Wards might find itself in a position to raise sufficient money to discharge all the liabilities. S. 41 imposes two penalties with regard to claims which have not been duly notified. The first of them is that

"it shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the expiration of the period prescribed by S. 37 for notifying claims."

This threatened loss of interest was strong inducement to notify claims and having regard to the express provision that interest shall cease even when payable under a decree and to the absence of any provision as to its again becoming payable except in the event specified in S. 55 (4), I agree with both the learned Judges that under the section, the cessation of interest is final and that the claimant is left to prosecute his legal remedies for the amount already accrued

due to him. As regards the second penalty that the unnotified claim

"shall not be paid until after the discharge or satisfaction of the claims notified or admitted under S. 38,"

it may be observed, in the present place, that the provision cannot be construed as depriving secured creditors of their security or as authorizing the application of money raised on their securities otherwise than in satisfaction of their claims. If not paid, the secured creditor is entitled to retain his security till he is paid. In these circumstances to hold that the Court of Wards is prohibited by this section from raising money on the security and discharging the secured creditor and applying the surplus in the discharge of the general indebtedness would merely be to prevent the Court from raising money for the beneficial purposes specified in S. 323 (3), Civil P. C., and would unnecessarily embarrass it in the discharge of the difficult function entrusted to it without advantage to anybody. This cannot, I think, have been the intention of the legislature, and I think that therefore we are not justified in putting a restrictive construction on this highly general section and that in the case of secured creditors who have not notified, it only prohibits payments to them by tha Court of Wards out of the unencumbered funds at its disposal, and does not prohibit the realization of the security and satisfaction out of the proceeds of the secured creditors' claim.

If the prohibition of payment in S. 41 is directed to the Court of Wards, it follows of course, that it must cease, as held by Krishnan, J., when the Court of Wards withdraws from superintendence I am disposed to think that it must be confined to the Court of Wards, and that it does not extend to the authorities executing decrees even during the continuance of the superintendence of the Court of Wards. Creditors whether they have notified or not are not prevented from obtaining decrees and proceedings to execute them. If the execution is left to the civil Courts each Court must execute the decree before it with due regard to the rights of secured creditors and to the rights of the unsecured decree-holders to rateable distribution. It can hardly have been intended that on each occasion of executing a decree the executing Court should have to embark on an inquiry whether all the notified debts have been paid, and I think that sufficient effect may be given to S. 41 without construing it as affecting the duties of executing Courts and that if it had been intended to affect them there would have been express provisions to that effect. Again when the Local Government exercises its power under S. 45 of transferring decrees against the ward to the Collector for execution, I think the same considerations apply and that the provisions of S. 41 as to the order of payment do not affect the decree-collector, as he is called, in the discharge of his duties under Ss. 321—325 (c) of the old Civil P. C., which are made applicable by S. 47 subject to the rules prescribed by the Local Government under S. 45 (2) which, however apply only to procedure and do not affect the substantive right of the parties. In the case of decrees such as the present obtained by secured creditors ordering the sale of immovable property in pursuance of a contract specifically affecting the same, the decree-collector has the powers conferred upon him by S. 321 and is required by S 324 (a) to apply the moneys realized by him subject to the claims of maintenance holders in execution of the decree for which the Court ordered the sale of the immovable property and in the case of other decrees to apply such moneys by way of rateable distribution. Under S. 323 (3), the decree collector is also empowered to discharge the claim of any encumbrancer whether it has matured or not,

"for the purposes of improving the saleable value of the property available or any part thereof or rendering it more suitable for letting or managing or for preserving the property from sale in satisfaction of an encumbrance."

I do not think that the second part of S. 41 was intended to affect the decree-collector as regards these powers and duties. This is an attempt to execute a mortgage decree passed in 1895. It is stated by the District Judge of North Arcot in his order on the connected Execution Petition No. 79 of 1912, dated 21st November 1912, that the Court of Wards assumed management on 26th July 1899 and gave up management of the estate on 27th September 1905, and that decrees were transferred to the Collector for execution and retransferred to the civil Courts on 27th February 1906. It is also stated that the Court of Wards again assumed superintendence on 27th

August 1907 and relinquished it on 15th January 1910 but it is stated that decrees were again transferred to the Collector for execution during that period, and that execution still remains with the civil Courts As it is now more than 18 years since the Court of Wards first took over management and the other secured and unsecured claims have not yet been satisfied it seems exceedingly unlikely that they ever will be satisfied and if they are the money which has been realized on account of the defendant's security and which is in Court must, according to the District Judge's order, remain there for ever, a result which legislature can certainly not have contemplated. In passing the order the learned District Judge relied on a ruling contained in a judgment to which I was a party with Krishnaswami Ayyar, J., in *Depuru Kalappa* v. *Umade Rajaha* (1) that the provisions of S. 41 are absolute, except in so far as they are cut down by S. 55 (3); and Oldfield, J., has also relied on this ruling. That was an appeal against an order in which the District Judge had held that the zamindari was not liable to be proceeded against for money debts incurred by the previous holder and the order was reversed on the ground that his view was wrong. Apparently the District Judge's ruling in that case, that S. 41 was not applicable when the decree was being executed in the civil Court, was also questioned before us; and as to this, I now think we expressed ourselves too broadly, because while I am still of opinion that the provisions of S. 41, as to the cessation of interest continue to apply, I have come to the conclusion on a fuller consideration of the subject that the further provisions of the section are inapplicable for the reasons already given to the present case. In the result we agree with the order proposed by Krishnan, J. Costs of the appeal to abide the result.

Bakewell, J.—I agree.

Kumaraswami Sastri, J.—I agree.

S.N./R.K. *Appeal allowed.*

1. (1911) 8 I.C. 392.

A. I. R. 1918 Madras 350

KUMARASWAMI SASTRI, J.

Dakshinamurthi Rajali and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 809 of 1916, and Criminal Revn. Petn. No. 659 of 1916, Decided on 20th November 1917, from judgment of 1st Class Sub-Divl. Magistrate, Kumbakonam, in Criminal Appeal No. 77 of 1916.

(a) Criminal P. C. (1898), S. 225—Omission to state common object of unlawful assembly in charge does not vitiate trial unless accused are prejudiced.

In an indictment charging the accused with being members of an unlawful assembly, the omission to specify the common object in the charge, though a defect, will not vitiate the trial unless it has really prejudiced the accused. [P 350 C 2]

(b) Criminal P. C. (1898), Ss. 424, and 225—Persons, convicted of being members of unlawful assembly, pleading alibi—Appellate Court should discuss evidence against each accused.

Where several persons have been convicted of being members of an unlawful assembly some of whom pleaded an alibi, it is the duty of the appellate Court to discuss the evidence as against each of the accused. [P 351 C 1]

K. S. Jayarama Aiyar — for Petitioners.

A. Narasimha Aiyar—for the Crown.

Order.—The finding of both Courts is against the case for the accused that they were attacked while exercising their lawful right of removing the paddy. The charge, no doubt, is defective in that it does not set out the common object, but both Courts find that the common object was to remove paddy stored in the threshing ground in spite of the objections of two of the lessors. I do not think the non-stating of the common object in the charge has really prejudiced the accused.

It has been argued that the judgment of the appellate Magistrate does not discuss the evidence as against each of the twenty accused and that as different pleas were put forward, the Court was bound to apply its mind as to the evidence against each of the accused. It appears from the judgment of the Sub-Magistrate that accused 3, 4, 7 to 15, 17, 18 and 19 denied all knowledge of the occurrence and their presence at the scene of offence. The other accused say they were first beaten and acted in self-defence. In cases of charges under S. 147, I. P. C., against several accused there is often little diffi-

culty in coming to the conclusion that there was an unlawful assembly. The real difficulty is to find whether individuals who deny their presence were members of the assembly. It is the duty of the Appellate Court to discuss the evidence as against each of the accused. I need only refer to *Gorripati Chelamiah, In re* (1), *Fidoi Hossein* v. *Emperor* (2), *Jamait Mullick* v. *Emperor* (3), *Bapu Naidu, In re* (4) and *Ramasami Naidu* v. *Emperor* (5). In the present case the Joint Magistrate has not noticed the evidence against each of the accused. I set aside the judgment of the Joint Magistrate and direct him to re-hear the appeal and dispose of the case according to law.

S.N./R.K. *Order set aside.*

1. (1911) 12 I C 216.
2. (1913) 40 Cal 376=20 I C 403.
3. (1908) 35 Cal 138=12 C W N 134.
4. (1915) 31 I C 175.
5. (1913) 7 Cr L Rev 227.

A. I. R. 1918 Madras 351

SESHAGIRI AIYAR AND NAPIER, JJ.

Thathamangalam Parakat Samu Menon and *another* — Defendants — Appellants.

v.

Vengannat Swaroopam Raja Vasudeva Ravi Varma and *others*—Plaintiffs—Respondents.

Second Appeal No. 674 of 1916, Decided on 6th November 1917, from decree of Sub-Judge., South Malabar, in Appeal Suit No. 954 of 1914.

(a) Malabar Compensation for Tenants Improvements Act (1 of 1900), Ss. 4 and 9—Compensation is restricted to rates agreed upon—Tenants cannot resort to S. 9 for valuation of tanks and channel dug in forest land—In all matters he is bound by contract.

Per *Curiam* (*Seshagiri Aiyar, J., dubitante*). —A tenant is entitled, under Madras Act I of 1900, to compensation for reclaimed lands only at the rates specified in the contract between the parties. He cannot, ignoring the valuation under the contract, resort to S. 9 for appraising compensation for tanks and channels dug by him in land, which, at the time of the demise, was a forest. [P 352 C 1]

In all matters which are provided for by the contract, the parties are governed by it: 40 *Mad.* 594 *Foll.* [P 351 C 2]

(b) Malabar Compensation for Tenants Improvements Act (1 of 1900), S. 9—S. 9 applies only where entire valuation is to be made ignoring contract—It cannot be used to add valuation to contract rates—No Cmpensation for trees of spontaneous growth is payable.

Per *Seshagiri Aiyar, J.*—Section 9 deals with cases where, at the time of demise, the land was of some value and an additional value was imparted to it by the labour of the tenant. The section is intended to apply to cases where the Court has to fix the entire valuation under the Act, ignoring the contract, if any, between the parties. There cannot be first a valuation under the contract and further valuation invoking the aid of S. 9. [P 352 C 1]

A tenant is not entitled to claim as improvements the value of trees of spontaneous growth standing on land reserved for the use of the landlord. [P 352 C 2]

(c) Malabar Compensation for Tenants Improvements Act (1 of 1900), Ss. 4 and 11—Method of valuation—Valuation for tanks and channels is to be made under S. 11.

Per *Napier, J.*—After the tenant has been given compensation at the rate fixed in the contract, he cannot for the purpose of valuing the improvements made by the construction of tanks and channels import the increase in the value of the annual net produce as a factor in ascertaining the value. The compensation for the value of tanks and channels must be ascertained under S. 11. [P 352 C 1]

Kutti Krishna Menon—for Appellants.

C. V. Anantha Krishna Aiyar—for Respondents.

Seshagiri Aiyar, J.—The case has occupied more time than the importance of the points to be decided in the appeal demands. The reason is that we have to construe an Act which does not err on the side of being very clear or explicit. After listening to the arguments of Mr. Kutti Krishna Menon and after giving my best consideration to Ss. 9 to 12 of Madras Act 1 of 1900, I am not sure that my decision is quite correct. It may be attributable to obtuseness, but one cannot help feeling that the Act is calculated to confuse even clearer minds than mine.

I shall proceed to deal with the points which have been argued. First of all, I shall take Mr. Anantha Krishna Aiyar's memorandum of objections. After the decision in *Kunhalloor Puthia Veettil Rayarappa* v. *Parkum Punnisseri Kelappa* (1), in all matters which are provided for by the contract, the parties are governed by it: consequently, in respect of Vettukanom for the reclaimed lands, the tenant is not entitled to anything more than what has been given in Ex. A. By reclamation the forest has been converted into nilams or paddy fields. Till that stage is reached, the tenant is not entitled as compensation to more than Rs. 7 per plot of one para (seed) area. Mr. Kutti Krishna Menon contended that as there is nothing in the contract regarding tanks andchannels, Ex. A is not conclusive as regards his client's rights to

1. (1917) 40 Mad 594=39 I C 741.

them. Mr. Anantha Krishna Aiyar did not seriously dispute this position under S. 4 Malabar Compensation for Tenants' Improvements Act. Tanks and channels are improvements, and when it is found that the tenant has expended labour in digging those tanks and making those channels, he is entitled to be paid compensation for that labour. The further point raised by Mr. Kutti Krishna Menon, so far as I am able to understand him, is, this; Under the contract the tenant is entitled to Rs. 7 for reclamation. Under the Act, he is entitled to the value of the labour spent by him in digging the tanks and constructing the channels. He is entitled further under S. 9 of the Act to have the tanks and channels valued by the process mentioned in S. 9. I am unable to agree with the learned vakil, though I have come to the conclusion against him with some hesitation. On the face of it, S. 9 seems to deal with cases where, at the time of demise, the land was of some value and an additional value was imparted to it by the labour of the tenant.

That is the plain reading of the section. When the land was let under the demise Ex. A and under the previous demises, it was of no value to the landlord as paddy fields. Therefore, prima facie, S. 9 has no application. Moreover, S. 9, as I understand it, is intended to apply to cases where the Court has to fix the entire valuation under the Act ignoring the contract, if any, between the parties. You cannot have first a valuation under the contract and a further valuation invoking the aid of S. 9. That, to my mind, is a good answer to Mr. Kutti Krishna Menon's contention. As I have said, this conclusion is by no means free from doubt. However, that is my present impression. The next question is whether the tenant is entitled to the valuation of the timber utilised by him for building farm houses and granaries. Here again, the contract makes it clear that if any timber is to be used by the tenant from the forest of the landlord, he is not entitled to the value of that timber. From a common sense point of view, it seems to me impossible to uphold the view that you can take the landlord's property and compel him to pay for what you have taken from him. Therefore, in fixing valuation for the farm houses, the value of the timber should be excluded. That disposes of Mr. Anantha Krishna Aiyar's memorandum of objections. On the appeal itself, Mr. Kutti Krishna Menon contended that his client is entitled to the value of the improvements in respect of the trees of spontaneous growth standing on the demised land. He has drawn our attention to the case of *Narayani Amma* v. *Kunchukutti Amma* (2), in which it was held that the Act has nothing to do with the ownership of trees but that it has regard only to the value of improvements to be paid at the time of eviction. But that question of law does not arise in the present case, for this simple reason. Under the contract, a certain portion of the demised land is reserved for the landlord's use and he is entitled to have the trees thereon cut by himself and removed; only when the forest thus reserved is denuded of trees the tenant is given liberty to enter upon it and to make it cultivable land. He has no other right in respect of this reserved plot of land. So far as we are able to see, these trees of spontaneous growth in respect of which improvements were claimed are to be found in the reserved plot. Mr. Kutti Krishna Menon wanted to argue that some of the trees were outside of that area, but this question was not raised in the lower Courts and we cannot allow it to be argued now. As, under the contract the plot is reserved solely for the use of the landlord, the tenant is not entitled, on eviction, to the value of the trees of spontaneous growth standing thereon For these reasons I would dismiss the second appeal with costs and allow the memorandum of objections. The learned Vakils state that on the principles stated by us, they will be in a position to fix the valuation in this Court. Therefore, it is not necessary to send the case down.

The decree of the lower appellate Court will be modified and the amount agreed to by the learned vakils in pursuance of the principles enunciated in our judgment will be entered in the place of the amount decreed by the Courts below. Parties to pay and receive proportionate costs throughout.

Napier, J.—I wish to add a few words on the points argued on S. 9. It is urged by Mr. Anantha Krishna Aiyar that, after the tenant has been given under the terms of the contract compensation for reclamation at 7 rupees per plot, he cannot for

2. (1917) 40 I C 247.

the purpose of valuing the improvement made by construction of tanks and channels import the increase in the value of the annual net produce as a factor in ascertaining the value. In my opinion this contention must prevail. The section gives the tenant compensation based on the increased outturn if that works out at higher value than the costs of the improvements. It is admitted that the improvements paid for under the contract cannot be used for the purpose of comparison under S. 9, Cl. 2, and the tenant wishes, of course, to exclude it, but as I am satisfied that part of this net increase has already been compensated for under the contract, he cannot use this increase at all and S. 9 does not apply. The compensation for construction of tanks and channels must be ascertained under S. 11. In other respects I agree with the judgment of my learned brother.

S.N./R.K. *Decree modified.*

A. I. R. 1918 Madras 353

OLDFIELD AND PHILLIPS, JJ.

Tirumalaisami Naidu—Plaintiff—Appellant.

v.

Subramaniam Chettiar— Defendant—Respondent.

Second Appeal No. 985 of 1916, Decided on 15th December 1916 against decree of Dist. Judge, Madura, in Appeal Suit No. 180 of 1915.

(a) Civil P. C. (1908), O. 21, R. 93 — Auction-purchaser—No suit lies for recovery of purchase money on failure of suit for possession—Application under R. 93 only can be made for refund of purchase money— Suit for refund of purchase money however lies when right to sue has accrued before new code—Right to sue dates from purchase and is contingent on failure to recover possession—Right accrued under old act is preserved by—Genenral Clauses Act (10 of 1897) S. 6 (c).

A Court-sale purchaser, whose suit for possession of the property put up for sale has failed, is not entitled to recover the purchase-money by suit, but can do so only by petition under O. 21, R. 93: 35 *Bom.* 29 *Diss. from*; 3 *Cal.* 806 (*P.C.*) and 17 *Mad.* 228 *Dist.* [P 354 C 1]

Where however the suit for possession was instituted while Act 14 of 1882 was in force and was dismissed after its repeal by Act 5 of 1908, the plaintiff's right to repayment of his purchase-money must be deemed to have accrued to him before the change in the law and the right having been preserved to him under the new enactment, a suit to enforce that right is maintainable.

The right dates from the purchase of the property and is primarily to the property, and secondarily in the alternative and contingently to repayment, the latter branch of it becoming enforceable only on failuro in respect of the former. The alternative and contingent rights is preserved to the purchaser under S 6 (c), Act 10 of 1897: *Colonial Sugar Refining Co.* v. *Irving*, (1905) *A. C.* 369; *Expl*; 9 *I. C.* 937, *A.I.R.* 1914 *Mad.* 287, 39 *Mad.* 645 and *Abbott* v. *Minister for Lands* (1895) *A.C.* 425 *Cons.* [P 354 C 2; P 355 C 1]

(b) Interpretation of Statutes— Repealing enactments cannot affect vested rights or impose impossible conditions to save such rights—Rule of limitation must be taken as subject to implied exception in which right would otherwise be destroyed.

A repealing enactment cannot impose an impossible condition on pain of forfeiture of a vested right or be applied to cases in which its provisions cannot be obeyed. A new rule of limitation must be read subject to an implied exception in cases where its provisions would absolutely destroy the right of suit which was in existence when that rule came into force. [P 354 C 1]

(d) Civil P. C. (1908), O. 21, R. 93 — Interest at only Court rate should be awarded.

In a suit for recovery, by a Court-sale purchaser, of the purchase-money, the Court should not award a higher rate of interest than six per cent. up to date of suit. [P 356 C 1]

T. Rangachariar and *K. Bhashyam Ayyangar*—for Appellant.

C. V. Ananthakrishna Ayyar — for Respondent.

Oldfield, J.—The question before us is in its most general form, whether the plaintiff, a Court-sale purchaser, whose suit for possession of the property put up for sale has failed, is entitled to recover the purchase money by suit or whether, as the lower appellate Court held, he can do so only by petition under O. 21, R. 93, Civil P. C. Such a right of suit, in cases to which the present Code can be applied without reservation, was dismissed in *Mohideen Ibrahim* v. *Mahamed Meera Levvai* (1), one learned Judge being unwilling to negative it, though expressing no decided opinion, and the other negativing it directly, because the purchaser had no longer a substantive right to recover, but only a statutory right to do so by application in special circumstances; and the latter opinion was confirmed obiter in *Parvathi Ammal* v. *Govindasmi Pillai* (2) The contrary view however has been taken in *Rustomji* v. *Vinayak Gangadhar Bhat* (3), the purchaser's right of suit being based on the existence of a contractual relation between him and the decree-holder and of a warranty by the latter of some saleable interest to be implied from the provisions of the Code.

1. (1912) 17 I C 437.
2. (1915) 39 Mad 803=30 I C 827.
3. (1910) 35 Bom 29=7 I C 955.

With all respect I cannot follow the reasoning: *Durab Ally Khan* v. *Khajah Moheeooddeen* (4) and *Sundara Gopalan Venkatavarada Ayyangar* (5) are referred to in the judgment, but they show that, in the absence of fraud (and none was referred to there or has been in the present case), the doctrine of warranty of title cannot be applied to Court sales or be the basis of proceedings except those which processual law permits; and, if there is no warranty between the decree-holder and purchaser, there was no other basis for a contractual relation between them, since the former had no ownership of the property sold. In a Court sale nothing passes beyond the right, title and interest of the debtor, and, as there is no guarantee that it exists or is of any particular extent, the purchaser would have no cause of action apart from the Statute. The former Code accordingly conferred on him a special right, which the present Code has restricted and for the enforcement of which it provides special procedure. Taking this view I am against the plaintiff's general contention.

The plaintiff, however, has relied mainly on the special circumstances of his case, that he made his purchase and brought his suit for possession, impleading the defendant when his right was regulated by Ss. 313 and 315 of the Code then in force. In that suit he asked for delivery of the suit land and profits. It was decided against him in 1909, after the provisions referred to had been superseded by O. 21, R. 93, under which, as I have held, his right is only to apply to the Court for refund. It is not disputed that he was originally entitled to sue. The argument for consideration is only that the change in the law did not deprive him of his right to do so. The effect of the change in the law is to be ascertained, in the absence of special provision, in the vew enactment (and S. 154 of the present Code preserves only existing rights of appeal—not other remedies), by refere nceto S. 6 (c) and (e), Act 10 of 1897, its material portion being that a repeal

"shall not (c) affect any right or privilege acquired or accrued under the enactment repealed or (e) affect any legal proceeding or remedy in respect of such right or privilege and any such legal proceeding or remedy may be instituted, continued or enforced as if the repealing Act had not been passed."

The first question then is whether the plaintiff's right to re-payment of his purchase-money had accrued to him before the change in the law. Under the former law, S. 315 of the former Code, he would have been entitled to receive back the money, when the sale was set aside under S. 312 or 313, the contingency we are concerned with

"When it was found that the judgment-debtor had no saleable interests in the property and the purchaser (plaintiff) was for that reason, deprived of it."

Was it so found and was the plaintiff deprived as the defendant contends, only when the former's suit failed in 1909, after the present Code came into force? In that event his right had not accrued and his remedy was affected, or did the right accrue earlier before his suit was filed in 1907? To support the former view the defendant has relied on the decision in *Nilakanta* v. *Imamsahib* (6) and *Mohideen Ibrahim* v. *Mahamed Meera Levvai* (1), the latter approved in *Sidheswari Prasad Narain Singh* v. *Mayanand Gir* (7), in which it was held that the plaintiff's cause of action for the claim, such as that before us, accrues, when there has been a suit against the person in possession, on its determination against him. But though such determination may be part of plaintiff's cause of action in the sense in which the terms is used in *Read* v. *Brown* (8) and subsequent Indian cases:

"Every fact, which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court."

It does not follow that it is necessary to the accrual of his "right," the term used in the enactment under consideration. If it did, it would follow further that his right was dependent on and arose only on his becoming conscious of it in consequence of his discovery that the debtor had no saleable interest and his deprivation of the property by reason thereof, although the title opposed to his own must have existed at the date of his purchase and could not have been affected by any proceedings subsequent to it. It is possible to avoid this anomaly only by holding that his "right" dates from his purchase and is primarily to the property and secondarily in the alternative and contingently to re-payment, the latter

4. (1877) 3 Cal 806= 5 I A 116 =3 Suth P C J 519 (P.C.).
5. (1894) 17 Mad 228.
6. (1893) 16 Mad 361.
7. (1913) 35 All 419=19 I C 986.
8. (1889) 22 Q B D 128.

branch of it becoming enforceable only on failure in respect of the former. If this view is correct, the plaintiff's right had accrued before the repeal of S. 315 the former Code. I refer next to authority for the position that such an alternative and contingent right will be preserved under S. 6 (c). In *Colonial Sugar Refining Co.* v. *Irving* (9) the question was to the effect on a right of appeal direct to the Privy Council of a change in the law pending the trial of an action, which would have interposed an appeal to the Local High Court. That right of appeal existed at the date of the change in the law, in the sense that it had been conferred by law on every suitor; it was suspended and contingent in the sense that it would be exerciseable only when and if the decision were given against him. It was held not only that the right was not one merely of procedure, but also that it had vested in the suitor, before the change took place. This case was followed in *Kalinga Hebbara* v. *Narasima Hebbara* (10) and *Salimmamma* v. *Valli Hussanabha Beari* (11) with reference to the right of appeal, and in *Madurai Pillai* v. *Muthu Chetty* (12) with reference to another consequential and contingent remedy. In *Rajah of Pittapur* v. *Gani Venkat Subba Row* (13) it was applied even more generally in a manner to which I return. On the other hand, *Abbott* v. *Minister for Lands* (14) was cited for the defendant as deciding that a mere right to take advantage of the provisions of a repealed Statute is not a "right accrued." But the judgment runs:

> "The mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take any advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot be properly deemed a "right accrued" within the meaning of the enactment."

And the case can accordingly be distinguished on two grounds. Firstly, if the doing of an act is necessary, the plaintiff before us had done one towards availing himself of his right, when he sued the person in possession. Secondly the plaintiff's right differed essentially from the right (if it was properly so called) which the Judicial Committee was considering; for the latter was a mere option to take up the land, enforceable against the Minister for the land only after it had been exercised by the making of an application with the necessary formalities and a specification of the land claimed whilst the former was definite and enforceable from its origin. This case is therefore in no way opposed to the conclusion, which is otherwise adequately supported, that plaintiff's right, including the branch of it, which he is now enforcing, had accrued, before the former Code was repealed. The conclusion has been reached on direct consideration of the law. But it can be supported also by reference to a rule of construction. Although the plaintiff was proceeding in a legal way towards recognition of his right to re-payment and could have been met by no objection, if the law had not changed, in terms the change made his further progress impossible; and in the absence of any specific provision or necessary implication the repealing Statute will therefore not be construed against him.

His only course under the present Code would have been to move for the setting aside of the sale under O. 21, R. 91, and Art. 166, Sch. 1, Lim. Act within 30 days of its confirmation and to apply for re payment under O. 21, R. 93, and Art. 181 within 3 years from its being set aside. This course he could not take since his first application would have been out of time at the date of the repeal. A repealing enactment cannot impose an impossible condition on pain of forfeiture of a vested right or be applied to cases, in which its provisions cannot be obeyed, *Gopeshwar Pal* v. *Jiban Chandra* (15), and similarly it was held by a Full Bench of this Court in *Rajah of Pittapur* v. *Gani Venkat Subba Row* (13) that a new rule of limitation must be read subject to an implied exception in cases where its provisions would absolutely destroy the right of suit, which was in existence when that rule came into force. On this ground also the plaintiff is entitled to succeed. Two other points have been referred to in argument. Firstly, the defendant contended in his written statement that

9. (1905) A C 369.
10. (1911) 9 I C 937.
11. (1911) 11 I C 653.
12. A I R 1914 Mad 287= 22 I C 775 =38 Mad 823.
13. (1915) 39 Mad 645=30 I C 94.
14. (1895) A C 425.
15. A I R 1914 Cal 806=24 I C 37=41 Cal 1125.

the judgment-debtor should be made a party. This cannot be considered since it was not pressed at the trial. Secondly, the Sub-Judge awarded interest up to date of suit at 12 per cent., the rate claimed in plaint. The interest at the usual Court rate is however all that plaintiff is entitled to in accordance with the authorities. *Rodger* v. *Comptoir D'Escompte deParis* (16), *Ayyavayyar* v. *Shashtram Ayyar* (17) and *Arunachellam* v. *Arunachellam* (18). The result is that the Sub-Judge's decree is restored, subject to modification, that the plaintiff will be entitled to interest at 6 per cent. instead of 12 per cent. to date of that decree and subsequent interest at 6 per cent. on the amount so decreed. The parties will give and receive proportionate costs.

Phillips, J.—I agree.

S.N./R.K. *Appeal allowed.*

16. (1871) 3 P C 465.
17. (1886) 9 Mad 506.
18. (1892) 15 Mad 203.

A. I. R. 1918 Madras 356 (1)

OLDFIELD AND KRISHNAN, JJ.

M. Pattabirama Naidu and *others*—Appellants.

v.

Subramania Chetti and *others*—Respondents.

Appeal No 97 of 1916, Decided on 31st August 1917, against appellate order of Dist. Judge Salem, in A. S. 67 of 1915.

Limitation Act (9 of 1908), Arts. 181 and 182—Preliminary decree under O. 34, R. 5 (2), Art. 181 and not Art. 182 applies to application for final decree—Civil P. C. (5 of 1908), O. 34, R. 5 (2).

Article 181 and not Art. 182 is applicable to an application for a final decree in a mortgage suit under O. 34, R. 5 (2), where the preliminary decree was passed after the new Code, Act 5 of 1908, came into force. 29 *I. C.* 237, *Dist.*; 41 *I. C.* 268 *Foll.* [P 356 C 2]

V. C. Seshachariar and *M. Raghavachariar*—for Appellants.

T. R. Venkatarama Sastriar and *M.S. Vaidyanatha Aiyar*—for Respondents.

Judgment.—The question is whether this application under O. 34, R. 5 (2), Civil P. C., for a final decree in a mortgage suit is subject to Art. 181 or Art. 182, Sch. 1, Lim. Act. We do not think it necessary to refer to any case before *Mahammad Husain* v. *Abdul Kareem* (1). It no doubt goes some way, if it is applicable, in support of appellant's contention for Art. 182. But it is, in our opinion, inapplicable to the case before us, the preliminary decree now in question having been passed after, whilst, the decree then in question was passed before, tha present Code of Civil Procedure came into operation. This distinction is drawn in the judgment in *Nimmala Mahankali* v. *Kallakuri Subba Rao* (2), with which we express our respectful concurrence. We are further fortified in that concurrence by the fact that the judgment is in accordance with the decisions of two other High Courts, those of Bombay and Allahabad, and that it is not in conflict with those of the High Court of Calcutta. *Datto Atmaram Hasalnis* v. *Shankar Dattatraya* (3), *Madho Ram* v. *Nihal Singh* (4), *Beni Singh* v. *Barhamdeo Singh* (5). We hold that Art. 181 is applicable and dismiss the appeal against appellate order with costs.

S.N./R.K. *Appeal dismissed.*

1. (1915) 39 Mad 544=29 I C 237.
2. (1917) 41 I C 268.
3. (1913) 38 Bom. 32=21 I C 318.
4. (1915) 38 All 21=30 I C 494.
5. (1915) 28 I C 211.

A. I. R. 1918 Madras 356 (2)

ABDUR RAHIM, OFFG. C. J., AND PHILLIPS, J.

Murali Doss Brijaratna Doss and *others*—Defendants—Appellants.

v.

Official Assignee of Madras—Plaintiff—Respondent.

Original Side Appeal No. 25 of 1915, Decided on 18th September 1916, from judgment of Bakewell, J., D/- 10th February 1915.

Presidency Towns Insolvency Act (1909), S. 45—Property acquired by insolvent after bankruptcy is deemed to be acquired as agent for benefit of Official Assignee—Possession of undischarged bankrupt is not adverse to Official Assignee—Bona fide discharge of debts by such assets will not avail as against Official Assignee when payment is made after notice of his claim.

Until the Official Trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. Apart from such transactions however property acquired by an insolvent before his final discharge must be deemed to have been acquired as an agent for the benefit of the Official Assignee or trustee. The possession of the undischarged bankrupt therefore cannot be adverse to the Official Assignee. [P 357 C 1]

Bona fide discharge of the insolvent's debts by means of such assets will not avail as against the Official Assignee, where the payment is made after notice of the latter's claim.: *Cohen* v. *Mitchell*, (1890) 59 *L.J. Q. B.* 409; 30 *Mad.* 145; *Herbert* v. *Sayer*, (1844) 2 *D.* & *L.* 49 and 29 *I. C.* 168, *Foll.*, and 8 *Cal.* 556 and 24 *Cal.* 244, *Diss From.* [P 357 C 1]

V. C. Seshachari and *M. Raghavachari*, —for Appellants.

M. O. Parthasarathy Iyangar and *Subbiah Chetty*—for Respondent.

Abdur Rahim, Offg. C. J.—I shall deal with the question of limitation first of all. It must be taken as settled law that until the Official Trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. This proposition was laid down by Esher, M. R., in *Bohen* v. *Mitchell* (1) and has been accepted and followed in this country: see *Sriramulu Naidu* v. *Andalammal* (2). But apart from such transactions the law laid down in *Herbert* v. *Sayer* (3), that the bankrupt acquires property and contracts for the Official Assignee's benefit, holds good not only in England but in India In fact whatever property an insolvent acquires before his final discharge is as an agent and for the benefit of the Official Assignee That being the position, I agree with the learned Chief Justice who held in another case arising out of the insolvency of the present defendants' father that the possession of the undischarged insolvent cannot be adverse to the Official Assignee. See *Official Assignee* v. *Moorli Doss* (4) confirmed on appeal in *Ratna Bai* v. *Official Assignee, Madras* (5). I am therefore unable with all respect to accept the dictum of Wilson J., to the contrary in *Kristocomul Mitter* v. *Suresh Bhunder Deb* (6), which had been followed by the High Court in *Suja Hossein* v. *Monohur Das* (7). After setting out the facts as above and referring to the sale of the jewels by the defendants, His Lordship proceeded: But if they sold these jewels they did so after the Official Assignee had intervened, of which fact they had notice. The proper order to make would be that they should account for these jewels to the Official Assignee, and if they have paid off any portion of their father's debt, they will be entitled to prove their claim to that extent against the estate of the insolvent. After they received notice of the claim of the Official Assignee they were in no way justified in paying the creditors of their father but should have referred them to the Official Assignee. The decree of the learned trial Judge will, therefore be modified in accordance with the above findings. Each party will receive and pay costs in proportion in this Court and in the Court of first instance.

Phillips, J.—I agree.

S.N./R.K. *Decree modified.*

1. (1890) 59 L J Q B 409.
2. (1907) 30 Mad 145.
3. (1844) 2 D & L 49.
4. (1915) A I R 1914 Mad 238=22 I C 271.
5 (1915) 29 I C 168.
6. (1882) 8 Cal 556.
7. (1897) 24 Cal 244.

A. I. R. 1918 Madras 357

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

(*Suguntur*) *Immidy Pedda Chikka Royal Yeshowan Bahadur* and *another*—Plaintiffs—Appellants.

v.

(*Suguntur*) *Immidy Samba Sadasiva Chikka Royal Yeshowant Bahadur*—Defendant—Respondent.

Civil Appeal No. 181 of 1914, Decided on 19th January 1917.

(a) Hindu Law—Maintenance— Deed of grant of—Heritability or otherwise must be determined in accordance with terms of deed.

In cases where a maintenance grant is not forthcoming the fact that payment has been made for successive generations may be taken as evidence from which a permanent heritable grant might be presumed but where the deed of grant is in existence the heritability or otherwise of the grant must be determined with reference to the terms of the grant itself. [P 358 C 1]

(b) Hindu Law—Maintenance— Rate of— Condition of estate and people having claims should be considered.

In fixing the amount of mainteance what is to be regarded is the condition of the estate and the number of people who have claims upon it for maintenance. [P 358 C 2]

(c) Hindu Law—Maintenance—Remote relations should get smaller amounts than their predecessors.

Remote relations are entitled to smaller amounts of maintenance than their predecessors: 4 *I. C.* 302, *Foll.* [P 358 C 1]

(d) Hindu Law—Maintenance—Rate of — Presumption enunciated.

Semble—Where the same rate of maintenance has been paid for a long time in a particular family, the presumption is that that is the rate to which members of the family are entitled. [P 358 C 2]

A. Krishnaswami Aiyar and *N. Chandrasekhara Aiyar*—for Appellants.

Advocate-General, T. Narasimha Aiyangar and *S. Satyamurthi Aiyar*—for Respondent.

Judgment.—In this case we agree with the District Judge that the deed, Ex. A, settling the provision to be made for the then zamindar's brother of Rupees 2,400 does not confer any heritable right. Mr. Krishnaswamy Aiyar has been unable to refer us to any words in the document which could bear that construction. What the document does is to recognize the right of the junior member to an allowance of Rs. 100 according to the custom of the family for maintenance and to provide more or less as a matter of favour that he should have another Rs. 100 as well. The arrangement was come to at the time when the zamindar and his brother were minors by their mother. There is no ambiguity in the grant. In certain cases where the grant was not forthcoming the fact that payment has been made for successive generations has been held to be evidence from which a permanent heritable grant might be presumed. But here we have the grant and, as we read, it it is simply a grant for life. We do not think there is any analogy between a maintenance grant like this and the service grants with which some of the cases to which we have been referred deal.

Then it is said that the present Raja, who succeeded in 1911 by paying at the rate of Rs. 200 for about eighteen months, must be taken either to have confirmed the annuity at this rate for the life of plaintiff 1 or to have contracted to pay him at this rate. The Raja was a very young man when he succeeded and we do not think that any inference either of confirmation or contract can be drawn from the fact that he paid this amount for such a short period. The only other question we have to consider on this appeal is whether the District Judge was right in fixing the rate of maintenance at Rs. 100. Plaintiff 1 is now a somewhat remote relation of the present Raja and there are various other people entitled to maintenance; and in a recent case it was held that so far as the rate of maintenance goes remote relations are entitled to smaller amounts of maintenance than their predecessors, that is *Chettikulam Prasanna Venkatachella Reddiar* v. *Chettikulam Kumara Venkatachella Reddiar* (1).

Now the evidence is that Rs. 100 has been regarded as a sufficient rate of maintenance in this family for a very long time. There are instances in 1833, in 1842, and we have this document of 1859, Ex. A, in which Rs. 100 is referred to as ths normal rate of maintenance and then so lately as 1907 and 1908, we find that that is taken as the rate of maintenance for the two brothers of the present Raja. It is quite true that under their grandfather's will those brothers had an additional provision made for them by a bequest of lands which were the self-acquired property of the testator. But we do not think that this bequest can properly be considered in fixing the amount of maintenance being a more or less adventitious source of income. In fixing the amount of maintenance what is to be regarded is the condition of the estate and the number of people who have claims upon it for maintenance. Applying these tests we do not think that there is sufficient ground for interfering with the amount which the District Judge has fixed. We must therefore dismiss this appeal. We make no order as to costs. As regards the memorandum of objections it has been suggested that this decree makes the rate of Rs. 100 payable not only during the lifetime of plaintiff 1 but during the lifetime of plaintiff 2 also if he happens to survive him. But we do not read the decree as having that effect but merely as providing for the payment of Rs. 100 for their joint lives. The memorandum of objections will be dismissed.

S.N./R.K. *Appeal dismissed.*

1. (1909) 4 I C 302.

A. I. R. 1918 Madras 358

SESHAGIRI AIYAR, J.

Ramaswami Sastri — Plaintiff—Petitioner.

v.

Kali Raghava Aiyangar—Defendant —Respondent.

Civil Revn. Petn. No. 328 of 1917, Decided on 11th October 1917, from decree and judgment of Sub-Judge, Mayavaram, in S. C. Suit No. 27 of 1916.

Contract Act (1872), Ss. 124 and 125—Assignment of debt—Assignor agreeing to indemnify against loss—Suit by assignee on

debt dismissed—He is entitled to be indemnified.

Where a person to whom an indemnity has been given takes steps which are necessary for laying the foundation for a future claim honestly and with the best of intentions, he is entitled to be indemnified : *A. I. R.* 1915 *Mad.* 36, *Foll.*

Where an assignee of a debt, whom the assignor has agreed to indemnify against loss, honestly sues on the debt and puts his case before the Court fairly but the suit is dismissed, he is entitled to be indemnified. His mere failure to examine a witness, whose evidence he thought was unnecessary, will not bar his right of action against his assignor.

Where there is a question as to which of two innocent parties should suffer and it is found that an active representation was made by one of the parties to the other, the party who made the representation is the party that should suffer and not the party to whom the representation was made. [P 359 C 2]

M. S. Venkatrama Aiyar—for Petitioner.

S. T. Srinivasa Gopalachari — for Respondent.

Judgment.—I am unable to agree with the learned Subordinate Judge. The defendant in this case assigned Ex. A, a deed of mortgage executed to him by one Kamuthathammal. Ex. B is the deed of assignment and in that the defendant stipulates :

"Excepting the sum of Rs. 52 . . . no other sum has been received. If any sum is alleged to have been paid in excess and proved, I shall myself be responsible for such sum and pay the same to you with interest."

After giving notice to Kamuthathammal, the present plaintiff sued upon Ex. A in Original Suit No. 356 of 1912 on the file of the Tiruthiraipundi Munsif's Court, and the District Munsif came to the conclusion that Ex. A was completely discharged and that the plaintiff was not entitled to recover anything. Thereupon the present suit was instituted to enforce the terms of the indemnity contained in Ex. B. Various defences were raised by the defendant, and one of them was that in the previous litigation the plaintiff acted in collusion with the defendant. The Subordinate Judge in the present case finds that that allegation is not made out. He goes further and says that the present defendant actively helped the plaintiff in that other suit and that the matter was very seriously contested. Therefore this plea of the defendant fails. The other plea of the defendant, which has apparently found favour with the Subordinate Judge and which Mr. Srinivasa Gopalachari pressed with some insistence, is this, that on the present occasion one Srinivasa Iyengar was examined upon the strength of whose evidence the Subordinate Judge has come to the conclusion that Ex. A was not discharged and that this witness was asked by the present defendant to be summoned in the Tiruthiraipundi Munsif's Court, but that the plaintiff refused to summon him, and therefore on the last occasion the plaintiff did not place before the Tiruthiraipundi Munsif all the available materials to enable him to come to the right conclusion and that consequently the defendant is not liable. There is no doubt that the plaintiff conducted the previous litigation honestly and, if he was under the impression that the evidence of Srinivasa Iyengar was not necessary, it cannot be said that his failure to summon him as a witness amounted to culpable negligence on his part so as to disentitle him to sue on the indemnity clause. In my opinion, the language of the indemnity clause is satisfied when an honest litigation is conducted by the plaintiff and when he seriously puts forward his case before the Munsif.

The result of that litigation was to hold that Ex. A had been discharged. That would amount to proving that nothing was due under Ex. A. I am strengthened in the view I have taken by the decision in *Nallappa Reddi* v. *Vridhachala Reddi* (1). It is there pointed out by the learned Judges that where a person to whom an indemnity was given takes steps which are necessary for laying the foundation for a future claim honestly and with the best of intentions, he is entitled to be indemnified. In my opinion, all the essentials mentioned in *Nallappa Reddi* v. *Vridhachala Reddi* (1) have been found by the Subordinate Judge in the present case and the mere fact that Srinivasa Iyengar was not examined is not a reason for refusing relief to the plaintiff. Here is a question as to which of two innocent parties should suffer. But in all these cases where an active representation is made by one of the parties to the other, the party who makes the representation is the party that should suffer, and not the party to whom the representation is made. In this view I reverse the decree of the Subordinate Judge and remand the suit for disposal on the second issue. Costs to abide the result.

S.N./R.K. *Appeal allowed.*

1. A I R 1915 Mad 36=25 I C 888=37 Mad 270

A. I. R. 1918 Madras 360 (1)

WALLIS, C. J. AND SADASIVA AIYAR, J.

Madura etc., Davastanam—Plaintiffs—Appellants.

v.

Chena Kondama Naicken—Defendant—Respondent.

Second Appeal No. 1904 of 1916, Decided on 22nd January 1918, against decree of Dist. Judge, Madura, in Appeal Suit No. 404 of 1915.

Madras Estates Land Act (1 of 1908), Ss. 46, 189—Jurisdiction of Civil and Revenue Courts in suits for rent—Execution of instrument by, Collector conferring occupancy right on person not 'non-occupancy ryot' is ultra vires—Jurisdiction of civil Court is not ousted.

Where there is no dispute about the rate of rent under the proviso to S. 46, there is nothing in S. 189 or in the Schedule to the Act to oust the jurisdiction of the civil Court or confer jurisdiction on the Collector as a Revenue Court.

[P 360 C 1]

Where the Collector acting under S. 46 (3) executes an instrument conferring occupancy right on a person who is not a 'non-occupancy ryot,' he acts ultra vires and the jurisdiction of the civil Court is not ousted. [P 360 C 2]

C. V. Anantakrishna Aiyar—for Appellants.

K. N. Kumaraswami Aiyar and *L. A. Govindaraghava Aiyar*—for Respondent.

Judgment.—Under S. 189 (1), Madras Estates Land Act, jurisdiction is conferred upon the Collector to hear and determine, as a Revenue Court, the suits and applications specified in parts A and B of the Schedule to the Act, and there is a corresponding provision depriving the civil Courts of jurisdiction in such matters. As regards S. 46, part B of the Schedule confers upon the Collector jurisdiction to dispose, as Revenue Court, of applications for settlement of rent of land for the purpose of S. 46 under the proviso to that section, and makes orders passed under that section appealable to the Court of the District Collector, if there is no dispute about the rate of rent under the proviso to S. 46 (1), there is nothing in S. 189 or in the Schedule to oust the jurisdiction of the civil Court or confer jurisdiction on the Collector as a Revenue Court; and even if there is such a dispute, jurisdiction is only conferred with respect to it.

Under S. 46 (3) the Collector may execute an instrument conferring a permanent right of occupancy upon the tenant, and the execution is to have the same effect as execution by the land-holder. The right to apply for a permanent right of occupancy is only conferred by the section on "a non-occupancy ryot," and the power conferred upon the Collector to execute an instrument conferring it is subject to the same limitation. If the Collector purporting to act under the section executes an instrument conferring occupancy right on a person who is not "a non-occupancy ryot", he is acting ultra vires, and, as the matter is one which he is not authorized to dispose of as a Revenue Court under S. 189 read with the Schedule to the Act, the jurisdiction of the civil Court is not ousted. The appeal must be allowed, the decrees reversed and the suit remanded for disposal according to law. Costs hitherto will abide.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 360 (2)

SADASIVA AIYAR AND KUMARASWAMI SASTRI, JJ.

Rama Naik—Plaintiff—Appellant.

v.

Nagamuthu Nachiar and *another*—Defendants—Respondents.

Second Appeal No. 953 of 1915, Decided on 5th October 1917, from decree of Sub-Judge, Ramnad, in Appeal Suit No. 284 of 1914.

Registration Act (16 of 1908), S. 28—Inclusion of property for registration to facilitate registration within jurisdiction not intended to be conveyed—Deed is void.

Where property, which is not intended to be conveyed, is included in a deed of sale solely for the purpose of facilitating registration in an office not having otherwise jurisdiction to register the deed, the deed is not legally registered and is therefore void: *A. I. R.* 1914 *P. C.* 67 *Foll.*

[P 362 C 2]

K. Bashyam Iyengar—for Appellant.

E. Duraisawmi Iyer—for Respondents.

Judgment.—The lower appellate Court should not have gone into the question of the genuineness (that is, the execution by the ostensible executant) of the sale deed C, when the grounds of appeal to the lower appellate Court did not raise any such contention and when the document was allowed without objection in the District Munsif's Court to be exhibited and argued upon as a genuine document. Some of the other questions, namely, whether the document was nominal or fictitious, whether its registration was legally effected (that is, whether a fictitious land was included in it

for purposes of registering it in a particular Registration Office, and whether that fact legally invalidates the registration), and the contention as to title, etc., mentioned in the District Munsif's judgment have not been considered at all by the lower appellate Court and the rest have not been decided by it. We request the lower appellate Court to submit its findings on these questions. Further evidence will be allowed only on the facts connected with the question of the validity of the registration of Ex. C. The findings should be submitted within two months from receipt of records and ten days will be allowed for filing objections.

Findings.—I have been directed to submit my findings on the following issues—(1) Whether the document Ex. C is nominal or fictitious, whether its registration was legally effected (that is, whether a fictitious land was included in it for purposes of registering it in a particular Registration Office and whether that fact legally invalidates the reglstration)? (2) Whether the plaint land belonged to defendant 4 and title passed to Nachiyappa Chetti and from him to plaintiff? (3) Whether the rent sale relied on by defendant 5 is true and valid or whether it is fraudulent or collusive as pleaded by plaintiff? 2. As per their Lordships' order, additional evidence was taken only on the question relating to the validity of the registration of Ex. C. 3. I shall first take up issues 2 and 3 together. Admittedly, the suit land No. 566, Veppal Punjah 1 1/8 kuli odd, in the village of Chinnavallikkulam, originally belonged to Poosari Subba Reddi. The plaintiff's case is that Poosari Subba Reddi sold this land to defendant 4, Venkatachala Reddi, under Ex. A, dated 15th May 1890, that the latter inter alia mortgaged it to Nachiyappa Chetti, now examined as P. W. 4, that the latter obtained a mortgage decree against defendant 4 and purchased in execution of that decree the suit land and three other items of land and got possession of the same through Court under Ex. E in November 1899, and that he sold the suit land along with a house site at Aramanaippatti, 80 miles off the suit village, Chinnavallikkulam, to the plaintiff under Ex. C, dated 4th August 1911, i. e., about two months before the institution of this suit. The contesting defendants are 8 and 9 who are the legal representatives of defendant 5, the late melwaramdar of the suit village. Their claim is confined to 0 14-0 kuli of the suit land and they are not interested in the remaining extent. Their case is that so far as 0-14-0 kuli is concerned, Poosari Subba Reddi continued in possession of the land, that neither defendant 4 as owner, nor Nachiyappa Chetti ever enjoyed the land, that for arrears of rent for Fasli 1313, 0-6-1 kuli was brought to sale and defendant 5 purchased it on 26th January 1905, and similarly he purchased 0-7-3 kuli on 25th January 1906 at a rent sale held for arrears of rent of Fasli 1314, and that ever since defendant 5 was enjoying the land through his tenants, defendants 1 to 4. The question is

'who was in possession of the land claimed by defendants 8 and 9 since 1890 until the dates of the rent sales?'

P. Subba Reddi was the real owner of the land claimed by defendants 8 and 9 at the time of the rent sale. The Ambalam (D. W. 1) speaks to the rent sales and the Kurnam (D. W. 3) also says that he prepared arrears lists that led to the sales, that notice was duly served and that the sales were conducted in a public manner. There is absolutely no evidence that the sale was brought about fraudulently or collusively. I find on issue 3 that the sale relied on by defendant 5 and his heirs is true and valid and that he acquired a valid title to at least 0-12-2 kuli of the suit land [to the north of D. W. 2, T. Subba Reddy's Punjah land and to the east of A. Kumaru's Punjah land (vide Exs. 3 and 4)].

Issue 2.—On the above finding, even if defendant 4 or Nachiyappa had any title to the said 0-12-2 kuli out of the suit land, it must be taken that the title had become extinguished before the date of Nachiyappa's sale to the plaintiff under Ex. C (dated 4th August 1911) and that therefore no title passed to the plaintiff under Ex. C so far as the said extent of land is concerned. As regards the remaining extent, there is practically no contest, and the plaintiff may be entitled to it, if the sale deed, Ex. C, in his favour be found to be valid under issue 1.

Issue 1.—As already stated, Nachiyappa Chetti's sale deed in favour of the plaintiff Ex. C covers 2 items, a house site at Aramanaippatti, 80 miles off the

suit village, Chinnavallikulam, and the suit Punjah land. On behalf of the contesting defendants, it is urged that item 1, i. e., house site at Aramanaippatti was included in Ex. C merely for the purpose of getting the document registered at Tiruppattur, that the Chetti had absolutely no interest in that item, and did not really intend to convey it to the plaintiff, and that the plaintiff too did not intend to purchase it. No doubt, the Chetti has now been called and he says that the site was his ancestral property and that he really intended to sell and did sell that site also to the plaintiff, as the latter wanted to build a godown at Aramanaippatti for the purpose of his alleged trade in cotton seeds.

It is suggested on behalf of the contesting defendants, and I think with reason, that the Chetti was only too willing to get rid of the suit land situated in a village 80 miles off his own and which he had not been able to get possession of, and he therefore readily agreed to sell his doubtful title in the land to the plaintiff for a small price, but at the same time he did not want to take the trouble of going to such a distant place to get the sale-deed for such a small price registered. He therefore adopted the device of including in the sale deed, the site item 1 to which he had absolutely no claim and which he did not really intend to convey to the plaintiff, all merely for the purpose of getting the document registered near his own village. i. e., at Tiruppattur. The document itself was executed not at Aramanaippatti where the site is situate but at Tiruppattur and it was not attested by any Chetti. 18. Although the house site item 1 is a property really in existence, it must be held that this parcel is in fact a fictitious entry and represents no property that the vendor intended to convey or that the vendee intended to purchase. In the words of their Lordships of the Judicial Committee in *Harendra Lal Roy* v. *Hari Dasi Debi* (1).

"Such an entry, intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged (here intended to be conveyed) in fact exists, is a fraud on the Registration law, and no registration obtained by means thereof is valid."

1. A I R 1914 P C 67=41 Cal 972=23 I C 637 =41 I A 972 (P C).

So far as item 2 is concerned, the transaction was a speculative one, but that by itself would not affect the validity of the document, but as regards item 1 it must be held that a fictitious entry was made in the deed merely for the purpose of registering the deed in a particular Registration Office, viz., Tiruppattur Office, and that that fact legally invalidates the registration under the ruling quoted above. I find issue 1 accordingly. After the return of the findings the lower appellate Court on the issues referred, the Court delivered the following).

Judgment.—We accept the findings of fact and following *Harendra Lal Roy* v. *Hari Dasi Debi* (1), we hold that the plaintiff's sale deed has not been legally registered, neither the vendor nor the vendee intending that the property included in the sale deed solely for the purpose of facility of registration in an office not having otherwise jurisdiction to register it should be really affected by the sale deed. The second appeal is therefore dismissed with costs.

S.N./R.K. *Appeal dismissed.*

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*A. I. R. 1918 Madras 362

BAKEWELL AND KUMARASWAMI SASTRI, JJ.

Perumal Koundan—Petitioner.

v.

Tirumalrayapuram Jananukoola Dhanasekhara Sanka Nidhi Ltd.—Respondents.

Civil Revn. Petn. No. 367 of 1917, Decided on 30th November 1917 from order of Sub-Judge, Madura, in Original Petition No. 303 of 1916.

***(a) Civil P. C. (5 of 1908), O. 33, R. 1—Companies and Nidhis can sue as paupers—Term "Person" includes companies also.**

Order 33, Civil P. C. applies to suits by Companies and Nidhis and the latter can take advantage of its provisions if they are paupers [P 363 C 2]

The word 'person' in the order has the same meaning as in the General Clauses Act unless there is something repugnant in the subject or context and includes any Company or Association or body of individuals, whether incorporated or not. [P 363 C 1]

(b) Civil P. C. (5 of 1908), O. 33, R. 1, Expl.—Construction of—Value of wearing apparel is to be deducted—Not that persons having wearing apparel only can sue as pauper.

The explanation to R. 1 of the Order simply allows deduction of the value of wearing apparel where the applicant has such apparel. It cannot be construed to mean that only persons who, in law, can possess wearing apparel, can sue as paupers. [P 363 C 2]

(c) Civil P. C. (1908), O. 33, R. 3—Liquidator of company can appear and sue as pauper for company.

Under R. 3 of the Order, the liquidator can fulfil all the obligations of a pauper petitioner required under the Order and can appear for the Company and present the petition in person.

[P 364 C 1]

The real question for the purpose of O. 33 being who is the actual plaintiff and whether he is a pauper within the meaning of the explanation to R. 1 of the Order, a liquidator can act for a pauper Company though he is not personally a pauper.

[P 364 C 2]

(d) Civil P. C. (5 of 1908), O. 33, R. 5—Payment of commission to liquidator does not disqualify him to sue as pauper for company.

The payment of commission to the liquidator does not make him a person intersted in the subject-matter of the suit within the meaning of O. 33, R. 5. The provision only applies to agreements between a pauper and a third person with reference to the subject-matter of the suit.

[P 364 C 2]

S. Parthasarthy Aiyar — for Petitioners.

C. Padmanabha Aiyangar and *A. Ramasami Aiyar*—for Respondent.

Judgment.—The Tirumalaayapuram Jananukoola Dhanasekhare Sanka Nidhi, Ltd., which was a Company registered under the Companies Act went into liquidation and an official liquidator was appointed. He as a liquidator, applied under O. 33, Civil P. C. to file a suit on behalf of the Nidhi in forma pauperis against the petitioners before us who are alleged to owe the Nidhi about Rs. 8,524 under a promissory note. The allegations in the petition show that the Nidhi was bankrupt and that the only properties it had (except the subject of the suit) were worth Rs. 12. The Subordinate Judge allowed the Nidhi to sue in forma pauperis and the respondents have filed this petition against the order. The chief contention raised before us is that O. 33, Civil P. C., does not apply to Companies, Corporations or other associations. It is argued that as the explanation to O. 33, R. 1 refers to necessary wearing apparel and R. 3 requires presentation of the petition by the applicant in person' the Order necessarily excludes petitioners who are not human beings.

We are unable to accept this contention. The word 'person' is not defined in the Code of Civil Procedure and consequently the definition of the word 'person' as including any Company or Association or body of individuals whether incorporated or not, in the general Clauses Act (X of 1897 would apply unless there is something repugnant to the subject or context. O. 33, Civil P. C. refers to suits by paupers and R. 1 enacts that any suit may, subject to the provisions of the Order, be instituted by a pauper and does not exclude the official persons. Now a registered Company or any other Association may be unable to pay the Court fee payable like any ordinary person and there is no reason to suppose that the legislature did not intend O. 33 to apply to such cases especially when it is remembered that the effect would be to allow debtors to escape payment and defeat or defraud the creditors and share-holders of the Company. The explanation to R. 1 no doubt states that where no Court-fee is prescribed, the petitioner should not be entitled to property more than Rs. 100, 'other than his necessary wearing apparel'. The explanation simply allows deduction of the value of wearing apparel and can only mean that if the applicant has necessary wearing apparel he can deduct its value. We do not think it can be construed to mean that only persons who in law can possess wearing apparel, can sue as paupers. In *Cortis* v. *Kent Water Works Co.* (1), the argument that an enactment (47 Geo. 3, C. 111 did not apply to Corporations as it allowed a person to appeal on entering into a recognizance which a Corporation was not competent to do, was negatived by Bayley, J., who observed as follows :

"Bnt assuming that they cannot enter into a recognizance, yet if they are persons capable of being aggrieved by and appealing against a rate. I should say that that part of the clause which gives the appeal applies to all persons capable of appealing, and that the other part of the clause which requires a recognizance to be entered into, applies only to those persons who are capable of entering into a recognizance, but is inapplicable to those who are not."

The word used in the explanation is 'person' and there is nothing repugnant in applying the definition given in the General Clauses Act. Where the applicant is a Company which ex hypothesi can have no wearing apparel, then it will not be entitled to deduct anything on account of wearing apparel and will not be a pauper if it has property worth Rs. 100 and the suit is one for which no fee is prescribed. As regards R. 3, which requires personal presentation of the application to sue in forma pauperis, it seems to us that where the law in consequence of personal appearance in Courts being

1. (1827) 7 B & C 314.

impossible either by reason of the party being a Company or an infant or lunatic, allows appearence by somebody else, appearance by such person would be sufficient. For example O. 32, Civil P. C. which relates to minors and persons of unsound mind, authorises appearance by the next friend and guardian allitem and it cannot be said that where the minor or lunatic is a pauper, the presentation of a petition to sue in forma pauperis by the next friend, would be invalid or contravene the provisions of O. 33, R. 3. So far as Companies are concerned, the Companies Act provides for the mode in which the Company is to be represented. Under S. 179, Companies Act the liquidator may institute any suit or other legal proceedings in the name and on behalf of the Company and under O. 29, Civil P. C. the principal officer of the Company may act in legal proceedings on behalf of the Company and may be required to appear when personal appearance is necessary. The liquidator can therefore fulfil all the obligations required of a pauper petitioner under O. 33. R. 3, O. 33, Civil P. C. in our opinion only prohibits a pauper who is competent in law to appear in person from taking advantage of R. 1, O. 3, Civil P. C. and appearing by a pleader or recognised agent instead of being present personally. It does not cover cases in which from the nature of the case, physical presence is impossible or where the law owing to any disability, directs that all acts required by the Code should be performed by a next friend.

We are of opinion that there is nothing in R. 3 to prevent an official liquidator from appearing and presenting the petition. A Company or other Association being a 'person' within the meaning of the definition of the General Clauses Act which applies to the Civil Procedure Code of 1908, could prima facie apply for leave to sue in forma pauperis and as we see nothing in O. 33, R. 1 and 3, which will be repugnant to the application of the definition, we think a Company can take advantage of the provisions of O. 33 if it is a pauper. It is next argued that as the liquidator is not a pauper though the Company may be so, O. 33 would not apply. The suit is really by the Company, and as the liquidator only acts for the Company, being so to say its agent, his financial standing is immaterial. We think the case is covered by *Venkatanarasayya* v. *Achemma* (2) where it was held that a next friend who is not a pauper, can sue in forma pauperis if the minor is proved to be a pauper. Reference was made to *In the matter of the Will of Dawubai* (3) and *Manoji Rajuji* v. *Khandoo Baloo* (4). These were cases of executors suing and without expressing any opinion as to the correctness of these decisions, it is sufficient for the purposes of this case to say that in the case of executors the estate vests in them and they are the real plaintiffs, though they sue not for their own benefit but for the benefit of the beneficiaries. For the purpose of O. 33 the real question is who is the actual plaintiff; and is he a pauper within the meaning of the explanation to O. 32, R. 1, Civil P. C.

The last contention is that as the liquidator received by his order of appointment a commission, he is interested in the subject-matter of the suit within the meaning of O. 33, R. 5, Civil P. C. The provision only applies to agreements between the pauper and a third person with reference to the subject matter of the suit. Where a Court or a Company appoints a liquidator, he is an officer who is appointed under statutory authority and the fact that he is paid a percentage of the collections, does not bring him within Cl. (e), O. 33, R. 5. No particular debt is ear-marked with the payment and even if it were so, an agreement in pursuance of the Companies Act to remunerate the liquidator for winding up the Company, would be on the same footing as an agreement by the pauper with his vakil, to pay him the legal fees for conducting the suit. We see no reason to interfere and dismiss the petition with costs.

S.N./R.K. *Petition dismissed.*

2. (1881) 3 Mad 3.
3. (1894) 18 Bom 237.
4. (1911) 36 Bom 279=11 I C 724.

A. I. R. 1918 Madras 364

ABDUR RAHIM AND BAKEWELL, JJ.

Rajagopala Aiyar — Plaintiff — Petitioner.

v.

Davood Rowther—Defendant—Respondent.

Referred Case No. 3 of 1917, Decided on 6th August 1917, made by Dist. Judge, Tanjore, in Original Petition No. 5 of 1917.

Specific Relief Act (1877), Ss. 12 and 17—Suit to recover unpaid consideration of mortgage does not lie.

A suit to recover the unpaid consideration for a mortgage is a suit for specific performance of an agreement to lend money on a mortgage, and is not maintainable. [P 365 C 1]

P. R. Narayanasami Aiyar—for Petitioner.

Judgment.—The plaintiff in the suit executed a usufructuary mortgage in favour of the defendant for Rs. 300 of which he only received Rs. 50 and he has instituted this suit to recover the balance of Rs. 250 on the basis of the mortgage. The question is whether this is a suit for specific performance. The rulings of this Court in *Anakaran Kasmi* v. *Saidamadath Avulla* (1) and of the Calcutta High Court in *Shaik Galim* v. *Sadarijan Bibi* (2) make it clear that this is a suit for specific performance, that is to say, a suit to enforce an agreement to lend money on a mortgage, and such a suit has been held not to lie. This is the law in England and has been followed in this country. The suit will not lie at all and no question of jurisdiction then arises. It is clear however that a suit for specific performance can only be instituted on the original side and not on the Small Cause side. The reference will be answered accordingly.

S.N./R.K. *Reference answered.*

1. (1878) 2 Mad 79.
2. (1915) 43 Cal 59=29 I C 621.

✻ A. I. R. 1918 Madras 365

WALLIS, C. J. AND COUTTS-TROTTER, J.

Voddina Kamayya and *another*—Defendants—Appellants.

v.

Gudisa Mamayya—Plaintiff—Respondent.

Second Appeal No. 472 of 1915, Decided on 28th April 1916, against decree of Temporary Sub-Judge, Ganjam, in Appeal Suit No. 479 of 1913.

(a) Fraud—Transfer of property to defraud creditors—Fraud effected—Suit by vendee to recover property — Vendor cannot set up fraud as defence.

Where one person transfers his property to another with the intention of defrauding his creditors, the vendee can maintain an action to recover the property if the contemplated fraud has been effected, and the vendor cannot set up his own fraud in defence to the claim. [P 365 C 2]

✻ (b) Fraud—That party fails who has first to allege fraud in which he participated.

Per *Coutts-Trotter, J.*—If the plaintiff can set up a case consistent with the terms on the face of the document or with what may be called the face import of the transaction on which he bases his claim, then the defendant cannot defeat that claim by alleging a fraud that implicates himself and showing that because of that fraud, the document or the transaction is not what it appears to be. If on the other hand the plaintiff cannot make a case on the document or transaction which involves implicating himself in a fraud with the defendant, then the defendant must succeed. In other words, the party fails who first has to allege the fraud in which he participated. [P 366 C 2]

V. Ramesam—for Appellant.

T. Rangachariar and *B. Narasimha Rao*—for Respondent.

Wallis, C. J.—In this case where the defendant had conveyed his property benami to the plaintiff for the purpose of effecting a fraud on his creditors and the fraud had been effected, the Subordinate Judge has decided that he cannot set up the benami character of the transaction by way of defence in a suit by the plaintiff for possession under the conveyance. This was expressly ruled by Jenkins, C.J., and Beaman, J., in *Sidlingappa* v. *Hirasa* (1), following *Doe* v. *Roberts* (2). I do not think the learned Judges who decided *Prole* v. *Wiggins* (3) intended to question this decision. It appears to be in accordance with the principles laid down by Lord Eldon in the earlier case of *Brackenbury* v. *Brackenbury* (4). Both cases were referred to by Lord Hatherley in *Greeni* v. *Bateman* (5), but it was thought unnecessary to consider the principle they laid down or the manner in which it had been applied in other cases. As regards this Court, I do not find anything opposed to them in *Rangammal* v. *Venkatachari* (6) or *Yarmati Krishnayya* v. *Chundru Papayya* (7). No doubt in these cases, the suit was brought by the fraudulent transferors to set aside the conveyance and recover the properties, whereas here the defence is set up in a suit for possession by the fraudulent transferee, but that was the state of things in the decisions already cited from which I am not prepared to differ. In the recent decision of the Privy Council in *Petherpermal Chetty* v. *Muniandy Servai* (8), where the point did not arise ex-

1. (1907) 31 Bom 405.
2. (1819) 2 B & Ald 368.
3. (1836) 3 Bing (n c) 230.
4. (1820) 2 Jac & W 391.
5. (1872) 5 H L 591.
6. (1895) 18 Mad 378.
7. (1897) 20 Mad 326.
8. (1908) 35 Cal 551=35 I A 98=4 L B R 266 (P C).

pressly, their Lordships cited with approval Mayne's observation in para. 446 of his Hindu law that

"if *A* requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether *A* has actually cheated *X* or not."

and at p. 559 they observed that

"to enable a fraudulent confederate to retain property transferred to him, in order to effect a fraud, the contemplated fraud must according to the authorities be effected. Then and then alone does the fraudulent grantor or giver lose the right to claim the aid of law to recover the property he has parted with."

I can find nothing in these observations inconsistent with the authorities relied on for the plaintiff. The appeal is dismissed with costs.

Coutts-Trotter, J.—I entirely agree and only desire to add a few words because the question has not expressly arisen in the Courts of this Presidency. Both the parties to this litigation on the finding are guilty of fraud, and there are sound principles of law which would by themselves preclude the success of either. The difficulty is that one or the other must succeed, and accordingly one has to see upon whom the incidents of the consideration barring success fall first. I may say at once that I am not impressed with the argument that to leave the porperty in the hands of the defendant would be to ratify that very fraud which has defeated the rights of the plaintiff's creditors by continuing to keep the property out of their reach. The answer to that is that the creditors or any one of them in a properly constituted action can, as against either or both of these parties, establish their rights and set aside the transaction. The only other observation that I desire to make is, that I do not think that there is any conflict between *Doe* v. *Roberts* (2) and *Prole* v. *Wiggins* (3). The distinction between the two cases is indicated by Tindal, C. J., in the latter and the principle I gather from it is this; if the plaintiff can set up a case consistent with the terms on the face of the document or with what I may call the face import of the transaction on which he bases his claim then the defendant cannot defeat that claim by alleging a fraud that implicates himself and showing that because of that fraud, the document of the transaction is not what it appears to be. That is *Doe* v. *Roberts* (2). If, on the the other hand the plaintiff cannot make a case on the document or transaction on its face, but has to go behind and allege some other transaction which involves implicating himself in a fraud with the defendant, then the defendant must succeed. That is the case of *Prole* v. *Wiggins* (3). In other words that party fails who first has to allege the fraud, in which he participated.

S.N./R.K. *Appeal dismissed.*

A. I. R 1918 Madras 366

SADASIVA AIYAR, AND BAKEWELL, JJ.

A. Bharadwaja Mudaliar—Defendant—Appellant.

v.

Arunachalla Gurukkal and *others*—Plaintiffs—Respondent.

Appeal No. 113 of 1917, Decided on 15th November 1917, against order of Sub-Judge, North Arcot, in A. S. No. 100 of 1916.

(a) Provincial Small Cause Courts Act (9 of 1887), Art. 13—Dues of office of Archeka fall under Art. 13.

A suit to recover an amount alleged to be duee to a hereditary archaka of a temple as the dues of his office falls under Art. 13, 31 *I. C.* 206. *Foll.* [P 367 C 2]

(b) Jurisdiction—Claim not wholly cognizable by Small Cause Court—Suit lies to regular side.

If any portion of a claim is not cognizable by a Small Cause Court the whole claim should be brought in the regular Court. 38 *I. C.* 373 *Foll.* [P 367 C 2]

(c) Limitation Act (9 of 1908), Art. 102—"Wages" include monthly salary—Claim for salary and perquisities of office of Archaka is governed by Art. 102.

The term 'wages' in Art. 102 is a very general term: although it is usually used in connexion with daily wages, it also includes the wages paid as monthly salary.

A claim therefore for the salary and perquisites of office by the archaka of a tempie, whose position is essentially that of a servant under the temple trustee, is governed by Art. 102. [P 368 C 1]

(d) Limitation Act (9 of 1908), Arts. 36 and 102—Perquisites of office recoverable from third person is not wages—Suit to recover same—Art 36 and not Art. 102 applies.

If the perquisites are received from third persons, thay are not wages and if the claim is for their recovery from the trustee as in tort, Art. 36 and not Art. 102 will apply. [P 368 C 1]

T. Narasimha Aiyangar and *N. S. Rangaswami Aiyangar*—for Appellant.

K. Bashyam Iyengar—for Respondents.

Sadasiva Aiyar, J.—Defendant 1 is the appellant. The appeal is against the order of remand passed by the appellate Court which held that the plaintiff's suit was not wholly barred by limitation, the

Court of first instance having held otherwise and dismissed the suit. The material allegations in the plaint are as follows:

(a) The two plaintiffs (father and son) are the hereditary Archakas of the famous temple at Tiruvannamalai. Defendant-appellant 1 before us is the trustee of the temple. Defendant 3 is the temple Peishkar. Defendant 1 in June 1912 suspended the plaintiffs from office. Defendant 3 intimated this fact to the plaintiffs on 19th June 1912 and the suspension of the plaintiffs lasted till 3rd July 1912. (b) The plaintiffs contend that the suspension order was illegal and unjust and that defendant 3 maliciously made misrepresentations to defendant 1 and made defendant 1 pass such an unjust order. (c) Defendant 4 discharged the duties of the office during the 14 days during which the plaintiffs remained under suspension. The plaint concluded for the following reliefs: (1) Pay for the days of suspension, Rs. 4-14-4. (2) The value of perquisites from other sources during such period, Rs. 25. (3) Damages for mental distress, loss of dignity, etc., Rs. 50. Total Rs. 79-14-4.

The District Munsif dismissed the suit, applying Art. 36, Lim. Act which allows two years for a suit for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specially provided for. The suit was brought on 28th June 1915, the cause of action having risen on 19th June 1912, more than two years before the suit was brought. The plaint was filed on the day on which the Tiruvannamalai District Munsif's Court opened after the summer vacation and if the limitation period of three years under Art. 62 or Art. 102 applied, the claim for at least Rs. 4 14-4 (the pay) was not barred. If Art. 120 applied (which provides six years) to the claim for pay, then also the District Munsif was not justified in dismissing the whole claim as barred. The Subordinate Judge, in appeal, held that Art. 120 applied so far as the claim for the pay (Rs. 4-14-4) and the perquisites (Rs. 25) against defendants 1 to 3 was concerned. As regards the claim against defendant 4 (the locum tenens during the plaintiff's suspension) the Subordinate Judge was inclined to apply Art. 62 (and only in the alternative Art. 120), defendant 4 having "constructively received" the money made up of the pay and the perquisites "for the plaintiff's use." So far as the claim for Rs. 50 was concerned, that is, the compensation for mental distress, loss of dignity, etc., he held that Art. 36 applied and concurred with the District Munsif in dismissing that portion of the claim as barred. He then remanded the suit for disposal in respect of the claim for Rs. 29-14-4. The contention for the defendant, the only appellant before us, on appeal is that the whole claim including the claim for salary and perquisities is a claim for damages for tort and not for a breach of contract, and hence Art. 36 alone applied and a suit even for this portion of the claim was barred by limitation.

A preliminary objection was taken by the respondents to the appeal on the ground that the suit was of a Small Cause nature and of the value of less than Rs. 500. We overruled it following the decision of Srinivasa Aiyangar, J., in *Subraya Acharya* v. *Kesava Upadhya* (1), where the learned Judge held that a suit to recover an amount alleged to be due to a hereditary Archaka as the dues of his office falls under Art. 13 of the Schedule to the Provincial Small Cause Courts Act. If any portion of a claim is not cognizable by a Small Cause Court, the whole claim ought to be brought in the regular Court. See *Mulambath Kunhammad* v. *Acharath Parakat* (2).

I shall now consider the question of limitation. The suit in the case reported as *Subbier* v. *Ranga Aiyangar* (3) was brought by a hereditary Stanikam office-holder against the Dharmakartha for the recovery of emoluments wrongly withheld between the date when the plaintiff brought a former suit for the recovery of the office against the trustee and the date when he recovered possession of the office in execution of the decree in that suit. The relevant portion of the judgment is very short and is as follows:

"We are unable to agree with the contention that Art. 36, Lim. Act applies. The case is not specifically provided for, and in our opinion comes under Art. 102."

I think that neither Art. 36 nor Art. 102, which are very generally worded Articles, should be applied if any other more specifically worded Article applies to a case. Art. 102 applies to

1. (1915) 31 I C 206
2. (1917) 38 I C 373.
3. (1899) 9 M L J 163.

suits for "wages not otherwise expressly provided for in this Schedule." 'Wages' is a very general term; though it is usually used in connexion with daily wages, it also includes the wages paid as monthly salary. [See *Kalichurn Mitter* v. *Mahomad Soleem* (4)]. Art. 4 which prescribes a period of limitation of six months applies to wages accruing due under the Employers and Workmen Act; Art. 7 prescribing one year applies to wages of household servants, artisans or labourers not provided for by Art. 4; Art. 101 for a seaman's wages and prescribes a limitation period of three years. The plaintiff's claim in this case does not fall under any of the three Articles. It therefore clearly falls under Art. 102. The plaintiff is the servant of the temple paid in monthly wages, though a hereditary servant. In *Seshadri Aiyangar* v. *Ranga Bhattar* (5). Benson and Sundara Aiyar, JJ.. say at p. 633 of 35 *Mad.*

"The position of an Archaka, though he may have a hereditary tenure in the office, is in our opinion, essentially that of a servant. The trustee is the representative of the temple and the Archaka must be subject to his disciplinary authority."

So far therefore as the claim for the pay Rs. 4-14-4 due to plaintiff is concerned, I think that Art. 102 applies and the suit is therefore not barred by limitation. As regards the perquisites (Rs 25), if they are payable by the temple they are part of the wages (that is, remuneration for work done and payable by a master to his servant) and the claim for them as against defendants 1 and 2, trustees, also falls under Art. 102. If the perquisites are received from third persons, they are not wages, Art. 102 will therefore not apply and the plaintiff's claim as against the defendants 1 and 2 will be in tort and Art. 36 might apply. As regards defendant 3 (the templepeishkar) there is either no cause of action against him or the claim against him falls under Art. 36 and it is therefore barred. As regards defendant 4 if Art. 62 applies that is, if it could be held that he received the plaintiff's salary and perquisites for the plaintiff's use [see *Sankunni Menon* v. *Govinda Menon* (6),] the claim against him for such salary and perquisites is not barred. I shall not finally decide just now whether, in law, it could be so held. In the result, I would modify the order of remand by confining it to the plaintiff's claims against defendants 1, 2 and 3 alone. The appeal has substantially .failed against the contesting respondents. Defendant 1 (appellant) will therefore pay the plaintiffs (contesting respondents) costs in this appeal.

Bakewell, J.—I agree.

S.N./R.K. *Order modified.*

4. (1866) 6 W R 33 (Civ. Ref.).
5. (1911) 35 Mad 631=10 I C 548.
6. A I R 1914 Mad 572=14 I C 254=37 Mad 381.

A. I. R. 1918 Madras 368

PHILLIPS, J.

Vengu Naidu and *others*—Petitioners.

v.

Deputy Collector of Madura Division —Oppo ite Party.

Civil Misc. Petns. Nos. 2137 to 2139 of 1916 Decided on 19th September 1916.

(a) Civil P. C. (5 of 1908), S. 151—Court has power to consolidate appeals—cases should be fit to justify loss of Court fees.

An Appellate Court has inherent power to consolidate appeals, though it is not conferred by statute, and Courts can, if necessary, invoke the provisions of S. 151, Civil P. C. for the purpose. [P 369 C 1]

Courts should however consider whether there is a fit case for consolidation having regard to the loss of revenue in Court-fees by allowing consolidation. [P 369 C 1, 2]

(b) Land Acquisitation Act (1 of 1894), Ss. 12, 18 and 20—One notice with respect to several plots — One application under S. 18 and one reference made—Award was however split up—Claims in such case can be allowed to be consolidated—Civil P. C. (1908) S. 151.

Where in respect of several plots only one notice was sent to the owner under S. 12 (2) of the Land Acquistion Act and he presented only one application under S. 18 and one reference was made by the Land Acquisition Officer to the District Court, the fact that the award was split up by the latter should not prejudice the party who is entitled to treat it as one single award. [P 369 C 2]

The absence of request for consolidation in the lower Court does not bar consolidation in appeal where the award was split up in the lower Court without notice to or knowledge of the party. [P 369 C2, P 370 C 1]

K. S. Jayarama Aiyar—for Petitioner.

V. Ramesam—for Opposite Party

Judgment.—This is an application to consolidate the several appeals from awards passed by the District Judge of Madura on reference made to him by the Land Acquisition Officer under S. 18 Act 1 of 1894. Several references appear to have been made to the District Judge, but they were all in connection with land taken up for the extension of Madura

town, except one with which we are not now concerned. The District Judge treated all the references as 47 separate petitions and passed a separate award on each of these, although they were all tried together and were disposed of in one judgment. It is not quite clear whether the Land Acquistion Officer divided up the references in this way, either of his own initiative or at the request of the District Judge, or whether it was done by the District Judge himself.

The first question argued is whether this Court has power to consolidate appeals. No express power to do so is conferred by the legislature, but such power has been held to be inherent in the Court, and I think, has rightly been so held. So long ago as 1871 the Calcutta High Court approved of the consolidation of two suits and their disposal by one decree. *Enayetollah* v. *Radha Charn Roy* (1), In *Kashi Prosad Singh* v. *Secy. of State* (2) appeals from 44 references under the Land Acquisition Act were ordered to be consolidated. In *Fink* v. *Secy. of State* (3) it was held that in that case it was too late to consolidate the appeals from references under the Land Acquisition Act, but the Court pointed out the inconveniences that arose from the failure to consolidate and remarked that the Judge and the Collector should have consolidated the references. In *Dorabji Cursetji Shroff, In re* (4), Macleod, J., held that the Court had power to consolidate, and relied on *Fink* v. *Secy of State* (3). Reference may also be made to *In the matter of the "Falls of Ettrick"* (5), where the question is considered: There appears to be no decision of this Court on the point, and the only case at all analogous is that when two appellate decrees have been passed on appeal from one decree, the second appeals are consolidated into one *Gangulakurti Sanyasi Lingam* v. *Nidugonda Gavaramma* (6), but the analogy is somewhat remote. Consolidation is allowed in England and consequently I agree with the Calcutta and Bomay High Courts that a Court has power to consolidate appeals and would, if necessary, invoke the provisions of S. 151 Civil P. C., in support of the proposition.

1. (1871) 15 W R 395.
2. (1902) 29 Cal 140.
3. (1907) 34 Cal 599.
4. (1908) 10 Bom L R 675.
5. (1895) 22 Cal 511.
6. (1906) 16 M L J 411.

The learned Government pleader takes objection to consolidation only on the ground that if it is allowed the public revenues will be deprived of a portion of the Court-fees payable by appellants. We have therefore to consider whether this is a fit case for consolidation. Although several plots of land were acquired from appellants, only one notice was served on them under S. 12 (2) Land Acquisition Act in respect of all the plots, and under S. 18 Land Acquisition Act the appellants only made one application to the Collector to refer their objection to the award. Under S. 20 Land Acquisition Act the Court has to determine the objection, i. e., the objection referred to in S. 18 (2). The fact that only one notice was sent under S. 12 and one objection filed under S. 18 would prima facie indicate that there was only one award, the correctness of which had to be determined by the District Court. The fact that the award contained several items does not make it as many awards, for there is no reason why one single award should not decide many questions referred for decision. So. far therefore as appellants were concerned, there was only one award which was referred under S. 18 for the decision of the District Court. The fact that, in the arbitration proceedings before the District Court, the award was split up and amalgamated with other awards, which had reference to other claimants, ought not to be allowed to prejudice the right of the appellants to treat their award as one, and they appear to be equitably entitled to consolidation.

A further objection is taken that the appeals cannot be allowed to be consolidated as there was no consolidation nor even a request for consolidation in the lower Court, and reliance is placed on *Rakhal Chandra Tewary* v. *Manmatha Nath Mitter* (7) and *Janardan Kishore Lal* v. *Sib Prasad Ram* (8). These are however appeals not from suits, but from arbitration proceedings *vide Secy. of State* v. *Chelikani Rama Rao* (9), and in the lower Court there was no occasion for for appellants to ask for consolidation. They had been furnished with only one award to which they objected and consequently there was only their objection

7. (1911) 10 I C 415.
8. (1916) 43 Cal 95=36 I C 179.
9. A I R 1916 P C 21=35 I C 902=39 Mad 617=43 I A 197 (P C).

to be disposed of, and it was disposed of in conjunction with other objections at one hearing and by one order. The splitting up of the award by the referring officer or by the Court may not even have been known to the parties, and in any case there was no occasion for the claimants to take any objection at the hearing, for all the cases were heard together. The splitting up of the awards, if made by the Land Acquisition Officer, was apparently not communicated to the parties under S. 12 (2) Land Acquisition Act and consequently there was only one valid award, so far as the appellants are concerned, and they are entitled to appeal against it in one appeal. The petition is therefore allowed with costs. Civil Miscellaneous Petitions 2138 and 2139 follow the order in the petition. The time allowed for the payment of the costs is three months from this date.

S.N./R.K. *Petitions allowed.*

A. I. R. 1918 Madras 370

WALLIS, C. J. AND SADASIVA AIYAR, J.

Nynam Veetill Mayan Kutti—Plaintiff—Appellant.

v.

Valappilakath Kunhammad and *others*—Defendants—Respondents.

Second Appeal No. 152 of 1917, Decided on 21st December 1917, against decree of Dist. Judge, South Malabar, in A. S. No. 143 of 1916.

(a) Landlord and Tenant — Ejectment—Ejectment decree granting compensation to tenant under Malabar Compensation for Tenants' Improvements Act becoming unexecutable by lapse of time—No fresh suit on same cause of action lies—Civil P. C. S. 47 and O. 2, R. 2.

A landlord who obtains a decree in ejectment against his tenant, which also directs payment of compensation to the latter under the Malabar Compensation for Tenants' Improvements Act, cannot, on the decree becoming barred, maintain another suit on the same cause of action: 29 *I C* 559 *Diss. from* and 25 *Mad* 300 (*FB*), *Appl.* [P 371 C 1]

(b) Civil P. C. (5 of 1908), S. 47—Decree becoming unexecutable by bar of limitation—No fresh suit for same relief lies.

Per *Wallis, C. J.*—When a man has a cause of action and brings a suit upon it, that cause of action is merged in the decree, transit in rem judicatum, and then his remedy is in execution and if he does not enforce his remedy and allows it to become barred, his rights are gone. [P 370 C 2]

The payment of compensation which is assessed in a suit for ejectment by a decree under the Malabar Compensation for Tenants' Improvements Act, is matter relating to execution and is intended to be dealt with as such. According to the scheme of the Act, the decree for ejectment on payment of compensation is left to be governed by the law of limitation with regard to the execution of decrees and it was not intended to interfere with the general principle that a man who sues on his cause of action and obtains a decree and allows his decree to become barred has no further remedy. [P 371 C 2]

Per *Sadasiva Aiyar, J.*—When a plaintiff has obtained in one suit based on some legal title a decree for the reliefs which he was entitled to as against a defendant and has allowed that decree to become barred, he cannot be allowed to bring another suit for obtaining the very same relief against the very same defendant, though on a different basis, if the latter ground of claim is founded on a right or title which existed and could have been relied on as a basis of relief when the first suit was brought. [P 371 C 2]

C. Madhavan Nair—for Appellant.

M. N. Krishna Aiyar—for Respondents.

Wallis, C. J.—This case raises a question of considerable importance and interest namely, what is the effect of a plaintiff, who obtains a decree in ejectment in Malabar directing payment of compensation, allowing that decree to become barred. The question is whether he is entitled to maintain another suit, as it is contended, upon his title, a proposition which is supported by reference to the decision in *Kutti Ali* v. *Chindan* (1). Now, the ordinary principle is that, when a man has a cause of action and brings a suit upon it that cause of action is merged in the decree, transit in rem judicatum; and then his remedy is in execution and if he does not enforce his remedy and allows it to become barred, his rights are gone. When a lessor sues to eject a lessee, he has to prove that there was in existence a lease and a determination of that lease. That is his cause of action, and if he gets a decree and allows that decree to become barred, it seems to me that, on general principles, his remedy is gone. I do not, with great respect, quite understand what is meant in *Kutti Ali* v. *Chindan* (1) by saying that he will still be allowed to sue on title. The suit on title, I take it, is a suit to eject the defendant on the ground that he was a trespasser. Even if it could be said that the effect of a decree in ejectment was to determine the tenancy and convert the tenant into a trespasser, that would not apply to the present case where the tenant has a statutory right to continue in possession after decree until he is paid for his improvements. Further, the de-

1. (1900) 23 Mad 629 (F B).

cision in *Kutti Ali* v. *Chindan* (1) seems difficult to reconcile with the subsequent decision of a Full Bench of five Judges in *Vedapuratti* v. *Vallabha Valiya Raja* (2) in which it was held, overruling some earlier cases, that, where a morgtagor brings a suit for redemption and allows the decree for redemption to become barred, his rights are gone and he cannot bring a subsequent suit for redemption. I do not see any reason why the same doctrine is not applicable to the case of lessor and lessee.

Lastly, as regards the Malabar tenancies I think that the provisions of Ss. 5 and 6, Malabar Compensation for Tenants' Improvements Act strongly support the view I have taken and show that it was the intention of the legislature that these matters should be dealt within execution. S. 5 provides that, notwithstanding the determination of the tenancy, the tenant is entitled to remain in possession until ejectment in execution of a decree or order of Court. S. 6 deals with the form of the deeree in ejectment and the detemination of compensation, and the decree is to direct that:

"on payment by the plaintiff into Court of the amount so-found due and also the mortgage money (if any), the defendant shall put the plaintiff into possession of the land with the improvements thereon,"

which is very like a decree for redemption. Sub-S. (3) deals with compensation for subsequent improvements and revaluation, if necessary, of the improvements at the time of ejectment. Sub S. (4) provides that:

"every matter arising under sub-S (3) shall be deemed to be a question relating to the execution of the decree within the meaning of Cl (c) S. 244, Civil P. C."

It seems to me a fortiori that the payment of the compensation which is assessed in the suit by the decree is still more a matter, or at least as much a matter, relating to execution and is intended to be dealt with as such. As I understand the scheme of the Act, it is that it leaves the deeree passed under the Act for ejectment of payment of compensation to be governed by the law of limitation with regard to the execution of decrees, and it was not intended to interfere with the general principle, that a man who sues on his cause of action and obtains a decree and allows that decree to become barred has no further remedy. With great respect I am not prepared to follow the decision in *Kutti Ali* v. *Chindan* (1) in this case. The second appeal is dismissed with costs.

Sadasiva Aiyar, J.—When a plaintiff has obtained in one suit, based on some legal title, a decree for the reliefs which he was entitled to as against a defendant and has allowed that decree to become barred, he cannot, in my opinion, be allowed to bring another suit for obtaining the very same relief against the very same defendant, though on a different basis, if the latter ground of claim is founded on a right or title which existed and could have been relied on a basis of relief when the firet suit was brought. If he had failed in the first suit on the basis on which he had brought it, he might be entitled to claim the same relief in a second suit on another basis, if this latter basis could be treated as affording a different cause of action. In *Chowakkaran Keloth* v. *Karuvalote Parkum* (3) the provisions of S. 6, Malabar Compensation for Tenants' Improvements Act and the decision in *Vedapurati* v. *Vallabha Valiya Raja* (2) do not seem to have been considered and brought to the attention of the Court. I do not therefore with great respect, feel bound to follow the decision in *Chowakkaran Keloth* v. *Karuvalote Parkum* (3).

S.N./R.K *Appeal dismissed.*

2. (1902) 29 Mad 300 (F B).

3. (1915) 29 I C 559.

A I. R 1918 Madras 371

ABDUR RAHIM AND NAPIER, JJ.

Raghuvalu Naicker —Complainant—Petitioner.

v.

Singaram and *another*—Accused—Opposite Party.

Criminal Revn. No. 677 of 1917 and Criminal Revn. Petn. 536 of 1917, Decided on 14th February 1918, from order of Third Presidency Magistrate, George Town, Madras, in Case No 15911 of 1917.

(a) Criminal P. C. (1898), Ss. 247 and 259—Offences under Ss. 352 and 504, I. P. C. tried together in one case — Accused discharged under S. 259—Held order did not operate as acquittal even for offence under S. 352.

On the day fixed for the hearing of a complainant under Ss. 352 and 504, I. P. C., the complainant was absent and the Magistrate passed the following order: 'Complainant absent. Accused discharged:

Held: that as there was only one case before the Court, the Magistrate must be deemed to have acted under S. 259, and that the order did not

operate as an acquittal of the accused even in respect of the offence under S. 352, I.P.C, [P 373 C 1]

(b) Criminal Trial—Procedure—Summons case and warrant case tried together procedure to be followed is of warant case.

Where there are two offences complained of one of which is triable as summons case and the other as a warrant case, both arising out of the same transaction, the Court cannot separate the two, applying two kinds of procedure, but should adopt the procedure relating to the graver charge, i. e., the warrant case. [P 372 C 1]

Per *Napier, J.*—Unless the Court chooses to separate the two offences and take them up, one as a warrant case and the other as a summons case, the fact that one of the offences complained of and tried by him is punishable by six months' imprisonment or less does not make that part of trial a summons case [P 373 C 1]

R. N. Aiyangar for *M. Narsimham*—for Petitioner.

W. V. Rangasami Aiyangar—for Accused.

Crown Prosecutor—for the Crown.

Abdur Rahim, J.—A complaint was made under Ss. 353 and 504, I. P. C, before the Second Presidency Magistrate. On the date fixed for the case the complainant was absent and the Magistrate discharged the accused. Then a fresh complaint was lodged with reference to the same transaction before the Third Presidency Magistrate and he held that so far as the offence under S. 352, I P. C, was concerned, the order of the Second Presidency Magistrate operated as an acquittal and that the case should be proceeded with only with reference to the offence under S. 504, I. P. C. We are asked to consider whether the order of fhe Third Presidency Magistrate that there has been an acquittal within the meaning of the law with respect to the charge under S. 352 by reason of the previous order of the Second Presidency Magistrate is right.

The case relating to an offence under S. 352 is a summons case, inasmuch as the punishment for such an offence is not more than six months' imprisonment, while the case relating to S. 504, I. P. C., is a warrant case, the punishment under this section being more than six months. imprisonment. It has been ruled in *Rajnarain Koonwar* v. *Lala Tamoli Raut* (1) that where there are two offences complained of, one of which is triable as a warrant case and the other as summons case, the proper procedure to be followed is that relating to the greater charge, namely, that of a warrant case. There is no express provision in the Criminal Procedure Code with reference to this matter. The learned Judges of the Calcutta High Court apparently proceeded on a general principle that the procedure to be followed should be that laid down with reference to the major charge and not the more summary procedure with reference to the minor offence. Now the Magistrate under S. 235. Criminal P. C., is empowered, where more than one offence has been committed by a person by a series of acts so connected together as to form the same transaction, to try all the offences at one trial or separately. Here the transaction in which the two offences are alleged to have been committed was undoubtedly one and the same and the Magistrate could therefore try both the offences at one trial.

Then the question is whether he treated the case before him as a summons case or a warrant case, or as two cases, one a summons case and the other a warrant case. It seems to me that if he wanted to try the two offences together, the case would be one and not two separate cases: and the punishment which could be awarded against the accused in such a case would be more than six months' imprisonment and that would bring it within the definition of a warrant case. It has been pointed out by the learned pleader for the accused that the complainant was absent when the case was taken up and he argues that it was open to the Magistrate at that stage to separate the two charges and try them as two different cases, one a summons case and the other a warrant case, and that we must presume that he did so and therefore his order of discharge must be taken to amount to an acquittal with reference to the offence under S. 352. But the Magistrate passed only one order, "complainant absent. Accused discharged." If he was, as suggested by the learned pleader for the accused, treating the matter for trial before him as two separate cases and wanted to deal with the charge under S. 352, I. P. C., under S. 247, Criminal P. C., the proper order for him to pass would have been one of acquittal. But he did not pass any such order. The order he passed was one of discharge, which would be the proper one if he treated the case before him as a warrant case coming under S. 259, Criminal P. C., which authorises him, in the absence of the complainant in a warrant case, to discharge the accused if the offence

1. (1885) 11 Cal 91.

complained of was compoundable. It would prima facie be unreasonable to suppose that where there are two charges arising out of the same transaction the Magistrate would think of separating the two applying thereto two kinds of procedure. There was one transaction in the course of which the two offences are alleged to have been committed and in such a cass the proper procedure, ordinarily speaking is to have one trial; and then as laid down in *Rajnarain Koonwar* v. *Lala Tamoli Raut* (1), the case ought to be treated for purpose of procedure to be followed as a warrant case having regard to the graver charge. This rule has been followed in *Rallabandi Sobhanadri*, In re (2) by a learned Judge of this Court sitting singly and also in *Hossein Sardar* v. *Kalu Sardar* (3). It is also mentioned with approval in *Samsudin*, In re (4). I would therefore set aside the order of Third Presidency Magistrate in so far as it holds that the order of the Second Presidency Magistrate dated 27th August 1917 amounts to an acquittal of the offence under S. 352, I. P. C.

Napier, J.—I agree. In my opinion there was no summons case before the Second Presidency Magistrate at all. The Magistrate took the complaint on his file, a number was given to it and he was prepared to hear it. The complainant was absent and he passed an order which was undoubtedly intended to be an order under S. 259, Criminal P. C. It is therefore clear to me that he was trying the whole case as a warrant case. The definition section does not speak of summons offences and warrant offences but of summons cases and warrant cases, and has reference to the case before the Court. Where the Code deals with offences it divides them into cognizable and non-cognizable, but where it is dealing with procedure then it speaks not of offence but of cases. I am therefore satisfied that, unless the Magistrate chooses to separate the two offences which are complained of and take them up, one as a warrant case and the other as a summons case, the fact that one of the offences complained of and tried by him in one case is one punishable by 6 months or less does not make that part of the trial a summons case. In this view it seems to me that the Magistrate had no option but to pass an order under S. 259 if he decided to dispose of the case and that it was not open to him to apply the procedure which is only applicable where he is in fact trying a summons case, namely, the procedure under S. 247. For these reasons I agree with the order proposed by my learned brother.

S.N./R.K. *Order set aside.*

2. (1916) 39 Mad 503=29 I C 668.
3. (1902) 29 Cal 481.
4. (1898) 22 Bom 711.

A. I. R. 1918 Madras 373

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Ansur Subba Naidu and *others*—Defendants—Appellants.

v.

Secy. of State—Plaintiff—Respondent.

Appeal Suit No. 303 of 1914, Decided on 2nd February 1917.

(a) Deed—Construction — Mining lease—Provision restraining lessee from assigning and empowering lessor to re-enter on assignment cannot be enforced.

Per *Seshagiri Aiyar, J.*, (*Wallis, C. J.*, not expressing any opinion).—A provision in a mining lease restraining the lessee from assigning and empowering the lessor to re-enter in the event of assignment cannot be enforced where the lessee mortgages his right, unless the whole of his interest is transferred to the mortgagee. [P 367 C 1, 2]

(b) Transfer of Property Act (4 of 1882), S. 58 — Mortgages — Kinds of—Property situated in the muffasal—Hindu executing English mortgage—Absolute interest is not transferred.

The definition of the various classes of mortgage contained in S. 58, T. P. Act should not be read as amplifying the quantum of interest which a mortgage by law confers upon the mortgagee. Cls. (b), (c), (d) and (e) only prescribe the forms in which the various mortgages are to be expressed. The general legal effect is that which is predicated in Cl. (a).

Where the mortgaged property is situate in the muffasal and one of the parties is a Hindu, an English mortgage, notwithstanding the form in which the document is expressed, does not transfer an absolute interest in favour of the mortgagee : 7 *Cal.* 394, *Dist.* [P 376 C 1]

(c) Lessor and Lessee—Mining lease providing lessee to work mines continuously without voluntary intermission—Onus is on lessor.

Where a lease of mines provides that the lessee should work the mines continuously without voluntary intermission and in a skilful and workmanlike manner the burden of showing that the lessee has not worked as aforesaid lies on the lessor.

The mere fact that a sufficient quantity of mineral is not produced is not enough to show that the mine has not been worked continuously and efficiently. [P 376 C 2]

(d) Mines — "Proper and workmanlike manner"—Meaning explained.

A proper and workmanlike manner may not mean the best possible mode of working for the lessor, but it means in such a manner as shall not be simply an attempt to get out of

the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding.

S. Srinivasa Aiyangar, K. Raja Aiyar and *S. Desikachariar*—for Appellants.

V. Ramesam and *S. K. Parthasarathy Aiyengar*—for Respondent.

Wallis, C. J.—This is an appeal from so much of the decree of the District Judge of Nellore in Original Suit No. 7 of 1912 as declared that the right of the defendants in the lands conveyed in the mining leases of the Tellabodu D. F., and Palamani mines had determined and gave the plaintiffs a decree for mesne profits and possession. The District Judge found against the plaintiff on issue 6 that the defendants had not incurred forfeiture under their leases by failing to work their mines continuously and without voluntary intermission and in a workmanlike manner, but that they had done so by executing the mortgage, Ex. O4 of 16th August 1909, which was an assignment of the premises demised without the lessor's consent. For the appellants it is contended, firstly, that this ground of forfeiture was not pleaded or made the subject of an issue, and secondly, that the mortgage in question did not amount to an assignment within the meaning of the clause against assignment. The plaint, after referring to the leases and to rules under which they were granted, sets out in paras. 6 and 7 the substance of the covenant for continuous working without voluntary intermission in a skilful and workmanlike manner, and the condition of re-entry for breach of any of the covenants in the lease, and in paras. 9 and 10, as originally framed, alleges that the defendants had failed to start work in some of the mines and as regards the others had failed to work them "continuously or without voluntary intermission and in a workmanlike manner." Para. 11 goes on to state that it had become clear that owing to their extravagance and mismanagement they had lost credit and it was impossible for them to resuscitate their business, and that it was also found that they had mortgaged the mines and entered into various transactions with divers persons touching the right to the mines which they had no right to do without the previous permission of the Government. Para. 12 then states that under the circumstances stated above the Government cancelled the nine leases.

As I read the plaint the case set up is that in consequence of the breaches specified in paras. 9 and 10 of the covenant set out in para. 6, the plaintiff had determined the leases under the power of re-entry specified in para. 7. Para. 11 I think merely refers to some reasons which induced the Government to insist on their rights of forfeiture, viz., that by extravagance and mismanagement the lessees had lost credit and were not in a position to resuscitate the business, and that they had mortgaged the mines to the creditors and entered into various transactions with divers persons touching the right to the mines which they had no right to do without the previous permission of Government. Para. 12 whilst stating that the Government had cancelled the leases in the circumstances stated above leaves the legal grounds of forfeiture to be ascertained from the earlier part of the plaint (paras. 6 to 10) where they are duly pleaded, and cannot, I think, be read as justifying the cancellation pleaded on the ground of any of the matters referred to in para. 11. Some of the matters referred to in para. 11 are not grounds of forfeiture under the lease; and, if it had been intended to rely on them as such, both the particular covenants and the breaches relied on would have been specifically pleaded as in the case of the covenant for continuous working. The defendants in para. 9 of their written statement were fully justified in treating the grounds of forfeiture as contained in paras. 8 to 10 of the plaint, and in only applying for particulars as regards the alleged failure to work continuously, though they took occasion in para. 8 to answer the allegations against them in para. 11 of the plaint.

In this paragraph they expressly denied the execution of the mortgage referred to in para. 8, and, if the plaintiff's advisers had understood that the execution of these mortgages was relied on as a ground of forfeiture, it would have been their duty to ask for an issue as to whether any such mortgages had been executed, and, if so, whether they constituted a breach of the covenant not to assign, in the same way as they obtained an issue as to the alleged failure to work continuously, etc., in which case the

defendants would have had an opportunity of asking for any other issues they might wish for with regard to the ground of forfeiture. This in my opinion shows conclusively that the pleadings were not then regarded as raising any question of forfeiture on this ground. It has been suggested that this question may be raised under issue 4, but that issue was clearly raised with regard to the specific pleas in paras 10 and 11 of the defendant's written statement and cannot be extended so as to include matters not properly pleaded. No such question then arose in the pleadings or issues. What happened at the trial, as appears from the B diary, was that after P. W. 8 had been examined and almost at the close of the plaintiff's case the plaintiff marked a number of agreements, Ex. O series, which were not proved by witnesses but admitted apparently for the defendants without objection. Our attention has not been called to any reference in the subsequent oral evidence to Ex. O4, the mortgage now in question, but defendant 1 hav.ng been questioned at the close of his cross-examination as witness 1 for the defence, as to his indebtedness deposed in re-examination that he had not obtained any advances under Ex. O5 and Ex. O6 and had got back the documents.

It appears, however from the B diary that at the very end of the case, on 25th March 1914, after the close of the plaintiff's evidence in rebuttal and on the day fixed for argument the defendants filed Ex. 17, the plaint in Original Suit No. 41 of 1913, in which the mortgagees under Ex. O-4 sued the present defendants on their mortgage. The relevancy of the document apparently was that it did not treat Ex. O-4 as a mortgage of the mines themselves. The fact that the defendants filed it at the very last moment may show that they had heard this case was to be raised, not that they consented to its being raised or went to trial upon it. At the final argument the present Advocate-General, who was brought in to sum up the case for the defendants, contended, and in my opinion rightly, that the questions whether the execution of mortgages put in evidence constituted a breach of the covenants and whether the leases had been cancelled on that ground did not arise in the case and I think for the reasons already given, the District Judge was not justified in treating this question as raised in the plaint and as covered bythe second part of the fourth issue.

If the plaintiff's advisers desire to rely on the ground of forfeiture it was their duty to ask for an amendment of the plaint, and if this had been granted the defendants would have been entitled to put in fresh pleas and appropriate issues could have been raised. Moreover this is a case of forfeiture and without saying that there are any special rules of pleading applicable to such cases, I think the Court should be specially careful to see that the forfeiture is not upheld on grounds on which the parties have not gone to trial. This is sufficient to dispose of this part of the case, and it is unnecessary for me to express any final opinion on the contention of the learned Advocate-General that Ex. O 4, which is an English mortgage and would operate as an assignment in England has not this effect in India because under S. 58 (a), T. P. Act, it is only a transfer of an interest in specific immovable property for securing the payment of money and does not pass the whole interest to the mortgagee but only certain rights including apparently the rights to possession as mortgagee and to foreclosure or sale. (After discussing the evidence as to the working of the mines his lordship concluded) If the plaintiff had relied on a breach of the covenant as far as possible to obtain mica, his case would have been overwhelming but putting this altogether out of the case as not relied cn in paras. 9 and 10 of the plaint, I think that looking at the effect of the evidence as a whole, both oral and documentary, for the defendants as well as for the plaintiffs, the breaches of covenant charged in the plaint are suffcienlty proved to justify the forfeiture and I find issue 6 in the affirmative and would dismiss the appeal with costs. If follows from my findings as to the Nandalagunta mine on issue 6 that the plaintiff's memorandum of objections must be allowed with costs and the decree varied by upholding the forfeiture of this mine also.

Seshagiri Aiyar, J. — I agree with the judgment of the learned Chief Justice. I shall first say a few words on the question whether the execution of Ex. O 4 caused a forfeiture of the leases and then deal shortly with the other questions. The learned Advocate-General contended.

(1) that the mortgage Ex. O-4 did not transfer any right in the mines; (2) that the transfer, if any did not amount to an assignment of absolute interest in the properties; and (3) that it was not open to the Government to claim a forfeiture upon this ground as it was not specifically pleaded in the plaint. Upon the first point, I am unable to agres with the contention put forward. The operative portion of Ex. O-4 makes it abundantly clear that all the mines were intended to be transferred to the mortgagee. Upon the second question, I have come to the conclusion that the contention of the learned Advocate-General must prevail. S. 58, Cl. (a), T. P. Act, contains the definition of a mortgage. It begins by stating that a mortgage is the transfer of an interest in specific immovable property. It does not say that a mortgage effects a transfer of the whole of the property to the mortgagor. Cls. (b), (c), (d) and (e) are illustration of the general definition; (b) refers to a sample mortgage; (c) to a mortgage by conditional sale; (d) to a usufructuary mortgage; and to an English mortgage. These definitions of the various classifictions of the mortgage should nct be read as amplifying the quantum of interest which a mortgage by law confers upon the mortgagee. Cl. (b), (c), (d) and (e), only prescribe the forms in which the various mortgages are to be expressed. The general legal effect is that which is predicated in Cl. (a). It was common ground that Ex. O4 conforms to what is known as an English mortgage. It is true that the language of the definition suggests that the properties are transferred absolutely to the mortgagee. But that to my mind is not conclusive of the legal rights created by the document. When we turn to S. 98, T. P. Act, we find that parties in the case of these four mortgages are not to be governed entirely by the rights and liabilities created by the contract. Whereas in the case of anomalous mortgagee, the rights and liabilities are solely regulated by the contract of the parties, in the case of these four mortgages and the combination of some of them the rights and liabilities are governed by S. 58, T. P. Act. It is well settled that unless the whole of the interest of the mortgagor is transferred to the mortgagee, there can be no forfeiture with reference to a clause not to assign, under an English mortgage. *West* v. *Dobb* (1) lays this down explicitly; and that is followed in *Serjeant* v. *Nash Field and Co.* (2), therefore it seems to me that the transfer of the mines under Ex. O4 did not violate the condition not to assign contained in the lease. It was held in *Shurnomoyee Dasi* v. *Srinath Das* (3) that a mortgage in the English form between Hindus of lands in the mofussil has always been treated by the Court as a mortgage by conditional sale. There is the dictum of Pontifex, J., in *Manly* v. *Patterson* (4), that if the parties happen to be both Englishmen, all the incidents of an English mortgage would apply to such a transaction.

In the present case, the property is situated in the mofussil and one of the parties is a Hindu. Consequently the dictum in *Manly* v. *Patterson* (4) does not govern the present case. Both Mr. Shephard and Mr. Ghose, in their commentaries on the Transfer of Property Act, say that notwithstanding the form in which the document is expressed, an English mortgage does not transfer, in India, an absolute interest in favour of the mortgagee. I am of the same opinion. I therefore hold that Ex. O4 did not offend against the condition not to assign the interest of the lessee without the sanction of the Government. The other mortgages are either simple or only convey a fractional interest in the mines. The learned Government Pleader, Mr. Ramesam, did not rely upon these mortgages as having led to the forfeiture. I entirely agree with the learned Chief Justice that it is not open to the plaintiff to rely upon the execution of Ex. O4 as the cause of the forfeiture, as that was not properly pleaded.

The learned Advocate-General contended that there was a waiver of forfeiture by the Government. Issue 5 raises this question. I am not satisfied that the District Judge has shut out any evidence on the question. The facts relied on as showing the waiver have been discussed very fully by the District Judge and I see no reason to differ from his conclusions. The learned Government Pleader sought to support the judgment of the District Judge upon a point decided by him against the Government. He

1. (1870) 5 Q B 460=10 B & S 987.
2. (1903) 2 K B 304=72 L J K B 630.
3. (1886) 12 Cal 614.
4. (1881) 7 Cal 394.

has held that the burden of showing that the defendants did not work their mines continuously without voluntary intermission in a skilful and workmanlike manner lay upon the Government. There can be no question that he is right. The question is whether on the facts his conclusions are justified. The test as to what is meant by working the mines in a skilful and workmanlike manner is not easy to lay down. In *Lewis* v. *Fothergill* (5) Lord Hatherley, L. C., says:

"A proper and workmaulike manner may not mean the best possible mode of working for the lessor, but it means in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding."

In *Wheatley* v. *Westminster Brymbo Coal Co.* (6) it is pointed out by Malins, V. C., at p. 550 that the mere fact that a sufficient quantity of mineral is not produced is not enough to show that the mine has not been worked continuously and efficiently. The judgment suggests that if the sleeping rent is procured that would enable the lessee to continue to work. The position of the Government would have been strengthened if evidence had been let in to prove the yielding capacity of the mines during the years 1909 and 1910. There is evidence that the two important mines, Tellabodu and D, were very deep and that water had accumulated in them. Expert evidence could have been let in to show within what time water could have been pumped out and how much mica could have been won by the employment of more coolies. It is to be regretted that the plaintiff has not chosen to assist the Court by giving more specific and more relevant evidence. The question has now to be decided on the materials placed before the Court. The statements annexed to the plaint and Exs. M, N, F and H series afford us some guide. There can be no question that in 1909 the mines were worked for a less number of days than in the previous years, that only a few coolies were employed in that year, and that the quantity of mica won from the mines was very small. There is evidence that the defendants were pecuniarily in an embarrassed condition, and were unable to find the necessory funds for the working of these mines. Under these circumstances, can it be said that the mines were worked continuously and without voluntary intermission. The District Judge has been hampered a great deal by the way the case was laid before him. I hesitated a great deal before coming to the conclusion that his findings on the facts should be upset. But the facts referred to by me and which have been examined fully and in great detail by the learned Chief Justice compel me to hold that the plaintiff has proved that the mines were not worked continuously and without voluntary intermission. I do not think it necessary to deal with the facts again as they have been clearly analysed if I may say so with respect, in the judgment of the learned Chief Justice. I am of opinion that the decree of the District Judge should be upheld, though not for the reasons given by him and that this appeal should be dismissed with costs. I also agree that the memorandum of objections should be allowed with costs.

S.N./R.K. *Appeal dismissed.*

5. (1870) 5 Sch 103.
6. (1870) 9 Eq 538.

A. I. R. 1918 Madras 377

SPENCER AND SESHAGIRI AIYAR, JJ.

Subroya Goundan and *others*—Defendant—Appellants.

v.

Perumal Chettiar—Plaintiff—Respondent.

Second Appeal No. 1868 of 1915, Decided on 23rd July 1917, against decree of Dist. Judge, Salem, in Appeal Suit No. 79 of 1912.

(a) Transfer of Property Act (4 of 1882), S. 53—Transfer, not bona fide and effected to defraud creditors—Transferor not benefitted—Transfer is still void.

A transfer of immovable property, which is not bona fide and which is effected to defraud creditors, falls within the mischief of S. 53, and is void though the transferor secures no benefit thereby: *A. I. R.* 1915 *P. C.* 115, *Dist.*

[P 378 C 1,2]

(b) Transfer of Property Act (4 of 1882), S. 53—Part payment of consideration does not validate fraudulent and mala fide transfer.

Where the transfer is fraudulent and is effected with a mala fide intent, the mere fact that a portion of the consideration is actually paid will not clothe the transaction with reality and take it out of the operation of S. 53: 4 *I. C.* 1140 and 18 *I. C.* 768, *Foll*; 30 *Mad* 6, *Dist.*

[P 378 C 2]

V. Venkatachariar, for *R. Shadagopachariar* and *V. K. Venkatarama Aiyar*—for Appellants.

A. Ramachandraier—for Respondent.

Judgment — The case, apparently, was not argued fully before the Courts below. The points arising for decision have now been discussed in all their aspects; and our conclusion is that the decision of the Court below is right. The first point for consideration is whether the decree obtained by the plaintiff was for a debt which was in existence when the release deed was executed by defendant 1 to defendant 4 in 1901. To enable us to decide this question, we gave time to the vakils appearing on either side to produce the judgment obtained against defendant 1 by the plaintiff; we now admit it under O. 41, R. 27, Civil P. C. as Ex. B. The document is necessary to enable us to pronounce judgment and as the learned vakils took time to produce the document before us, we think we have power under O. 41, R. 27, read with O. 42, to admit the new document in evidence, and we accordingly do so. From this document it is clear that the plaintiff was a creditor before defendant 1 released his rights to defendant 4. Consequently S. 53, T. P. Act, is applicable to his claim, if that section is otherwise applicable. It was next contended that plaintiff being only one of the creditors, the suit is not maintainable to impeach the release-deed. There is no evidence of the existence of other creditors and consequently the decision in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (1) does not govern this case.

The main contention was that the release was not fraudulent. The finding is that on the date of the release, defendant 1 had sub-mortgaged the right derived by him from defendant 4's husband; and that being a man of loose morals and reckless habits, he released his rights in favour of the mortgagor's widow, defendant 4, who was his near relation. There can be no doubt from a perusal of Ex. A, the judgment obtained by the sub-mortgagee against defendant 1 and defendant 4, that the object of the release was to defraud the sub-mortgagee; that is to say, that the transfer was not bona fide. In this view, the decision in *Musadar Sahu* v. *Hakim Lal* (2) does not help the appellant. The Judicial Committee held in that case that the essence of the mischief contemplated by S. 53, T. P. Act, is that there must be an intention to secure a benefit to the transferor; on a reference to the judgment of the High Court in *Hakim Lal* v. *Mooshahar Sahu* (4), from which *Musahar Sahu* v. *Hakim Lal* (3) was the appeal to the Judicial Committee, it is clear that in that case the transfer was made bona fide without reserving any right to the transferor. In the present case, the element of bona fides is wanting. Defendant 1 acted recklessly and with the evident intention of cheating his sub-mortgagee. Therefore *Musahar Sahu* v. *Hakim Lal* (3) does not affect the present case.

It was lastly argued that on the finding that Rs. 1,500 out of Rs. 4,000 was paid, the transaction cannot be said to be fraudulent. This was the argument put forward in *Chidambaram Chettiar* v. *Sami Aiyar* (4) and negatived by the learned Judges. When the matter was taken up before the Privy Council, Mr. De Gruyther did not apparently consider the point arguable; we must therefore take it that in cases of similar transactions not coming under the Transfer of Property Act, the fact that a portion of the consideration was actually paid will not necessarily clothe the transaction with reality. We think the same considerations apply to cases under the Transfer of Property Act. The protection sought to be given is the same in both the cases; and we are prepared to follow *Koolayappa Rowther* v. *Balusami* (5) and *Soma Row* v. *Doraswamy Chettiar* (6), where the principle of *Chidambaram Chettiar* v. *Sami Aiyar* (4) has been extended to transactions under S. 53, T P. Act. The case of *Bhagwant* v. *Kedari* (7) is distinguishable on the facts of that case. As regards the decision in *Jaladanki China Pitchiah*, In re (8) it is enough to point out that it is a decision of a Single Judge and that in that case, there was no intention to defeat or delay any one. It may be that where a portion of the consideration remains unpaid owing to no fault of the transferee, the transaction should not be impeached as fraudulent. It is only to that extent we think that the decision in *Jaladanki China Pitchiah*, In re (8)

1. A I R 1916 P C 238=40 I C 242=44 I A 72=44 Cal 662 (P C).
2. A I R 1915 P C 115=32 I C 343=43 I A 104=43 Cal 521 (P C).
3. (1907) 34 Cal 999.
4. (1907) 30 Mad 6.
5. (1909) 4 I C 1140.
6. (1913) 18 I C 768.
7. (1911) 35 Bom 202.
8. (1911) 36 Mad 29=11 I C 868.

should be regarded as an authority. For all these reasons we are of opinion that the decision of the learned District Judge is right. We dismiss the second appeal with costs. The vakil for the respondent will pay the necessary court-fee on the new document.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1918 Madras 379

ABDUR RAHIM AND OLDFIELD, JJ.

Chelimi Chetti and *others*—Appellants.

v.

Subbanna—Petitioner—Respondent.

Second Appeal No. 1543 of 1917 and Original Civil Revn. Petn. No. 1322 of 1916, Decided on 29th August 1917, against decree of Dist. Judge, North Arcot, in Mise Appeal No. 18 of 1915.

*** Hindu Law—Partition—Suit by minor does not ipso facto dissolve joint status—Plaintiff dying—His legal representative cannot claim as of right to be made party—Civil P. C. (1908), O. 22, R. 3.**

The filing of a plaint in a suit instituted on behalf of a minor for partition does not ipso facto constitute a severance of the joint family status because the option or choice which the law lodges in a coparcener to effect such severance by a mere declaration of intention must be deemed to be limited only to adult members and not to persons acting on behalf of minors.

In such a suit it is in the discretion of the Court to say whether there should be a division of the famiy status or not.

On the death therefore of a minor plaintiff in a suit for partition his legal representative cannot claim as of right to be made a party to and continue the suit. [P 380 C]

A. Krishnaswami Aiyar — for Appellants.

T. Narasimha Aiyangar. —for Respondent.

Judgment.—This matter arises in connection with a suit instituted on behalf of a minor member of a joint Hindu family for partition. The minor plaintiff died after the institution of the suit but before the written statement was filed. The respondent before us, who is the mother of the plaintiff, applied to the First Court to be brought on record and for permission to continue the suit as legal representative of the deceased plaintiff. That Court held that no cause of action survived and refused the application of the respondent. On appeal however the District Judge set aside the order of the First Court holding that the respondent was entitled to continue the suit as legal representative of the plaintiff. The contention before us on behalf of the defendants in the suit is that when the minor died whatever rights he had in the family property survived to the other members of the family as there was no partition. A rather interesting question was discussed before us as to whether an apppeal lay to the District Judge from the order of the Court of the first instance but the learned vakil for the respondent did not mean to persist in the objection as to whether the proper remedy for the defendants in this Court was by way of second appeal or by way of moving us in revision. We need not therefore decide any such question.

On the merits the question that requires our decision is whether by the filing of the plaint severance was effected by the joint status of the family. This is an important point but there is no authority expressly dealing with it. It is now settled law especially after the recent Privy Council decision in *Girja Bai* v. *Sadashiv Dhundiraj* (1) and the Full Bench decision of this Court in *Sundararajam* v. *Arunachelam Chetty* (2), that it is open to a member of a joint Hindu family to effect a division of his status by a clear and unequivocal expression of his intention without the necessity of any concurrence on the part of the other coparceners. The last case laid down that the filing of the plaint is such an unambiguous manifestation of intention within the meaning of the ruling of the Privy Council. It is curious, as has been pointed to us by the learned vakil for the respondent, that in the Full Bench case the plaintiff who instituted the suit was a minor. Apparently however no question such as this was raised before the Full Bench for decision. There can be no doubt that what the Privy Council decided and what the Courts have followed is that it depends upon the discretion of a member of a joint Hindu family whether he is to continue the joint status or whether there should be a separation. That prima facie implies that the member who exercises such discretion must be of an age capable of exercising discretion in law. That will not be the case with a minor at least if he is of an age when discretion cannot be imputed to him. In the case of a suit instituted on behalf of a minor

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1. A I R 1916 P C 104=43 Cal 1031=12 N L R 113=37 I C 321=43 I A 151 (P C).
2. (1915) 39 Mad 136=33 I C 858.

member of a Hindu family for partition it has been laid down that it depends upon the discretion of the Court whether to make a decree for partition or not, that is to say, the Court has to consider in such cases whether a decree for partition would be for the benefit of the minor.

If it is satisfied that it is not for the benefit of the minor to give a decree for partition, the Court will dismiss the suit. This is laid down by the Privy Council in *Bachoo Hurkisondas* v. *Mankoretai* (3), approving the decision of the Bombay High Court on this point. This has also been the law in this presidency as stated in *Kamakshi Ammal* v. *Chidambara Reddi* (4) and that position has not been contested before us. If it is left to the discretion of the Court to say in a suit instituted on behalf of a minor whether there should be a division of the family or not, it seems to us prima facie to follow that the matter does not depend on the choice or option of any person who chooses to act on behalf of a minor member of a Hindu family. Any person is at liberty to institute a suit on behalf of a minor as the next friend and it was forcibly urged upon us by Mr. A. Krishnaswami Aiyar that it would lead to great hardship and inconvenience if it were left to the discretion of any person who chooses to file a suit on behalf of a minor to decide whether the family of which the minor is a member shall continue joint or become separate. The institution of a suit, so far as it expresses the intention of a member of the family to divide depends on principle on the same basis as any other expression of intention of a competent member of the family. If we are to hold that the filing of a plaint on behalf of a minor ipso facto constitutes a severance of the family status, then logically one would be driven to hold also that a notice given by such a person on behalf of the minor to the other members of the family of the intention to divide would also effect a severance of the joint status. This seems to us to be a position which we would not like to uphold without authority and no authority has been cited to us in support of it. It was strongly argued by the learned pleader for the respondent that as the plaint states facts and circumstances which if proved would be good justification for the Court decreeing partition therefore at this stage we must proceed on the basis that there was a good cause of action and there was thus a severance of status effected by the institution of the suit. This clearly does not amount to anything more than this, that it is open to a person who chooses to act on behalf of a minor member of a Hindu family to exercise the discretion on his behalf to effect a severance. What causes the severance of a joint Hindu family is not the existence of certain facts which would justify any member to ask for partition but it is the exercise of the option which the law lodges in a member of a joint family to say whether he shall continue to remain joint or whether he shall ask for a division. In the case of an adult he has not got to give any reasons why he asks for partition but he has simply to say that he wants partition and the Court is bound to give him a decision. In the case of a minor the law gives the Court the power to say whether there should be a division or not and we think that it will lead to considerable complications and difficulties if we are to say that other persons also have got the discretion to create a division in the family purporting to act on behalf of a minor. It is urged that there might be cases in which it would be desirable that partition should be effected in the best interests of the minor and as soon as possible. In such cases those who are interested on behalf of the minor are entitled to institute a suit but having regard to the decisions in *Bachoo Harkisondas* v. *Mankorebai* (3) and *Kamakshi Ammal* v. *Chidambara Reddi* (4), it must be left to the Court to decide whether there should be a partition or not.

We treat this civil revision petition as a second appeal and set aside the order of the District Judge with costs here and in the Court below. The respondent's petition will stand dismissed. This decree will not be drawn up until the learned pleader for the appellants pays Court-fee within a week.

S.N./R.K. *Order set aside.*

3. (1907) 31 Bom 373=34 I A 107 (P C).
4. (1866-67) 3 M H C R. 94.

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SADASIVA AIYAR AND PHILLIPS, JJ.

C. S. Parameswara Ayyan—Plaintiff —Appellant

v.

Kittunni Valia Mannadiar and *another*—Defendants—Respondents.

Second Appeal No. 418 of 1916, Decided on 31st August 1917, from decree of Sub-Judge, South Malabar, in Appeal Suit No. 767 of 1914.

(a) Malabar Compensation for Tenants' Improvements Act (1 of 1900), Ss. 5 and 6—Tender of mortgage amount — Mortgagee continues as mortgagee till compensation is actually paid—Tender by deposit into Court does not make mortgagee liable for mesne profits from date of tender.

Under S. 5, the mortgagee notwithstanding a valid tender remains in possession as mortgagee and not as trespasser or trustee, till compensation is actually paid. A mere tender of the mortgage amount by deposit into Court even where it is found sufficient to cover the compensation for improvements will not render the mortgagee tenant liable for mesne profits from the date of the tender. 32 *I. C.* 861, *Diss. from.* [P 381 C 2]

(b) Interpretation of Statutes—Proceedings of legislature—Reference to, is not permissible.

The proceedings of the legislature which result in the passing of an Act cannot be referred to as legitimate aids to the construction of particular sections therein. [P 382 C 1]

(c) Interpretation of Statutes—Language capable of two constructions—Question of unreasonableness of construction is relevant.

The question of unreasonableness of construction is relevant in considering the meaning of a statutory provision, only where the language is capable of two constructions, one reasonable and the other unreasonable and not where the language of the provision is plain. [P 382 C 1]

(d) Interpretation of Statutes—Act ambiguous—Preamble and object of Act can be referred to.

Where there is some ambiguity in an Act, the preamble and the object of the Act can be referred to to find out the intention of the legislature. [P 382 C 1]

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar*—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Sadasiva Aiyar, J. — Plaintiff 2 in this suit for redemption is the appellant before us. The two questions for consideration are (1) whether a mortgagee tenant to whom the Malabar Compensation for Tenants' Improvements Act applies, is bound to pay mesne profits from the date of tender of the amount due under the mortgage into Court when it was found that the money tendered sufficiently covered the compensation for improvements also, (2) whether plaintiff 2 Melcharatdar is under the circumstances of this case entitled to his costs.

The answer to the first question depends entirely upon the construction to be placed upon Ss. 5 and 6, Malabar Compensation for Tenants' Improvements Act (1 of 1900), and especially S. 5. Omitting the words immaterial for our purpose S. 5 is as follows: (1) "Every tenant" (which includes a mortgagee in possession),

"shall on ejectment be entitled to compensation for improvements for which compensation has not already been paid and every tenant to whom compensation is so due shall be entitled to remain in possession *until ejectment in execution of a decree or order of Court.*"

(2) "A tenant" (mortgagee) "so continuing in possession shall, during such continuance, hold as a" (mortgagee) tenant subject to the terms of his mortgage." I think the language is plain that till compensation is actually paid (mere tender not sufficing), the mortgagee remains in possession as mortgagee (not as trespasser or trustee) notwithstanding a valid tender. It is not difficult to find reasons for this exceptional favouring of the Malabar tenants by the legislature there being other such exceptional provisions in the Act, such as the reopening of decrees in execution in the matter of compensation for improvements, the allowing of a mortgagee or tenant to continue to make improvements notwithstanding the passing of a decree and so on. Mr. Ramachandra Aiyar, the learned vakil for the appellant, relied on the decision of two learned Judges of this Court (Coutts Trotter and Seshagiri Aiyar, JJ.), reported as *Chami* v. *Ana Pattar* (1). With the greatest respect, I am unable to agree with that decision. In the judgment of Coutts Trotter, J., S. 5 is quoted but without the reproduction of the clause "*for which compensation has not already been paid.*" That learned Judge was not inclined to adopt the literal construction of the section because he thought that that was

"a wholly unreasonable construction of the Act and would permit wholly unreasonable conduct on the part of the tenant."

Seshagiri Aiyar, J., says that "under S. 5, Cl. 2, the tenant is bound to pay the mesne profits." As far as I could seed, under Cl. 2, he is not bound to pay the mesne profits but only the purapad mentioned in the kanom mortgage. Even

1. (1916) 32 I C 861.

in a previous portion of the learned Judge's judgment he says that where the mortgage money has been tendered and where the relation of landlord and tenant subsists between the parties, "the liability to pay mesne profits" to the landlord also subsists. Of course rent is usually paid out of the mesne profits (though rent may have to be paid even if the tenant is unable to obtain any mesne profits) and probably that is what the Judge means in the former portion of his judgment about mesne profits being payable to the landlord mortgagor. The question of unreasonableness of construction is relevant in considering the meaning of a statutory provision only where the language is raasonably capable of two constructions one reasonable and the other unreasonable: see Maxwell on the Interpretation of Statutes Ch. 8. Supposing, however, there is some ambiguity in an Act, then the preamble and the object of the Act can be referred to as has been done by the Privy Council recently in the *Urlam case*, *Kandukuri Balasurya Prasadha Row* v. *Secy of State* (2). In *Administrator-General of Bengal* v. *Premlal Mullick* (3) their Lordships of the Privy Council state that the preceedings of the legislature, which resulted in the passing of an Act, cannot be referred to as legitimate aids to the construction of a particular section which was construed in that case. In that case however the language according to their Lordships of the Privy Coubcil was quite plain. As I have said already, the language of S. 5 seems to be quite plain. In a case which I recently decided sitting with Spencer, J., (A.A.A. O. No. 123 of 1914) where mesne profits were claimed on the ground that the money had been paid into Court I stated quoting Cl. 1, S. 5 as also Cl. 2, that the mortgagee is not liable for mesne profits as a trespasser because till actual ejectment in execution of the decree of Court he continues to be mortgagee. In the case of *Churiyayi Kanaran* v. *Thattarai Chirutha* (4) it was held that the rights of a purchaser in execution of a mortgage decree under the Transfer of Property Act cannot prevail against the right of a subsequent tenant under the mortgagor to be paid his compensation for improvements before ejectment. Assuming for a moment that the language of S. 5 is not plain, Maxwell at p. 43 quotes a Privy Council case in which their Lordships referred to a portion of the proceedings connected with a Statute in its passage through the legislature for interpreting an ambiguous expression contained in it. Their Lordships referred to the introduction of a proviso by the Lords in the Act (i. e., Uniformity Act 13 and 14, Car. 2, c. 4) and its rejection by the Commons and to the reasons assigned by the latter for the rejection as an indication of the intention of the legislature. Now when S. 5 of the Act was before the legislature the Hon'ble M.R. Ry. P. Ratnasabapathi Pillai wanted to amend S. 5 by adding after the words "is so due" the words "but is not tendered" so that, if that amendment be made, the tenant would not be entitled to possession after such tender and would not be entitled to remain in possession as tenant or mortgagee until ejectment in execution of the decree of Court. In moving this amendment he said:

"the object of my amendment is to provide for cases in which reasonable compensation might be tendered by the landlord to the tenant and the tenant chooses to refuse the compensation so tendered. Even in such a case the tenant might contend, as the section stands that the compensation is still due to him and on that ground he may insist upon continuing in possession till he is evicted by Court's decree or order. I did not think that such is the intention of the Select Committee which drafted this portion. I think it is better to make the meaning clear. If a reasonable compensation is offered by the landlord to the tenant and if the tenant chooses to refuse it, he does so at his peril."

These words "he does so at his peril" occur also in the judgment of Coutts-Trotter, J., in *Chami* v. *Ana Pattar* (1). The Hon'ble Mr. Rashyam Iyengar replied in the Legislative Council:

"I may state that this point was very anxiously and carefully considered in the Select Committee and if it were feasible to practically give effect to the suggestion made by the Hon'ble Mr. Ratnasabapathy Pillai, it would have been done. But the ascertaining of the amount of compensation under the provisions of this bill is so intricate that it is impossible for either party to ascertain it, but both the landlord and the tenant may mutually agree as to the amount, which case is provided for by the proviso to S. 19.

It is impossible for the landlord to know what amount to tender and it is still more impossible for the tenant to know whether the amount tendered by the landlord is the amount that he is entitled to on eviction. But so long as the parties do not agree as to the amount, the inser-

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2. A I R 1917 P C 42=40 Mad 886=41 I C 98=44 I A 166 (P C).
3. (1895) 22 Cal 788=22 I A 107 (P C)
4. A I R 1914 Mad 351=38 Mad 954=23 I. C. 321.

tion of the words proposed in S. 5 will be one which would give rise to great complication and the result will be that the tenant might lose the value of the imrovements effected by him since the date of the tender. The tenant might have bona fide considered that the amount tendered was insufficient, but it may turn out that, when the improvements are valued, the amount tendered was correct or was more than the amount found on calculation. . . . . .Therefore I submit that while my Hon'ble friends's suggestion is sound in principle and in theory, yet having regard to the peculiar nature of this Act and the peculiar custom of Malabar and the difficulty of ascertaining the amount of compensation due when the parties do not amicably settle it, the insertion of any such words as those proposed in this section will, to a great extent, defeat the object of this bill.'"

Then the amendment was put to the council and lost. I think the legislature clearly intended that the amount shall remain due to the tenant till he is actually paid or (if he would not take it though tendered or paid into Court) till he is ejected in execution of a decree or order of Court [after the payment of the amount into Court in pursuance of an order under S. 6 (1) and (3)]. The first question is therefore decided against the appellant. The second point, namely, the question of costs, follows the finding on the first point, and even if the first point had been decided in the appellant's favour, it being clear from para. 27 of the First Court's judgment that the parties were in dispute as to whether one of the taks in plaint item No. 6 was or was not included in the mortgage and it having been found that it was not so included and that the plaintiff's claim to redeem that tak was therefore unsustainable, the order of the First Court directing the parties to bear their respective costs can be fully supported on this ground. In the result the second appeal wholly fails and is dismissed with costs.

Phillips, J.—I agree.

S.N./R.K. *Appeal dissmissed.*

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SADASIVA AIYAR AND SPENCER, JJ.

Swaminatha Mudali and *others*—Defendants—Appellants.

v.

M. Saravana Mudali and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 991 to 1051 of 1915. Decided on 28th February 1917, against decrees of Dist.-Judge., Chingleput, in Appeal Suits Nos. 180 to 185, 187 to 194, 196 197, 199 to 201, 203, 204, 206, 207 to 244 and 246 of 1914.

(a) Grant—Construction—Doctrine of contemporanea exposito—Application of.

The doctrine of contemporanea expesito must be restricted to the acts and conduct of the grantor beginning contemporaneously with the grant and continued for a long course of years and should not be extended to acts and conduct done say, 40 years after the date of grant; 36 *Bom.* 639 (*P. C.*), *Foll.* [P 386 C 1]

(b) Landlord and Tenant—Lease by Government—Covenant by lessee not to do any act which may grow to detriment or annoyance of Government or their tenants—Grantee describing himself as mirasidar and 11 years before lease one lessee recognising right of permanent occupancy in tenant—Covenant could not be construed as giving rights of permanent occupancy—Lessees could not be presumed to have secured advantage which they had to hold for benefit of tenants as their trustees under Trusts Act (1882), S. 90.

Government, which absolutely owned certain lands, leased them to the plaintiffs. On the date of the lease, there were tenants already on the land. One of the terms of the lease which the plaintiffs obtained on renewal (and on which date the tenants claimed permanent rights of occupancy) was that the lessees will not do any act "which may grow to the grievance or damage of the Government of India or the Government of Madras or their tenants." Subsequent to the grant, one of the grantees described himself as a mirasidar in the pattas granted to the tenants and 11 years before the renewed lease one of the lessees recognised the right of permanent occupancy in the tenants and issued pattas in recognition thereof:

Held: that this covenant was the usual one in English indentures creating leases by which the lessor protects himself against the acts of his lessees which might injure other tenants of his, and could not be construed as conferring permanent rights of occupancy on tenants in the occupation of the land. [P 386 C 2]

Held also: that it could not be said in the circumstances of this case that the plaintiffs represented themselves as acting on behalf of these tenants also or ever did represent these tenants when or before they obtained a renewal of the lease from Government and that in such circumstances they could not be presumed to have secured an advantage which they must hold for the benefit of the tenants as trustees under S. 90, Trusts Act. [P 387 C 1]

(c) Transfer of Property Act (1882), S. 43—Land belonging to Government—No question of estoppel or question under S. 43 arises as to interfere with rights of subsequent grantee.

Where land really belongs to Government, no question of estoppel and no question under S. 43, Act 4 of 1882 arise so as to interfere with the rights of the subsequent grantee from the Government. [P 387 C 2]

(d) Landlord and Tenant—Tenancy by estoppel—Creation of.

A tenancy by estoppel cannot be created where the act of the landlord which is relied upon and which created a lesser right than the landlord represented himself to be entitled to create, did confer upon the tenant a right as lessee for some

term, however short: *Weller* v. *Spiers*, (1872) 26 *L. T.* 866, *Foll.* [P 387 C 2]

T. Rangachariar—for Appellants.

S. Srinivasa Aiyangar and *V. V. Srinivasa Aiyangar*—for Respondents.

Sadasiva Aiyar, J.—In these 61 connected second appeals the appellants are the principal defendants in the suits. The suits were brought in ejectment, the appellants being treated as having been subtenants from year to year of persons who owned rights in the lands as grantees of lease rights under the East India Company under a grant of 1801, that grant being a grant of lease rights for 99 years. After that grant expired in January 1900 the plaintiffs became direct lessees of the Government (from the date of the expiry of the prior grant) for another term of 99 years. The prior grant of 1801 is evidenced by the indenture Ex. P. 1, while the new grant of 1904 is evidenced by the indenture Ex. A.

The following facts may be set out to understand the conditions on both sides. The East India Company claimed to be the owners of the lands in dispute in January 1801. It appears from the Chingleput District Manual that in 1760 a grant was made to the East India Company of the Chingleput District by the Nawab Muhammad Ali as a jaghir or estate and that the grant was confirmed in 1768. This word jaghir is a word of very undefined signification, but as regards the particular lands in dispute the East India Company considered themselves to be the owners. Soon after January 1801, the Company became the sovereign power for the territories in which these lands were situated and it is of course absurd to speak of them thereafter as jaghirdars of these lands under themselves or to speak of these lands as a jaghir estate Now the lease of 1801 under Ex. P was made to two European gentlemen, Messrs. Roebuck and Abbutt, who seem to have already (presumably with the Company's permission) almost completed a brick building on a portion of the 300 cawnies of the leased lands and seem to have effected other improvements. The material portions of this document Ex. P are to the following effect:

(1) The lessees and their heirs and assigns etc., were entitled "to have, hold, use, occupy, possess and enjoy the leased lands" "with all the benefits and advantages" at a yearly rent of Rs. 1,575 in consideration of a small premium of five pagodas paid then and the payment of additional premia of Rs. 105 to be paid at the end of every thirty years. (2) The lessees, etc., "shall not do or cause anything to be done upon the leased premises" "which shall grow to the annoyance, grievance or damage of the said Company, their tenants or the inhabitants or their bounds." (3) If the lessees, or their heirs, or assigns, etc., shall commit breach of any of the covenants, the Company may "re-enter" upon the leased premises or any part thereof in the name of the whole" and "have again, possess and enjoy the same." Subsequently, by successive assignments the right under Ex. P —which I shall call grant-ownership— passed in 1816 to a Mudaliar belonging to the well-known Manali family: see Ex. Q. Since then this grant-ownership has remained either with the members of the Manali family or with the members of a family connected with them by marriage: and at the time of the expiry of the lease in January 1900, the grant-ownership was vested in Manali Ramakrishna Mudali, the father of the present plaintiffs.

About the year 1840, the Manali Mudaliar who then owned the grant-right seems to have sold the lands to his brother, claiming not only the grant-ownership right but also the right as mirasidar in the lands. For the first time evidently, about 40 years after the grant, the person representing the original grantees seems to have set up an independent mirasi right in the lands: see Ex. S. Then about the year 1850 or so, this alleged mirasi right in the lands seems to have become the subject of dispute between the grant-owners and their tenants now represented by the defendants. That mirasi right which included the occupancy right in the lands was finally decided to belong to the grant-owners as between them and their tenants: see Exs. D to G. In 1889, however, about 11 years before the expiry of the term of the grant, the tenants seem to have been recognized by the then grant-owner as having occupancy rights in their holdings. These documents of recognition—(the pattas)—have been noted in the footnote at p. 37 of the judgment of the District Munsif. When the term of the grant of 1801 expired in January 1900, the Revenue Officers of the District entered into correspondence with their higher officers as to the proper mode of

the future disposal of these lands. In May 1900 Manali Ramakrishna Mudali applied for the renewal of the lease for another term of 99 years, or, in the alternative, for the grant of a ryotwari patta to him by the Government. The tenants seem, in rivalry, to have applied for the grants of ryotwari pattas to themselves. While these qnestions were being considered, Ramakrishna Mudali died. The present two plaintiffs are his sons and in December 1904 they were granted a renewal lease evidenced by Ex. A.

These suits have been brought in ejectment after the issue of notices to the defendants to quit the lands. The lower Courts decreed the plaintiffs' suits on these two findings of facts, namely, (1) that the East India Company were full owners of the plaint lands (known as Pozhal lines lands) at the time of the grant of 1801 and that the Government were full owners at the time of the second grant of 1904 to the plaintiffs; and (2) that no miras right (whether it means permanent occupancy right or whether it means the peculiar right to some Chingleput mirasidars to swathantharam, kuppatam and other minor perquisites in consideration of their once having been full kudivaram owners)—that no miras right vested either in the grant-owners or in any of their successors or in the tenants (defendants). Now Mr. Rangachariar for the appellants (defendants) contested the validity of the above two findings of fact and he also argued a long array of other contentions which however might be summarised under 2 or 3 heads as follows: —(1) that under the grant A itself of 1904 the Government recognized the occupancy rights of the defendants and that therefore the plaintiffs cannot contest such rights, which they were bound to recognize under the terms of their own grant; (2) that in 1889 there was a contract by the then grant-owner Vythilinga Mudali to transfer the rights of occupancy to the tenants and that there was such a transfer in 1889; and (3) that even if the transfer and the contract of transfer of 1889 conferred no permanent kudivaram right in favour of the defendants (the tenants), they were entitled, after the plaintiffs got the second grant, to claim such occupancy rights (at least during the 99 years' term of the second grant) as against the plaintiffs (a) on the strength of S. 18, Specific Relief Act, or (b) under the provisions of S. 43, T. P. Act, or (c) under S. 90, Trusts Act, or (d) on the doctrine of estoppel.

As regards the first question, namely, whether the East India Company were full owners, the first grantees, viz., the two European gentlemen to whom the Company granted the lease, could not surely deny the title of their landlord who claimed full ownership. Mr. Rangachariar was obliged to argue that even at the time of the grant there were some mirasidars—some unknown people who had occupancy rights in these lands. That is very improbable, as it appears from Ex. B that the lands were waste lands and that it was only the grantees under Ex. P who made improvements and built buildings thereon. We are asked to give no weight to Ex. B on the ground that it contains some mistakes. The lower Courts are entitled to find facts on the evidence including the documentary evidence. The question of the weight to be given to the evidence rests with them, not with us in second appeal. Even if the East India Company were known as jaghirdars in 1801, a jaghirdar might have absolute interests in waste lands and even in cultivated lands, and the presumption which has been adopted in respect of grants of jaghirs by the British Government cannot reasonably be applied to grants made by the Nawabs of the Carnatic.

It also appears to me from the documents contained in Ex. Z that the Government, the tenants, the plaintiff's father all acknowledged the right of the Government to dispose of these lands in their absolute discretion, either by granting ryotwari patta to anybody they liked or by granting a fresh lease. As I have already suggested, even if the East India Company were mere jaghirdars, they became full owners after the territory passed to them by treaty and their grant must be a grant of the right to directly take possession of the soil of the lands as lessees, unless it is shown that somebody else owned the kudivaram rights in the lands in 1801. As regards the alleged mirasi right of others, it was only (as already remarked) about 40 years after the grant that it was first set up and the Government is clearly not bound by what the successors of their grantees stated behind the back of Government. The case of *Raghojirao*

Saheb v. *Lahshmanrao Saheb* (1) relied upon by Mr. Rangachariar has no relevancy. Their Lordships of the Privy Council point out in that case the danger of relying upon the doctrine of contemporanea exposito and restrict the application of the doctrine to the acts and conduct of the grantor, beginning contemporaneously with the grant and continued that for a long course of years. Here we are asked to extend that doctrine to declarations of the grantee's successor made 40 years afterwards behind the back of the grantor. I think that we ought to accept the finding of fact of both the lower Courts that no mirasi right existed in these lands in 1801 in any person other than the East India Company and if none existed then, no such right could have come into existence afterwards which could be set up validly against the Government. It may also be noted here that these lands were carved out of two villages by an artificial line and hence they seem to have become known as Puzhal Line lands. The usual argument that villages in the Chingleput District were formerly miras villages could not therefore be applied to these lands. It is unnecessary to speculate whether this assertion of miras right in 1840 for the first time (thare being no indiction in the assertion itself as to how the miras right was acquired or how it originated) was due to the grantee's anxiety to protect himself against his tenants' setting up occupancy rights in themselves or whether it was due to his intention to claim occupancy rights for his successors against the Government after the expiry of the term of the grant or to both motives. On the findings that the Government owned and own the absolute right in the soil of the lands and that they are not mere melvaramdars, it is unnecessary to consider another contention raised by Mr. Rangachariar that the lands formed part of an unsettled jaghir estate [Cl. 2 (*c*), S. 3, Estates Land Act] and that the tenants occupying lands therein are raiyats in such an estate entitled to permanent occupancy rights from the date when the Estate Lands Act came into force, under S. 6 of the Act. The above disposes of contentions 1 and 2 of Mr. Rangachariar.

As regards the third contention, namely, that the Government itself by Ex. A directed the plaintiffs not to interfere with the occupancy rights of the defendants. This contention is founded upon the following covenant in Ex. A, namely. that the lessees, their heirs, etc., will not do any act,

> "which may grow to the grievance or damage of the Government of India or the Government of Madras or their tenants."

Mr. Rangachariar argued that 'their tenants" meant the tenants of the lands, namely, the defendants. This clause has been taken from the former indenture Ex. P of 1801 where the words are "the damage of the said Company, their tenants or the inhabitants or their bounds." Clearly the expression 'their tenants" in Ex. P means the Company's tenants. The same expression when used in Ex. A clearly means "the tenants of the Government of India or the Government of Madras." This covenant is the usual covenant in English indentures creating leases, by which the lessor protects himself against the acts of his lessees which might injure other tenants of his (i. e., of the lessor) either of the same land or of neighbouring lands, and also against acts of his lessee which might cause nuisance or damage to neighbouring landowners. The 4th contention of Mr. Rangachariar was argued in a rather indefinite way. That is, sometimes he argued that the event of 1889 on which he relied was a contract to transfer rights in lands and at other times as if it was a completed transfer of such rights. I shall consider his contention in both of its aspects. So far as I could find from the written statement (para. 9) the defendants do not set up that there was a contract by Vythilinga Mudaliar to transfer his mirasi or occupancy right to them: Nor do they set up that there was an actual transfer of any such right. A transfer of the permanent occupancy right in immovable property can be made either by a registered instrument or by giving possession if the transfer was an oral transaction of sale. As I said, I cannot find any language in the written statement, which could be treated as asserting a transfer to defendants at that time of an occupancy right. On the other hand, para. 9 says and implies that Vythilinga Mudaliar had not yet got any occupancy right and that the raiyats had occupancy right all along, that that right of theirs had been judicially recognised and that all that

1. (1892) 16 Bom 639=16 I C 259=19 I A 202 (P C).

Vythilinga Mudaliar did was himself to recognise the right which had been in the tenants from the long past. The theory of transfer being thus brushed aside, there is the question of the contract to transfer. Again, I cannot find that there was a contract to transfer any right, set up in the written statement.

It denies that Vythilinga Mudaliar had any right of occupancy which he could contract to transfer. Assuming, however, for argument's sake that there was a contract to transfer, or that there was a transfer, I shall shortly consider the contentions based under the heads (*a*), (*b*), (*c*) and (*d*) already set out. Coming to S 18, Specific Relief Act, it has no application as the defendants do not seek any specific relief in this case based on any such contract, that is, they are not suing for specific performance of the alleged contract of transfer of occupancy rights to last for the second term of 99 years. With regard to S. 43, T. P. Act, that applies to cases where a person erroneously represents that he is authorised to transfer certain rights in immovable property. No such representation is alleged and we are asked to imply such a representation as having been made in 1889. It is impossible, in my opinion, to imply any such representation from the mere fact that in issuing pattas Vythilinga Mudaliar called himself the mirasidar of the land and then acknowledged the tenants' * * * * * * (kaipathu) rights. Coming to S. 90, Trusts Act, it applies to cases where a tenant for life or co-owner or mortgagee or other qualified owner avails himself of his position as such and gains an advantage in derogation of the rights of other persons interested in the property, or where he representing all persons interested in such property gains any advantage. It is impossible from the facts of this case to hold that the plaintiffs represented themselves as acting on behalf of these tenants also or ever did represent these tenants when or before they obtained the renewal. On the date of the renewal of Ex. A, they had themselves ceased to have any interest in the lands. Nor had defendants any rights in the lands on the date when the fresh grant was made. S. 90, Trusts Act, therefore, has no application [see also *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib*(2), where Hannay, J., and myself (myself with some hesitation) held that where a land really belongs to Government, no question of estoppel and no question under S. 43, Act 4 of 1882, arise so as to interfere with the rights of the subsequent grantee from the Government.]

Coming to the question of estoppel, a tenancy by estoppel cannot be created where the act of the landlord which is relied upon (and which created a lesser right than the landlord represented himself to be entitled to create), did confer upon the tenant a right as lessee for some term, however short: see Fox on Landlord and Tenant, p. 473; see also *Weller* v. *Spiers* (3). In result I would dismiss all these second appeals with costs. Pleaders' fees Rs. 15 in each case.

Spencer, J.—I agree.

S.N./R.K. *Appeals dismissed.*

2. (1915) 27 I C 785.

3. (1872) 26 L. T. 866=20 W. R. 772.

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SADASIVA AIYAR, J.

Damodara Shanabhaga —Plaintiff —Petitioner.

v.

Subraya Pai —Defendant —Opposite party

Civil Revn. Petn. No. 653 of 1916, Decided on 17th July 1917, from decree of Dist. Munsif, Karkal, in Small Cause Suit No. 404 of 1915, D/- 15th February 1916.

Contract Act (1872), Ss. 249 and 262—Decree against firm—Payment by one partner—Assignee of such partner cannot maintain suit for contribution.

It cannnot be said to be an invariable rule of law that no suit against a partner can under any circumstances, be maintained for contribution even in respect of a distinct and separate transaction though connected with the partnership business, but in the absence of special circumstances, the rule should not be departed from. [P 388 C 1]

Unless there has been a dissolution of partnership, no suit can be maintained by a partner or his assignee for contribution against the other partners in respect of a partnership debt. 18 *Mad.* 134; 28 *Mad* 344; 29 *I C.* 811 and *Sedgwick* v. *Daniell*, (1857) 157 *E. R.* 132, *Dist*

[P 388 C 1]

Where a decree was obtained against a firm, and one of the partners who was made to pay the whole of the decretal amount transferred his right of contibution against the other partners to a stranger:

Held: that the assignee could not maintain a suit for contribution against the other partners.

[P 388 C 2]

B. Sitaram Rao—for Petitioner.

K. Y. Adiga—for Opposite party

Judgment.—The plaintiff is the petitioner. The plaintiff's assignor, Lakshmana Kamthi, and the defendant were partners in trade. The two partners borrowed money from a stranger for the partnership purposes. A decree was passed against both on 2nd December 1912: see Ex. 6. The plaintiff's assignor alone was arrested and he paid the whole amount (Rs. 66 odd) and he transferred to the plaintiff his alleged right of contribution against the defendant. Hence the plaintiff has brought this suit for obtaining such contribution. The District Munsif dismissed the suit on the ground that, unless there had been a dissolution of partnership between the plaintiff's assignor and the defendant, no claim for contribution could arise between the partners. I do not think that it could be stated that it is an invariable rule of the law that no suit against a partner could, under any circumstances, be maintained for contribution even in respect of a distinct and separate transaction though connected with the partnership business. In *Karri Venkatareddi* v. *Kollu Narasayya* (1) Sir Arnold White, C. J., and Abdur Rahim J., held:

"It has never been a hard and fast rule that the Court will not interfere in a dispute between the partners simply because the dispute relates to a matter connected with the partnership business: and apart from any technical rules relating to the form of action, the grounds for non-interference would seem to be co-extensive with the inability of the Court to give any effective relief, or the inexpediency of giving the relief sought, having regard to the essential characteristics of a contract of partnership and the justice of the case."

In *Beecham* v. *Smith* (2) it was held that if one partner gave to his co-partner a note which bound only the partner who gave it and not the firm, he might be sued by his co-partner theron, whatever the state of the accounts between the two might be and although the bill or note in question had reference to some partnership transaction:

"for, by giving the bill or note, the demand in respect of which it was given was isolated from the general partnership account."

In *Sedgwick* v. *Daniell* (3) it was held that if some of a number of partners gave their promissory note for better securing the payment of a debt owing by them and their co-partners and one of the makers of the note was compelled to pay the whole amount of it, he was entitled to sue each of the other makers of the note for his proportion of the sum so paid. But his right to sue the other partners who did not join in making the note has not been established in the English cases in the absence of special circumstances. In the present case the plaintiff's assignor and the defendant seem to have been the sole partners, and though the plaintiff's assignor was obliged to pay up the whole, I do not think, in the absence of special circumstances, the general rule, that one partner cannot sue another except for the dissolution and the taking of the general accounts of the partnership, need be departed from in this case. I am the more unwilling to do so, because it seems to have been conceded before the District Munsif in the lower Court that if the debt borrowed under the joint promissory note was a partnership debt, the plaintiff's claim was unsustainable: See para. 6 of the judgment. It also appears (see para. 9) that the assignment to the plaintiff was made by his assignor in order to get over the difficulty of himself obtaining a decree against his co-partner. The District Munsif was entitled to infer that, if the partnership accounts were taken between the plaintiff's assignor and the defendant, nothing would probably be due to the plaintiff's assignor even after giving credit in his favour to the amount paid by him in satisfaction of the joint promissory note debt incurred for the partnership purposes and that therefore "the justice of the case" did not require the Court to depart from the usual rule. As for the cases *Subbarayudu* v. *Adinarayudu* (4), *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (5), *Sadhu Narayana Ayyangar* v. *Ramaswami Ayyangar* (6) and *Laban Sardar* v. *Choyen Mallick* (7), it does not appear in the first case that the partnership had not been dissolved before the suit was brought, *Subbarayudu* v. *Adinarayudu* (4) relies on *Sedgwick* v. *Daniell* (3).

The latter was a case (as I have already shown) where only some of the several partners gave a promissory note for an already existing partnership debt. The decision in *Subbarayudu* v. *Adinarayudu* (4)

1. (1909) 32 Mad 76=1 I C 384.
2. (1858) 120 E R 574.
3. (1857) 157 E R 132.
4. (1895) 18 Mad 134.
5. (1905) 28 Mad 344.
6. (1909) 32 Mad 203=3 I C 486.
7. (1915) 29 I C 811.

was again the decision of a single, though very learned, Judge. In *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (5), a suit for a share of partnership assests was brought long after the dissolution, and even in that case, it was laid down that the defendant would be entitled to show that if the general aocounts are taken, the plaintiff would be entitled to nothing. *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar* (6) was also a case which arose after the dessolution of the partnership and it followed *Sokkandha Vannimundar* v. *Sokkanadha Vannimundar* (5). In the present case, the District Munsif finds (see para. 6) that the partnership between the plaintiff's assignor and the defendant has not been dissolved; that is, that it still existed. The jurisdiction of this Court to interfere in revision is a discretionary one, and on this ground also I do not think that this is a fit case under these circumstances for revision. The petition is therefore dismissed with costs.

S.N./R.K. *Petition dismissed.*

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SPENCER AND SRINIVASA AIYANGAR, JJ.

Parvathammal—Petitioner.

v.

Chokalinga Chetty—Opposite Party.

Civil Revn. Petn. No. 181 of 1916, Decided on 26th April 1917, from order of Dist. Judge, Salem, in Revn. Execn. Petn. No. 14 of 1914.

Guardians and Wards Act (8 of 1890), S. 34 (e)—Order passed against guardian under S. 34 (e) is not executable—Civil P. C. (1908), S. 2 (14).

Under S. 34 (e), Guardians and Wards Act, the District Court directed the guardian appointed by Court for the estate of a minor female to pay the sum of Rs. 1,600 to the guardian of the person of the minor step-daughter of the aforesaid minor for her marriage expenses. The money was not so paid. The ward attained majority and obtained possession of the property. The step-daughter's guardian applied for execution of the order passed by the District Court as a decree of Court:

Held: that the order was not one contemplated by S. 2 (14), Civil P. C., and could not be executed under the provisions of that Code, the proper remedy being by a suit: 36 *Mad.* 39, *Foll.*

[P 390 C 1]

T. M. Vedantam and *C. Pattabirama Aiyangar*—for Petitioner.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* — for Opposite Party.

Spencer, J.—One Anganna Chetti had three wives. At his death he left surviving him a daughter by his first wife, named Thayammal and Parvathammal, his third wife. Application was made to the District Court of Salem to appoint a guardian for the estate of Parvathammal. As the result of a razinama put in by the contending parties, it was arranged that Chokkalinga Chetti should be guardian of Thayammal. Subsequently, Gurunatha Chetti was appointed by Court guardian of the person and property of the minor Parvathammal, he being her own father. In 1908 an application was made to the Court to allot a sum of money for the marriage expenses of the minor Thayammal. The District Judge, after considering all the circumstances of the case, fixed Rs. 1,600 as a proper sum to be paid out of the estate for the said marriage, and on appeal to this Court, the order was confirmed. Parvathammal has now attained majority and her guardian Gurunatha Chetti has been discharged. Chokkalinga Chetti now seeks to have the order directing the minor's guardian to pay Rs. 1,600 for the marriage expenses of Thayammal, executed under the Civil Procedure Code by attachment and sale of the property of Parvathammal and the District Judge has made an order accordingly.

Objection has been taken in appeal that the Court was not competent to pass an order of this kind, as though it was an order passed between parties in execution orders passed under the Guardians and Wards Act, being by way of administrative directions to the guardian. Under S. 34, Guardians and Wards Act, a guardian may apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of the persons dependent on him may be a party, such portion of the income of the property of the ward as the Court may direct to be employed for that purpose. But this Act contains no provision for the execution of such orders as decrees of the Court. It is, however, sought to justify the District Judge's order by a reference to S. 36, Civil P. C. That section says:

"The provisions of this Code relating to the execution of decrees shall so far as they are applicable, be deemed to apply to the execution of orders"

and an "order" has been defined in S. 2 (14), Civil P. C., as

"the formal expression of any decision of a civil Court which is not a decree."

I do not think that the order passed by the District Judge in 1908 was such an order as is contemplated in this section. Moreover the order was one intended to be obeyed by the guardian appointed by the Court and to relate to the property of the minor who was a ward of Court. There is now no guardian and no minor. It is therefore not possible to execute it against Parvathammal, who has now become a major, without allowing her an opportunity to contest the order in her own right. In *Komma Somakka* v. *Kodidala Pedda Ramiah* (1), to which I was a party it was pointed out by Abdur Rahim, J., that the Guardians and Wards Act does not provide any machinery for deciding upon and enforcing claims of third parties for or against a ward, as those are left to be regulated by ordinary proceedings by suits. We decided that an order purporting to be made under the Guardians and Wards Act could not be enforced as a decree passed in a suit. Secondly, an attempt has been made to justify the order by relying on the fact that notice was given to Parvathammal of the application and that she did not object that the Court had no jurisdiction. In *Komma Somakka* v. *Kodidala Pedda Ramiah* (1), that point also was considered, but there the respondent's pleader did not attempt to argue that if the Court did make an order without jurisdiction altogether, any waiver of objection or consent on the part of a party would make it valid. I am clearly of opinion that if there is an initial absence of jurisdiction, the conduct of the parties cannot validate an order passed without such jurisdiction.

Lastly, it is suggested that justice does not require the order to be set aside, that it is an order held by three Courts to be a fair one, and, therefore, that we should not interfere in revision. In the previous proceedings, Parvathammal was represented by her guardian Gurunatha Chetti who has since been discharged. She has had no opportunity of raising any contention as to her personal liability to pay the sum now sought to be recovered, the order in that case being one of the nature of a direction to the guardian appointed by Court. It is thus an open question whether Parvathammal should justly be made to pay the sum. I therefore consider that the order under appeal was one that the Court was not competent to pass and it should be set aside with costs here and in the lower Court.

1. (1913) 36 Mad 39=13 I C 251.

Srinivasa Aiyangar, J.—I agree. The facts of the case have been fully stated in the judgment just delivered. The order that was passed In favour of Chokkalinga Chetti on behalf of the minor girl Thayammal in the guardianship matter of Parvathammal was in these terms:

"I accordingly direct that the respondent (i. e., Gurunatha Chetti) pay this amount (viz , Rupees 1,600) to the petitioner (i. e., Chokkalinga Chetti)."

This order was passed under S. 34, Cl. (e), Guardians and Wards Act, under which a Court may direct a guardian to apply the income of the property or if the Court so directs the whole of the property for, among other things, the celebration of the ceremonies of any person who is dependent on a ward. This is in the nature of a direction to the guardian, over whom the Court has control, to pay a certain sum of money out of the funds of the minor in discharge of the liability of the minor's estate. If this is obeyed by the guardian, that would be, so far as between himself and the minor, a good payment, and to that extent the guardian will be discharged of his liability to account for that sum. But this does not in my opinion, give any right to the person, to whom the money is directed to be paid, to enforce it as if there was a decree in his favour. The order as a matter of fact, does not purport to adjudicate upon the relative claims of the minor and the person who seeks to enforce the liability against the minor's estate. If, for example, a person calling himself a creditor of the minor's estate applies to the Court for a direction to the guardian to discharge that debt, and if on inquiry the Court comes to the conclusion that the liability is subsisting, and the debt is payable out of the minor's estate, and makes an order to pay that debt, still I conceive that the minor would be entitled to challenge the order or the amount of debt so directed to be paid. That is the nature of the order and I think there was nothing to execute. It was quite competent to the person in whose favour this order was made to go to the Court which had jurisdiction in the guardianship matter and ask for a direction that the guardian should pay the money or the income of

the minor's estate in his hands into Court and if he gets such an order, the Court will be competent to pay the money on behalf of the guardian or of the minor to the person so entitled. But I do not think that this so-called order can be executed as if it was a decree. In this case, as has been pointed out, the guardian has been discharged and the minor has been allowed to take possession of her property.

One argument which was advanced by Mr. Krishnaswami Ayyar is that at the time the guardian was discharged, in view apparently of some objection by the guardian with reference to this order for payment of Rs. 1,600 which he had not obeyed, there was an undertaking by Parvathammal who had then attained majority that she would pay this sum. That undertaking evidently was given in order that the guardian may be free from all liability with reference to this matter, But that to my mind, does not by itself, impose any liability on the minor, for it is not shown that that undertaking was given to or that agreement was made with Chokkalinga Chetti on behalf of Thayammal. The next objection taken is, there having been notice to Parvathammal of an application made to execute this order and there having been an order for attachment, that order is res judicata and binding on her. But it is clear that she is entitled to raise the question that the order cannot be executed at all, in that it is not an order within the meaning of S. 36, Civil P. C. I do not think there is any substance in the contention, and further it was quite open to the Court which previously passed the order, on objection made at a later stage, to vacate the previous order, if it came to the conclusion that that order was ultra vires, as I think it was in this case. I do not wish to add anything with regard to the last contention of the learned pleader, viz., that in this case we ought not to interfere in the interests of justice, for we do not know whether the order directing Rs. 1,600 to be paid out of the minor's estate is just or unjust.

S.N./R.K. *Petition allowed.*

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* A. I. R. 1918 Madras 391
Full Bench

AYLING, SESHAGIRI AIYAR AND BAKEWELL, JJ.

(*Kasaribada*) *Venkatachelapatirao* — Decree-holder—Appellant.

v.

(*Maddipatla*) *Kameswaramma*—Judgment-debtor—Respondent.

Appeal No. 128 of 1916, Decided on 19th September 1917, against appellate order of Temporary Sub-Judge, Kistna, in Appeal Suit No. 118 of 1915

*** Civil P. C. (1908), O. 41, R. 5—Stay of execution by appellate Court—Steps taken by lower Court before communication are valid.**

An order of an appellate Court staying execution is in the nature of a prohibitory order to the lower Court which becomes effective only on communication. Till it is communicated, steps in execution taken by the lower Court must be treated as legally valid: 32 *Cal* 927, *Diss. from*; 1 *C W N* 226 and 33 *Mad* 74, *Foll.* [P 392 C 2]

Per *Seshagiri Aiyar, J.*—A Court exercising jurisdiction which is conferred on it in express terms cannot be regarded as having been deprived of it, unless a superior authority informs it that that has been done. [P 393 C 1]

V. Ramesam—for Appellant.

P. Narayanamurty—for Respondent.

Order of Reference.

Abdur Rahim and Bakewell, JJ.—In this case the appellant decree-holder obtained an order of attachment of certain properties of the judgment debtor on 14th March 1914 and attachment was actually carried out on 17th March. It appears that the judgment-debtor, who had filed an appeal against the decree, made an application for stay of execution and obtained an interim order staying execution till the disposal of the appeal, on 13th March 1914. This order was finally vacated on 15th April, the judgment-debtor having failed to furnish security as required by the appellate Court. In the meantime, that is, after the order for interim stay was passed, and before that order was set aside, the judgment-debtor sold the property to a third person. The question that we have been asked to consider in the appeal is, whether the order of attachment of 14th March has any effect so as to affect the alienation subsequently made by the judgment-debtor or whether the attachment must be held to be ultra vires and ineffectual because of the fact that the appellate Court had made an interim order of stay previous to the date of attachment, though it was not communicated to the Court that

passed the order of attachment and the decree-holder had no knowledge of it at the time he made the application.

The question, so far as the principle involved is concerned, was decided by a Bench of this Court in a case reported as *Muthu Kumaraswami Rowthan* v. *Kuppuswami Aiyangar* (1), where it was laid down, accepting the view of the law laid down by the Calcutta High Court in *Besseswari Chowdhurani* v. *Horro Sundar Mozumdar* (2), that an order of the appellate Court granting interim stay does not operate so as to suspend proceedings in execution before the first Court before the date of its communication to the latter Court. The learned Judges had before them another ruling of the Calcutta High Court in *Hukum Chand Baid* v. *Kamalanand Singh* (3) which was to the contrary effect, but they preferred the view expressed in *Bessesswari Chowdhurani* v. *Horro Sundar Mozumdar* (2). In a subsequent case in this Court reported as *Ramanathan Chetty* v. *Arunachallam Chetty* (4), the same question came up for consideration before Sadasiva Aiyar and Spencer, JJ. Sadasiva Aiyar, J., expressly dissented from the decision in *Muthu Kumaraswami Rowthan* v. *Kuppuswami Aiyangar* (1) and Spencer, J., also seemed to be inclined to the same opinion, though he thought that the case in *Muthu Kumaraswami Rawthan* v. *Kuppuswami Aiyangar* (1) might be distinguished from the case which he had to deal with. We are inclined to agree with the earlier ruling of this Court in *Muthu Kumaraswami Rowthan* v. *Kuppuswami Aiyangar* (1). We think that it is ordinarily the duty of a Division Bench to follow on a pure question of law a previous ruling of another Division Bench, unless it is of opinion that that ruling is wrong, in which case the proper course is to refer the question to a Full Bench so that the law on the point may be conconclusively ascertained so far as this High Court is concerned. Having regard however to the fact that dissent has been expressed by Sadasiva Aiyar, J., and also by Spencer, J., from the view of the law expressed in *Muthu Kumarasuamt Rowthan* v. *Kuppuswami Aiyangar* (1), it is necessary that the question involved which is one of importance should be settled by a Full Bench.

The Court which passed the decree has full jurisdiction to proceed with its execution until its hands are stayed by the order of the appellate Court, and it is difficult to see how that Court, if a proper application for execution is made to it, could refuse the application until the order of the appellate Court granting stay of execution has been communicated to it. There can be no doubt that an order for prohibitory injunction, so far as it affects the question of the validity of any act of the party against whom it is made does not come into operation until it is communicated to him. The Civil Procedure Code expressly lays down that the mere preferring of an appeal will not operate to stay execution. It seems to follow that until the first Court receives the order of the appellate Court staying execution, it is bound to proceed to execute the decree on proper application being made to it by the judgment-debtor. It is then difficult to conceive how an order, which the Court of first instance was bound by law to pass, could be said to be made without authority. The grounds of convenience seem also to preponderate against the opposite view. The question which we refer to the Full Bench is: Where subsequent to an interim order for stay of execution made by the appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order for attachment has been made by the latter Court, is the order of attachment void and ineffectual as having been made without jurisdiction?

Opinion

Ayling, J.—With all respect to the views of the learned Judges in *Hakum Chand Baid* v. *Kamalanand Singh* (3), I prefer to follow the reasoning of an earlier Bench of the same Court, *Bissesswari Chowdhurani* v. *Horro Sundar Mozumdar* (2), which has been adopted by this Court in *Muthu Kumaraswami Rowthan* v. *Kuppuswami Aiyangar* (1). I regard an order of an appellate Court staying execution as in the nature of a prohibitory order to the lower Court which becomes effective only on communication. Till it is communicated, steps in execution taken by the lower Court must be

1. (1910) 33 Mad 74=3 I C 82.
2. (1897) 1 C W N. 226.
3. (1905) 33 Cal 927.
4. A I R 1914 Mad 261=38 Mad 766=22 I C 99.

treated as legally valid. I would answer the reference in the negative.

Seshagiri Aiyar, J.—Notwithstanding the high regard I entertain for the opinions of the two learned Judges who decided *Hukum Chand Baid* v. *Kamalanand Singh* (3) and to the opinion of Sadasiva Aiyar, J., I am unable to agree with their conclusions. In my opinion, sufficient attention has not been paid by those learned Judges to the provisions of O. 41, R. 5. The legislature has enacted by that rule that the Court of first instance still retains jurisdiction to order execution notwithstanding the fact that an appeal has been preferred against its decision. That power can only be taken away by some communication made to it by the Court to which it is subordinate and in which an appeal has been preferred. A Court exercising jurisdiction which is conferred on it in express terms, cannot be regarded as having been deprived of it unless the superior authority informs it that that has been done. This principle of jurisprudence should not be departed from unless there is any legislative provision to the contrary. As regards the citation of the American authorities, I wish to point out that it appears from what is said in Spilling on Injunction, Vol. 2, S. 1713, that the preferring of an appeal operates in some of the States to suspend the powers of the Court beiow. In that view, it may be justifiable to hold that the lower Court need not be informed of the action taken by the Court of appeal. I agree in holding that *Muthu Kumaraswami Rowthan* v. *Kuppuswami Aiyangar* (1) was rightly decided. My answer to the reference is in the negative.

Bakewell, J.—I agree with Ayling, J.

S.N./R.K. *Reference answered in the negative.*

A. I. R. 1918 Madras 393

WALLIS, C. J. AND OLDFIELD, J.

C. Streeramulu Naidu—Plaintiff—Appellant.

v.

T. Ramaswami Mudaliar and *others*—Defendants—Respondents.

Original Side Appeal No. 38 of 1916, Decided on 28th March 1917.

(a) Registration Act (1908), Ss. 17 and 49—Receipt for advance of rent containing terms of lease and description capable of identification is agreement to lease and if unregistered is inadmissible in suit for specific performance—Evidence Act S. 91.

If a document which purports to be a receipt for money paid as advance for rent contains the terms of the lease and a sufficient description of the demised premises to be capable of identification it is an agreement to grant a lease and if unregistered, is inadmissible in evidence in a suit for specific performance of the agreement or for damages for breach of the covenants contained therein. [P 394 C 1]

It is not uncommon In India for agreements to sell or to lease to take the form of a receipt for a deposit on account of purchase-money or of an advance for rent. [P 393 C 2, P 394 C 1]

In deciding whether a document amounts to an agreement to lease the substance rather than the form of the document should be regarded. [P 393 C 2]

An unregistered document was in the following terms: "Received advance from *S.* or order Rs. 100 for giving 1-3/4 lease of land of *R* after the expiry of the present lease, rent at Rs. 3/8 a month." In a suit for specific performance of the agreement:

Held: that the document was an agreement to grant a lease and being unregistered was inadmissible in evidence in a suit for specific performance thereof or in a claim for damages arising out of the contract. [P 394 C 1]

(b) Evidence Act (1872), S. 91—Scope.

The agreement being inadmissible any other evidence of the agreement to lease cannot be tendered under Evidence Act S. 91. 35 *Mad.* 63, and 17 *Mad.* 456, *Foll.* [P 393 C 2]

C. V. Ananthakrishna Aiyar and *P. V. Ramachandra Raju*—for Appellant.

V. V. Srinivasa Aiyangar, *S. Ponnuswamy Iyer* and *Mahomed Ibrahim Sahib*—for Respondents.

Wallis, C. J.—This is an appeal from a judgment of Coutts-Trotter, J., in an action for specific performance, dismissing the plaintiff's suit witout calling on the defendant. Mr. C. V. Ananthakrishna Aiyar has argued that the evideuce for the plaintiff made out a prima facie case. On the other hand Mr. V. V. Srinivasa Aiyangar for respondent 2, has contended that the learned Judge was wrong in admitting as evidence Ex. A, which he contended is an unregistered agreement for a lease and inadmissible for want of registration. He also argued that as in it the terms of the contract between the parties have been reduced to writing no other evidence can be given of the contract under S 91, Evidence Act. We are of opinion that these contentions must be upheld As regards the question whether Ex. A amounts to an agreement for a lease we think that the substance rather than the form of the document must be regarded. It is not at all uncommon in this

country for agreements to sell or to lease to take the form of a receipt for a deposit on account of purchase-money or of an advance for rent. Agremeents which took the from of a receipt have been held inadmissible in *Narayanan Chetty* v. *Muthiah Servai* (1) and *Sreekisan Pithy* v. *Kota Namalwarayya* (2). Ex. A is in the following terms:

"Received advance from C. Streeramulu Naidu or order Rs. 100 only for giving 1-3/4 lease (which is explained by the evidence as a lease of 1-3/4 grounds) land of Mr. Rajagopalachariar after the expiry of the present lease to him for 25 years; rent at Rs. 3/8 amonth."

The demised premises appear to be sufficiently capable of identification and the term and the rent are also mentioned. On the whole, we have come to the conclusion that though in the form of a receipt, this document Ex. A embodies the terms of an agreement to grant a lease on the terms therein mentioned, in addition to a receipt for a deposit of Rs. 100 as advance on account of rent. According to the decision of the Full Bench in *Narayanan Chetty* v. *Muthiah Servai* (1), an unregistered agreement for a lease is inadmissible in a suit for specific performance. It has been argued by Mr. Ananthakrishna Aiyar that that decision is not only opposed to a decision of an earlier Full Bench in *Rajah of Venkatagiri* v. *Narayana Reddi* (3), but also to the view which had been taken in some other Courts as in *Hemanta Kumari Debi* v. *Midnapur Zemindari Co. Ltd.* (4). That decision however has now stood for nearly 7 years and we think must be taken as settling the question so far as this Court is concerned, and we are not prepared to re-agitate the question by a further reference to a Full Bench. If this be the case it follows that S. 91, Evidence Act, forbids any other evidence being given of the agreement to lease which is sued upon. That disposes of the claim for specific performance.

Mr. C. V. Ananthakrishna Aiyar, however has raised another objection and has argued that although under the decision of the Full Bench in *Narayanan Chetty* v. *Muthiah Servai* (1), the plaintiff is precluded from obtaining specific performance for want of a registered agreement, he still has his right to damages and he has relied upon the decision of the earlier Full Bench in *Rajah of Venkatagiri* v. *Narayana Reddi* (3), which no doubt is expressly to that effect. After very carefully considering the question we think that the contrary view necessarily follows from the view taken by the more recent Full Bench in *Narayanan Chetty* v. *Muthiah Servai* (1), and that if the view taken by that Full Bench is to be accepted as regards suits for specific performance the necessary consequences should be accepted as regards suits for damages. S. 49, Registration Act, prohibits the document from being received "as evidence of a transaction affecting immovable property." The transaction affecting the property, if it does not affect it is the agreement to lease. Therefore the section in this view prohibits the document from being given in evidence of the agreement to lease and it seems to us that it prohibits it equally whether the claim be for specific performance or for damages. It appears to be the logical result that the claim for damages must also fail, if the view taken by the more recent Full Bench be adhered to and as I have already said, we are not prepared to re-open that question. In the result the appeal fails and will be dismissed with costs of respondent 2.

Oldfield, J.—I should like to add that the question of admissibility of a document such as Ex. A, ought in my opinion to be dealt with according as it is or is not the record which the parties may be supposed to have prepared for future use in case it should be necessary to ascertain the terms of the agreement between them and that the circumstances in each case will therefore be to some extent material. Here we find that Ex. A is propounded by plaintiff as having been passed to him when the agreement on which he now sues was made. It was passed directly as a receipt for the advance which was paid under that agreement. But it does also contain a full record of the terms of the agreement and it seems to me that in the circumstances it was meant for future use as a record for such terms and that the case is therefore one in which the document must be taken as embodying the agreement and must be registered. In those circumstances it seems to me that being unregistered it is inadmissible. On the other point I entirely agree.

S.N./R.K. *Appeal dismissed.*

1. (1912) 35 Mad 63=8 I C 520.
2. (1915) 29 I C 246.
3. (1894) 17 Mad 456.
4. (1915) 28 I C 879.

A. I. R. 1918 Madras 395

ABDUR RAHIM AND OLDFIELD, JJ.

Aiyavier—Defendant—Appellant.

v.

Subramania Iyer and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1271 of 1915, Decided on 9th January 1917, against decree of Sub-Judge, Kumbakonam, in Appeal Suit No. 325 of 1914.

(a) Hindu Law — Partition — Father can partition property although sons are dead and only grandsons are living—Partition must be equal and fair.

The right of a father to partition family property between himself and his sons and their sons includes the right to make such partition when the sons are dead and the grandsons are living. A partition at the will of the father or grandfather can only be valid if it is equal and fair : 2 *Mad* 317 and 36 *I C* 507, *Foll.*

[P 396 C 1]

(b) Hindu Law—Alienation—Coparcener—Property converted into tenancy-in-common—Member can dispose of his share by gift.

Ordinarily a co-parcener cannot make a gift of his undivided share ; but once the co-parcenary is converted into a tenancy in common by means of a partition, there is no bar to a member of the family disposing of his share by gift and it can make no difference in law that both the partition and gift were effected by means of one and the same instrument : 7 *Mad* 357 and 11 *Mad* 246, *Foll.*

[P 395 C 2 ; P 396 C 1]

(c) Contract Act (1872), Ss. 20, 21 and 22—Execution of document on mistaken assumption which bears only on motive inducing execution, does not amount to "mistake as to rights."

The execution of a document by a person on a mistaken assumption which bears only the motive which induced the execution, does not amount to "a mistake as to his rights" which would justify a Court in passing a decree for its cancellation.

[P 395 C 2]

T. V. Muthukrishna Aiyar and *K. S. Jayarama Aiyar*—for Appellant.

T. Rangachariar and *G. S. Ramachandra Aiyar*—for Respondents.

Abdur Rahim, J.—Defendant 3 who died since the institution of the suit at the age of about 92, was the grandfather of the plaintiffs, respondents 1 and 2, and divided brother of defendant 1's father. He purported to make a settlement of the family property on 16th May 1911 by Ex. A, and the question under litigation was how far, if at all, it was valid and binding. Both the Courts have found that the settlement was not brought about by the exercise of fraud or undue influence on the part of defendant 1, and I am unable to say that the finding is vitiated in law as contended for respondents 1 and 2 by the onus of proof being wrongly laid on them. The finding was arrived at on a consideration of all the circumstances and the evidence bearing on the point, and we are not at liberty to re-open it in second appeal. The Subordinate Judge however held that the settlement was validly revoked by defendant 3 by Ex. B, inasmuch as according to him defendant 3 had executed Ex. A under a mistaken notion that the plaintiffs were not of sound mind.

Exhibit B had been executed, not as the Subordinate Judge wrongly imagined after the institution of the suit, but before it and it was under this mistake as to its date that he raised an additional issue and called for a finding upon the effect of the deed of revocation. It is undoubtedly strange that the plaintiffs should not have relied upon the alleged revocation in the plaint itself and it is also remarkable that defendant 3 should not have joined as a plaintiff in getting the deed of settlement set aside, if the allegations of the plaintiffs were well founded. However that may be, even granting that the plaintiffs were not in fact of unsound mind as stated in Ex. A, that in itself would not be sufficient in law to invalidate the settlement. Apart from any question as to whether defendant 3 at the time he executed the deed, understood the nature of his act,—which plea so far as it was raised at the trial has been negatived—the mistaken assumption only bears upon the motive which induced defendant 3 to execute Ex. A, and does not amount to a mistake as to his rights which would justify the Court in passing a decree for its cancellation.

It is clear from the provisions of Ex. A by which defendant 3 sought to make a complete partition of the family properties, allotting to himself and the plaintiffs the shares to which they were respectively entitled, that he intended to create a division of status and property. That being so, there can be little doubt that the settlement which he sought to make of his own share was valid in law. It is undoubtedly settled law that a coparcener cannot make a gift of his undivided share [see *Baba* v. *Timma* (1) *Ramanna* v. *Venkata* (2)]. But once the co-parcenary is converted into tenancy-in-common, there is no bar to a member of the family disposing of his share by gift and it can make no difference in law that both the

1. (1884) 7 Mad 357.
2. (1888) 11 Mad 246.

partition and gift were effected by means of one and the same instrument. But the settlement under Ex. A is of specific properties (in Sch. A), which defendant 3 reserved to himself for his share. That a Hindu father can partition the family property between himself and his sons is well established in this Presidency: [see *Kandasami* v. *Doraisami Ayyar* (3) and *Murugayya* v. *Palaniyandi* (4)]. It is hardly disputed that the fact there are grandsons can be no bar to the exercise of his rights ; for the grandsons' right is to stand in the shoes of their father. The question then arises, should the death of the son make any difference. There is no express decision on this point. but it is difficult to see why it should. The right of a father to partition family property between himself and his sons and their sons would seem to include the right to make such partition when the sons are dead and grandsons alone are living. A partition at the will of the father or grandfather can only be valid if it is equal and fair. In this case, there can be no doubt that it was so, as was conceded before the District Munsif and is amply clear from the facts.

The Subordinate Judge's judgment must be set aside and the decree of the District Munsif restored with costs here and in the Court below.

Oldfield, J.—I entirely agree, and only wish to add a few words regarding the scheme of the settlement, Ex. A, and Mr. T. Rangachariar's argument from its terms. It no doubt begins with a statement that the plaintiffs have lost their right to the settlor's properties because they are of unsound mind. But, looking to the fact that it was apparently drafted without legal advice and to the clear statements contained in its later provisions, I find no difficulty in holding that the settlor's intention was to make a partition, the reference to plaintiff's incapacity having no effect, except that their shares were vested during its continuance in defendant 1 for their benefit. As they were never really incapable, that and the further provisions for defendant 1's reversionary interest never took and never could have taken effect. Ex. A being essentially an expression of intention to adopt a divided status, my learned brother's conclusion follows, that the gift of the settlor's share to defendant 1 is valid, notwithstanding that it is contained in the same document. I therefore concur in the decree proposed.

S N /R.K. *Appeal allowed.*

3. (1878-80) 2 Mad 317.
4. (1916) 36 I C 507.

A. I. R. 1918 Madras 396

SESHAGIRI AIYAR AND BAKEWELL, JJ.

T. K. K. N. Ramakrishna Kadirvelusami Naicker and *another*—Appellants.

v.

Eastern Dovelopment Corporation Ltd. London and *others*—Respondents.

Civil Misc. Appeals Nos. 173 of 1914 and 353 of 1913, Decided on 26th March 1917, against order of Dist. Judge, Madura, in E. P. R. No. 7 of 1913

(a) Limitation Act (1908), Art. 182—Execution application seeking relief not granted by decree is not an accordance with law.

An application for execution of a decree which prays for a relief not granted by the decree, is not an application in accordance with law and cannot be treated as a 'step in aid of execution' so as to save the bar of limitation [P 397 C 2]

Where no personal decree is passed in a mortgage suit an application in execution praying for the attachment of non-mortgaged properties is not covered by Cls (5) and (6), Art. 185, Sch. 1, Lim. Act: 33 *Cal.* 867 and 13 *Bom.* 237, *Foll.*; *A. I. R.* 1914 *Mad* 663 *Dist* P 398 C 1]

(b) Contract Act (1872), Ss. 212 and 215—Inchoate contract which, if completed, would bar execution of decree, does not operate as bar to execution.

An inchoate contract, whfch, if completed would bar execution of a decree, cannot be pleaded as a bar to execution and the judgment-debtor cannot claim that the contract should be completed and then be invoked in bar of execution. [P 397 C 2]

A zamindari property was subject to two mortgages, one in favour of *B* and another in favour of *C*. *D* entered into an arrangement with *A*, the zamindar, to take the zamindari on long lease and pay up the two mortgages. The agreement was not completed. *D*, subsequently, obtained a transfer of the two mortgage decrees in favour of *B* and *C* and applied for execution. *A* pleaded the agreement entered into with *D* against the execution.

Held: that the inchoate agreement did not operate as a bar to execution: 19 *Mad* 230, *Dist.* P 397 C 2]

T. Rangachariar, *T. R. Venkatrama Sastriar*, *N. Rajagopalachariar* and *A Srirangachariar*—for Appellants.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastriar*—for Respondents.

In A. A. O. No. 173 *of* 1914.

Judgment.—The District Judge has disposed of the applications on the affidavits. In a case of such magnitude, it would have been better, if the evidence

tendered by the counter-petitioner had been taken. However, we think, these appeals can be disposed of on the admitted facts contained in the affidavits filed. The decree was passed on appeal by the High Court on 30th November 1905. The plaintiffs were the puisne mortgagees, defendant 1 was the mortgagor and defendants 2 and 3 were the first mortgagees. The decree provided that the sale-proceeds shall be applied in a particular manner. Various attempts were made by the two mortgagees to execute the decree until 1910. In that year, one Mr. Rosher opened negotiations with the mother and guardian of the legal representative of the deceased judgment-debtor, defendant 1, with a view to purchasing or obtaining a long lease of the mortgaged property. One of the conditions agreed upon was that the transferee should purchase the decree rights of the two mortgagees and that he should take credit only for the actual sum that he paid to them, and not for the full amount of the decree. It is said that Mr. Rosher opened negotiations with the mortgagees after entering into preliminary agreements with the guardian. We advisedly do not desire to refer to these agreements in detail, as the exact relationship created by the agreements has not been investigated. Upon one question, however, both the parties are agreed. On 29th April 1912, Mr. Rosher informed the guardian that he was not willing to treat with her for the transfer of the zamindari. It was after this date, that he obtained the transfer of the rights of both the mortgagees under the decree. He applied for execution as the transferee decree-holder. His applications were opposed on the ground that the transfers were really for the benefit of the judgment-debtor and that consequently execution should not be allowed to proceed.

The District Judge allowed execution, overruling this objection. Two appeals have been preferred against his order. The appeal against the order permitting execution of the decree in favour of the first mortgagees may be first disposed of. Mr. Rangachariar contended that as the decree was transferred after agreements were entered into between the guardian and Mr. Rosher, the latter became a trustee for the jndgment-debtor and that the transferee should not be allowed to reap a benefit which he has fraudulently secured for himself. S. 88, Trusts Act, and Ss. 212 and 215, Contract Act, were relied on. We do not think these sections have any bearing on the present case. There has been no completed contract between the parties. Till that stage is reached the relationship of decree holder and judgment debtor subsists between them. Consequently, under O. 21, R. 2, execution could be prevented only, if there had been payment or adjustment. As none of them is pleaded, we fail to see what answer can there be to the execution application. An inchoate contract would not give the judgment-debtor a right to plead against execution that this contract should be completed and that he should then be permitted to plead that the transferee was only his alias and has no locus standi. In *Rama Ayyan* v. *Srecnivasa Patter* (1) and other cases there was a completed contract. Whatever may be the appellant's rights to claim specific performance and other remedies in a suit, they cannot avail him in execution. We must, therefore, hold that the District Judge was right and dismiss the appeal with costs.

In A. A. O. No. 353 of 1913.

The above conclusion is applicable also to the execution application presented on behalf of the second mortgagees. A further point was raised by Mr. T. Rangachariar in this case. The learned vakil contended that the application of 26th February 1911, which was relied on to save limitation, would not really assist the decree-holders. In that application, there was a prayer that properties other than those mortgaged should be attached and sold. Mr. A Krishnaswami Aiyar admitted that at that time no personal decree was passed in favour of the second mortgagees. Consequently the relief asked for could not have been granted; but the learned vakil contended that if an application in form complies with the requirements of the Code, the question whether the relief claimed is capable of being granted or not does not affect the validity of the application as being in accordance with law. We are unable to agree with this contention. Under the Limitation Act, the application must be one to execute a decree; but if that decree is non-existent, there can be no application in accordance with law. We are

1. (1896) 19 Mad 230.

unable to hold that the nature of the relief is immaterial, so long as the tabular form is properly filled up. We are in agreement with the view taken in *Purna Chandra Mandal* v. *Radha Nath Das* (2) and *Pandarinath Bapuji* v. *Lilachand Hatibhai* (3). *Varadiah* v. *Rajakumara Venkata Perumal* (4) proceeds on the view that the application which saved limitation was effective in some respects. As regards Civil Miscellaneous Second Appeal No. 22 of 1915 we are not in possession of all the facts which induced the learned Judges to take the the view they have taken. We must, therefore, hold that the view taken by the District Judge is not right. Mr. A. Krishnaswami Aiyar has asked us to decide that the application made by the first mortgagees seved limitation in favour of the second mortgagees.

Mr. T. Rangachariar objects to our looking into those applications. We think that the question should be decided by the lower Court after placing on record such of the records as may be tendered for the purpose as evidence. We reverse the order of the Subordinate Judge and transfer the application to the District Judge of Madura for disposal in the light of the above observations. The appellant is entitled to his costs in this Court. Costs in the lower Court will be provided for in the revised order.

S.N./R.K. *Order accordingly.*

2. (1906) 33 Cal 867.
3. (1889) 13 Bom 237.
4. A I R 1914 Mad 663=21 I C 782.

A. I. R. 1918 Madras 398

SADASIVA AIYAR, J.

Nallasivan Pillai—Petitioner.

v.

N. Ramalingam Pillai — Opposite Party.

Civil Revn. Petn. No. 1111 of 1916, Decided on 23rd February 1917, from order of Dist. Judge, Tinnevelly.

(a) Criminal P. C. (1898), S. 476— Judicial proceeding—Inquiry by Court without jurisdiction — Prosecution for perjury during inquiry is not legal.

Dubitante—A Court making an inquiry without jurisdiction is not competent to pass an order, under S. 476, Criminal P. C., for the prosecution of a witness for perjury committed during the course of such inquiry, even though the Court honestly believed it had jurisdiction and the parties did not object to it, inasmuch as the proceedings in the inquiry are not "judicial proceedings. [P 399 C 2; P 400 C 1]

(b) Criminal P. C. (1898), S. 476— "Judicial proceeding" defined.

A proceeding before a Court of Justice acting in the administration of justice is a "judicial proceeding". [P 399 C 1]

(c) Criminal P. C. (1898), S. 476— Proceedings under Legal Practitioner's Act are "judicial proceedings."

A Court taking evidence in a proceeding of which it is entitled to take cognizance under the Legal Practitioners Act, is a "Court" within the meaning of S. 476, Criminal P. C., and the proceeding is a "judicial proceeding." [P 399 C 2]

(d) Legal Practitioners Act (1879), Ss. 13 and 14—Inquiry by a Court into conduct of pleader not entitled to practice before it is ultra vires.

A charge of unprofessional conduct in the discharge of professional duty made against a pleader can be inquired into only by the presiding officer of the Court in which the pleader practises. Where a District Judge, in an inquiry into the conduct of a second grade pleader in the matter of an execution proceeding in a Subordinate Judge's Court, sent a witness to a Magistrate under S. 476, Criminal P. C., to be prosecuted for perjury:

Held: that the proceeding was ultra vires as the District Court had no jurisdiction to inquire into the pleader's conduct. [P 400 C 1]

M. D. Devadoss—for Petitioner.

E. R. Osborne—for the Crown.

Judgment.— The petitioner, Nallasivan Pillai, presented an application under S. 13, Legal Practitioners Act, 18 of 1879, against a second grade pleader, Ramalingam Pillai, to the District Court of Tinnevelly on the ground that the said vakil, whom he had engaged to conduct an execution, was guilty of imnroper conduct in the discharge of his professional duty in the matter of that execution.

Section 13 relates to the power of the High Court to suspend a pleader or mukhtar and has clearly no application. Taking it that S. 13 is a mistake for S. 14, even then, a charge of unprofessional conduct in the discharge of professional duty made against a pleader can be inquired into only by the presiding officer of the Court in which the pleader practises. The second grade pleader, Ramalingam Pillai, having no right to practise in the District Court and the execution matter in which the alleged misconduct took place relating to a decree of the Tinnevelly Sub Court on its Small Cause Side, the charge should not have been made to the District Court and could not be taken cognizance of or inquired into by the District Judge. The District Judge however overlooked this point, went elaborately into the matter, examined the petitioner Nallasivan Pillai on solemn affirmation as petitioner's witness,

found his allegations against the vakil to be wholly false and dismissed the petition on 2nd September 1916. It goes without saying that the learned District Judge quite honestly believed himself to have jurisdiction to make that inquiry, neither the petitioner, Nallasivan Pillai, nor the second grade pleader, Ramalingam Pillai (who was represented in the inquiry by another vakil Arumugam Pillai) having evidently brought to the notice of the District Judge that the District Judge had no jurisdiction to make such inquiry.

On that same date, 2nd September 1916, the learned District Judge sent the petitioner, Nallasivan Pillai, under S. 476, Criminal P. C., to the nearest First Class Magistrate in order that he might be tried for offence under S. 193, I. P. C., in that the petitioner made false statements as his own witness in the inquiry held under the Legal Practitioners Act in the matter of a receipt, Ex. 1, and in two or three other matters. Against this order under S. 476, Criminal P. C., the present civil revision petition has been filed and the petition contains six grounds. The last two of the six grounds relate to the merits. I need not say that this Court will interfere under S. 115, Civil P. C., or under S. 107, Government of India Act, 1915, with an order passed under S. 476, Criminal P. C., by a lower Court, only in very exceptional cases. The other four grounds of the revision petition raised the two following points: (1) the inquiry under the Legal Practitioners Act by the District Judge is not a judicial proceeding, (2) it was not in this matter a Court within the meaning of S. 476, Criminal P. C. It will be seen that neither of these points expressly raises the contention that the District Judge had no jurisdiction under the Legal Practitioners Act to conduct the inquiry which he did. An inquiry under the Legal Practitioners Act by a Court is, in my opinion, a judicial proceeding: see *Kotha Subba Chetti* v. *Queen* (1). The expression "judicial proceeding" is not directly defined in the Penal Code. Expln. 2 to S. 193, Penal Code however makes it clear that a "proceeding before a Court of Justice" acting in the administration of justice is a judicial proceeding. The Criminal P. C., S. 4, Cl. (m), defines "judicial proceeding" as including any proceeding in the course of which evidence may be legally taken on "oath" (which includes "solemn affirmation"). I cannot therefore accept the contention that a District Judge taking evidence in a proceeding of which he is entitled to take cognizance under the Legal Practitioners Act is not "a Court" or that the inquiry is not a "judicial proceeding."

I am of opinion therefore that the grounds mentioned in the memorandum of civil revision petition have not been established as valid. But Mr. Devadoss argued that as the District Judge had no jurisdiction to entertain the petition or to inquire into it, the whole inquiry was ultra vires and, for false statements made in such an enquiry by the petitioner as a witness, he cannot be punished under S. 193, I. P. C., as the petitioner was not legally bound (see S. 191, I. P. C.,) to state the truth before the District Judge in that inquiry and as the proceeding before the District Judge was not a "judicial proceeding" within para. 1, S. 193. This latter contention however cannot wholly absolve the petitioner from punishment, as the giving of false evidence, though it was not done in a judicial proceeding, is also punishable under para. 2, S. 193, I. P. C. However proceedings under S. 476, Criminal P. C., can be taken only where the offence is committed or is brought to the notice of the Court in a "judicial proceeding." It is, no doubt, a very startling proposition that though everybody is morally bound to state the truth, he may not in certain cases be legally bound to state the truth, even after an oath of solemn affirmation has been administered to him by a Court which honestly believes itself to have jurisdiction to conduct certain proceedings in which that man is a witness and when the person giving evidence (or for whom the evidence is given, if he is not the person giving evidence) has not objected to the jurisdiction of the Court to take the evidence. It has been held that where a Court had no power to put a particular person upon oath, (say an accused person) he was not legally bound by the oath and therefore cannot be punished for giving false evidence. This seems clearly equitable: see *Kotha Subha Chetti* v. *Queen* (1) and *Queen-Empress* v. *Subbaya* (2).

It was held in *Queen-Empress* v. *Bharma* (3) that where the Court had no

1. (1883) 6 Mad 252.

2. (1889) 12 Mad 451=1 Weir 113.

3. (1887) 11 Bom 702.

power to enter upon an inquiry at all, the proceedings in that inquiry are not judicial proceedings and a witness in that inquiry, though solemnly affirmed, was not legally bound to state the truth. The same view was taken in 1891 by Muthusami Aiyar, J., in the case reported as *Poosia Naicken*, In re (4): see also *Queen-Empress* v. *Venkataramanna* (5) and *Abdul Rahman* v. *Emperor* (6). I might be permitted to express my regret that the highly technical view that a person is not legally bound to state the truth before a Court of Justice which has bound him by an oath or solemn affirmation, when that Court of Justice had no jurisdiction to enter upon the inquiry though it honestly believed itself to have such power and though no objection had been taken to its jurisdiction, has been adopted by the Indian High Courts following the English cases on this point; see *Reg.* v. *Pearce* (7), where Cockburn, C. J., says when quashing the conviction for perjury:

"I regret that a man who has been convicted upon the merits, should escape from punishment upon a technical point of this sort, but we administer the law according to the established rules."

I might be further permitted to express a hope that an explanation may be added to Ss. 191 and 193, I. P. C., to the effect that a person is legally bound in a Court of Justice as witness in any inquiry to state the truth and that such an inquiry is one in a judicial proceeding even if the Court had no jurisdiction to enter upon the inquiry, provided (1) that the inquiry was not into an offence alleged to have been committed by the witness, (2) that the Court honestly believed that it had jurisdiction and (3) that an objection (to the inquiry or to the examination of the witness therein) on the ground of jurisdiction had not been brought to the notice of the Court before the evidence was taken.

In the result, I feel myself bound to set aside the proceedings under S. 476, Criminal P. C., owing to the District Judge's want of jurisdiction to enter upon the inquiry under the Legal Practitioners Act.

S.N./R.K. *Appeal allowed.*

4. (1889) 1 Weir 151.
5. (1900) 23 Mad 223=1 Weir 152.
6. (1910) 32 All 30=3 I C 952.
7. (1863) 3 B & S 531=32 L J M C 75.

A. I. R. 1918 Madras 400

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

(*Muthuramalinga Setupati Avergal*) *Raja of Ramnad*—Plaintiff—Appellant.

v.

Rajagopala Iyer and *others*—Defendants—Respondents.

Appeal Suits Nos. 60 to 63 and 65 of 1915, Decided on 23rd February 1917, against decree of Sub-Judge, Ramnad, in Original Suits Nos. 156 to 159 and 161 of 1913.

(a) Limitation Act (9 of 1908), Art. 91—Document executed under undue influence—Suit to set aside—Cause of action accrues from date of knowledge.

The cause of action for a suit to set aside a document executed under undue influence does not arise until the cessation of that influence, that is, the date on which the facts must be considered to have come to plaintiff's knowledge within the meaning of Art. 91. [P 400 C 2 P 401 C 1]

(b) Trusts Act (2 of 1882), S. 63—Trustee acting in violation of trust — Beneficiaries can sue for possession.

Where a trustee deals with the trust property entrusted to him in violation of the trust, the beneficiaries are entitled to sue for possession of the property. [P 401 C 1]

S. Srinivasa Aiyangar and *R. Krishnamachariar*—for Appellant.

G. S. Ramachandra Iyer and *A. V. Viswanatha Sastri*—for Respondents.

Judgment.—The Subordinate Judge held that these appeals along with others already disposed of by us were concluded by the decision of this Court in *Raja Rajeswara Dorai* v. *Arunachellam Chettiar* (1). He has not considered the special allegations as to the continuance of undue influence in the pleadings in these appeals. In the plaint, it is stated that: "the Dewan Trustee, Rao Bahadur Venkata Ranga Aiyar, old and infirm as he was, was also under the domination and influence of the lessees and particularly of Arunachellam Chettiar. Arunachellam Chettiar became more and more powerful and the position of the Dewan more and more difficult and dependent. In these circumstances, the Dewan Trustee had no independent course left to him but to follow what the lessees wanted."

The suggestion is that the alienation made in these various suits were due to the influence of the person above mentioned. There can be no doubt that the trustee ought to have taken steps to set aside the deeds of transfer if they were brought about by the exercise of undue influence over the late Raja. If the allegation is true that he himself was similarly subjected to undue influence, the cause of action would not arise for the

1. (1915) 38 Mad 321=19 I C 596.

plaintiff until the cessation of that influence. In *Sri Kishan Lal* v. *Mt. Kashmiro* (2) the Judicial Committee of the Privy Council observe obiter, with reference to undue influence operating on the mind of a pardanashin lady, that time did not begin to run against her until the death of the person who dominated her will, which, we are disposed to think, only means the date on which the facts must be considered to have come to the knowledge of the plaintiff within the meaning of Art. 91, Lim. Act. Applying this test, it is clear that the suit should not have been disposed of on the pleadings. In some of the plaints, there is a further allegation that the succeeding trustees were subjected to similar influences. We are unable so say on the materials placed before us that there is no substance in these contentions.

As the learned Advocate-General pointed out, where a trustee had dealt with the property entrusted to him in violation of the trust, the beneficiaries are entitled to sue for possession of the property (S. 63, Trusts Act). On examining the document executed by the Dewan Trustee, Ex. 2, we are not prepared to accede to the contention of Mr. G. S. Ramachandrier that the property was not transferred by the trustee. Cl. 1, says:

"that Subba Sastrial should enjoy the property from generation to generation for ever and ever free from all claims, with full powers of sale, gift, etc."

which is mentioned in the said deed and also mentioned by Mr. G. S. Ramachandra Aiyar. That we should decide the question of limitation upon the materials placed before us is likely to prejudice both the parties. We think it desirable that the cases should be remitted to the Court below for a proper trial on the merits. Costs will abide.

S.N./R.K. *Appeals allowed.*

2. A I R 1916 P C 172=34 I C 37 (P C).

A. I. R. 1918 Madras 401

ABDUR RAHIM AND OLDFIELD, JJ.

Doorvas Seshadri Iyer—Appellant.

v.

Ananthayee and *others*—Respondents.

Appeals Nos. 23 and 24 of 1917, Decided on 17th September 1917, against appellate orders of Dist. Judge, Madura, in Appeal Suits Nos. 19 and 20 of 1916.

(a) Execution — Court ceasing to have jurisdiction over property—Application must be made to Court having jurisdiction over property.

Where properties which are sought to be attached in execution of a decree have been transferred to the jurisdiction of another Court, it is that Court that is competent to entertain all applications for execution, and not the Court within whose jutisdiction the properties originally were and which passed the decree: *A I R* 1914 *Mad* 162; 35 *I C* 237; 26 *I C* 413 and *A I R* 1915 *Mad* 602, *Foll.* [P 401 C 2]

(b) Limitation Act (1908), Art. 182—Execution application returned and net represented does not save limitation.

A petition for execution which has been returned and not represented cannot be deemed to be pending application for the purpose of saving limitation. [P 402 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

T. Narasimha Aiyangar—for Respondents.

Judgment. — The question for decision was whether the petition dated 3rd April 1912 which was presented to the Madura Court, was in accordance with the law so as to save limitation. The jurisdiction over the properties had been transferred before the date of the application from the Madura Court to the Melur Court. We have a recent ruling of this Court reported as *Subbiah Naicker* v. *Ramanthan Chettiar* (1), which concludes the point. That decision has been followed in several other decisions of this Court: *Penagonda Rattam* v. *Korasika Thatha* (2), *Vadivelu Pillai* v. *Maruda Pillai* (3), *Parthasaradhi Appa Rao* v. *Maka Venkatadri Appa Rao* (4). It may be taken to be settled that when the properties with respect to which execution is sought have been transferred to the jurisdiction of another Court, it is that Court that is competent to entertain all applications for execution, and not the Court within whose jurisdiction the properties originally were and which had passed the decree.

Another point was raised by the learned pleader for the appellant that the order of 3rd May 1912 passed by the Madura Court, to the effect that the application was to be sent for execution, has the effect of res judicata inasmuch as it was acquiesced in by the other side. The order was passed in the absence of

1. A I R 1914 Mad 162=37 Mad 462=22 I C 899.
2. (1916) 35 I C 237.
3. (1915) 26 I C 413.
4. A I R 1915 Mad 602=27 I C 88.

the respondents and the question of acquiescence was not raised before any of the lower Courts. We think that it is too late to raise it now. It was also suggested that Execution Petition No. 118 of 1912 filed in the Court of Melur on 21st November 1911 might be still deemed to be pending but it is impossible to assume any such thing inasmuch as the petition was returned by that Court and it was afterwards presented to another Court and proceeded with there. In the result the appeal is dismissed with costs. The memorandum of objections is also dismissed with costs. Appal against Appellate Order No. 24 of 1917 follows and is dismissed with costs.

S.N./R.K. *Appeals dismissed.*

** A. I. R. 1918 Madras 402

ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

(*Avasarala*) *Kondol Row* and *another* —Plaintiffs—Appellants.

v.

Swamulavaru and *others*—Defendants —Respondents.

Appeal No. 96 of 1914, Decided on 13th February 1917, against decree of Sub-Judge, Cocanada, in Original Suit No. 7 of 1909.

(a) Hindu Law—Succession—Sanyasi should perform prescribed ceremonies and relinquish all property and worldly concerns—Relinquishment need not be in favour of particular person.

The essentials of Sanyasam, according to Hindu law, are that the postulant for Sanyasam should perform the necessary rites and ceremonies prescribed by the sastras, in particular the prajapathiyeshti or agneshti and the viraja homam, and finally relinquish all property and abandon all worldly concerns, down to even a desire for them. The relinquishment need not be in favour of any particular person, but one about to become a Sanyasi may simply abandon his property in which case the law will vest it in his heirs. The mere adoption of the external symbols of Sanyasam as the wearing of coloured clothes or shaving of the head is not enough.

[P 403 C 2; P 406 C 1,2]

(b) Hindu Law—Will — Sanyasi—Will by Sanyasi takes effect from its execution.

A will made by a Sanyasi takes effect from its execution, as the Sanyasi becomes dead to the world from the date of his entry into the holy order, and not from his death. [P 407 C 1]

(c) Hindu Law—Will—Sanyasi—Evidence of conduct showing intention not to abandon property may be given.

Evidence may be tendered to show by the conduct of the Sanyasi that he did not intend to abandon his property and that a will executed by him during his so-called Sanyasam was not intended to take effect. The non-delivery of the will to the beneficiary named in it and its retention by the testator is one important test showing that the testator did not intend to abandon his property during his natural life.

[P 403 C 2]

(d) Hindu Law — Will — Sanyasi — Will directing to perform testator's death ceremonies — It negatives intention that will should take effect immediately.

Where the will of a Sanyasi directs the beneficiary under it to perform the testator's death ceremonies, it negatives the intention that the will should take effect immediately as there are no death ceremonies to be performed for a Sanyasi and a subsequent codicil will prevail over the earlier will. [P 403 C 2]

S. Srinivasa Aiyangar — for Appellants.

T. R. Krishnaswami Aiyar, *T. R. Ramachandra Aiyar*, *B. Narasimha Rao* and *D. Appa Rao*—for Respondents.

Srinivasa Aiyangar, J.—This is an appeal by the plaintiffs against the decree of the Subordinate Judge of Cocanada dismissing their suit to recover possession of the immovable properties belonging to defendant 1, from him and his alienees. There are two plaintiffs, but as the 2nd is only an assignee from the 1st and as it is the right of plaintiff 1 that is in question in the suit, I shall hereafter refer to plaintiff 1 as the plaintiff. The claim is as the universal legatee, heir and successor of a living person defendant 1. According to the plaintiff defendant 1 his uncle, made his will on 20th December 1905 at Benares by which he bequeathed all his immovable properties—they are the suit properties—to the plaintiff, constituted him his heir and successor, and a few days after, became a Sanyasi or entered the fourth Asrama prescribed by the sastras, became dead to the world and its concerns, and the plaintiff therefore became the owner of his properties as if defendant 1 had died on the day he became Sanyasi. This remarkable claim—for this is the first instance to my knowledge of a claim to recover possession from a living person of his properties as his heir or legatee which involves the fiction of civil death—requires to be made out in the clearest possible manner. The plaintiff and defendant 1 are Telugu Brahmins of the Godavari District and belong to the sect called Golakonda Vyaparies who though they wear namams and follow some of the practices of Sri Vaishnavas, in several other matters apparently follow the practices of Smarthas. Several interest-

ing questions were argued at the hearing of this appeal, as to the acts to be done and the ceremonies to be performed by a Brahman before he can become a Sanyasi, as to the effect of that status on legal rights, as to the possibility of a reversion from or change of that status, and as to how far British Indian Courts are bound or entitled to recognize any such limited or inferior civil status; but in the view I take of the facts it is scarcely necessary to decide most of the questions so argued.

It must be remembered that there are a large number of sects with their peculiar rites, mode of initiation and practices who though in a general sense may be termed ascetics cannot come under the category of those who have entered the fourth order (Asrama) in the ideal of life prescribed for the Brahman by the Dharma Sastras. For example, in a passage cited in Sarkar Sastri's Hindu Law from Maha Nirvana Tantra, it is said that in this Kali age there are five castes (varnas) i. e., besides the well-known four castes, a fifth caste comprising all other beings, that Sanyasam according to vedic rites does not exist (***) and that all the above five castes can become Avadhutha Sanyasis according to the saiva ritual. As regards ascetics of this class, it is impossible to apply the special texts in the Smritis or to hold that they are divested of their property or become incapable of holding any or that the special rules of inheritance prescribed for Vanaprastas (hermits), yathis (ascetics) and Brahmacharis (perpetual students) govern succession to their property on their death. It has been held in this Court that as a Sudra cannot become a yathi or Sanyasi according to the Smritis or the Dharma Sastras, his property on his death devolves on his natural heirs, though there can be no doubt that a Sudra is ordained as an ascetic according to the Saiva Agamas. So also in Bengal the rule of inheritance applicable to yathis is not applied to Bairagis who apparently may be of any caste. In Mr. Oman's Book on 'Ascetics etc.,' and Dr. Bhattacharya's Book on 'Hindu Castes and Tribes' are described a considerable number of orders of ascetics who are not governed by the rules prescribed in Smritis or by Nibandakars who for convenience I may call heretical sects; and so far as they are concerned, in the absence of any special custom, there is no reason to treat them as of inferior status for the purposes of civil law. Unless therefore the plaintiff proves that defendant 1 became a Sanyasi according to the orthodox rites and ceremonies I shall show later on that it is essential for such a Sanyasam that there should be an actual gift or an actual relinquishment or abandonment of all worldly possessions—the plaintiff cannot succeed, even though he may be able to prove that defendant 1 wore coloured clothes or shaved his head or acquired certain external symbols of Sanyasam; for some or all of these are adopted also by the heretical sects.

Defendant 1 lost his wife and children at the same time in an accident when he was young and did not marry again. He was naturally much affected by such a calamity, turned to his religion for consolation, had puranas read and expounded to him, and was often going on pilgrimage to holy places. In the latter part of 1905 he went to Benares with the plaintiff and stayed in the house of V. Narayana Rao (P. W. 1) in whose house he had stayed for months on a previous occasion. While he was there, on 20th December 1905 he made the will, Ex. A, under which the plaintiff claims as legatee, got it registered the next day at his residence as he was ill, and a day or two later, it is said, became an ascetic and had his name changed to Iswara Sanyasi in token of his having entered the holy order of Sanyasis. The plaintiff who evidently knows that a person about to become a Sanyasi should give up his property, says, that the will, Ex. A, was executed by defendant 1 as a preliminary to his Sanyasam and with the intention of divesting himself of his property. If this was the intention of defendant 1, he not merely managed to conceal it but manifested a contrary intention; for in his will there is no reference to any impending Sanyasam at all but a direction that the legatee should after the testator's death—he obviously refers to his natural death—perform his death ceremonies and take his property as his heir and successor. The reference to the death ceremonies is significant, as there are none such to be performed by the relations of Sanyasi after his natural death. There is one other matter in connection with this will which also shows that defendant 1 had no idea of relinquishing

his property during his natural life. The will after registration was asked by the testator to be delivered to one Ram Narain Singh, and acquaintance of his, and not to the plaintiff, and although the plaintiff stayed with defendant 1 for over a month at Benares after the date of the alleged Sanyasam defendant 1 never gave the will to the plaintiff and never intended to give it to him. The plaintiff however obtained the will long after, from the Singh against the wish of defendant 1. The conduct of the plaintiff and defendant 1 after the alleged Sanyasam makes it difficult to believe that defendant 1 became a Sanyasi at all as alleged by the plaintiff. On 13th January 1906 (i. e.) within a few days after defendant 1 is to have become an ascetic, he made another will, or rather a codicil, leaving to others a portion of the properties devised to the plaintiff by his previous will (Ex. 8). On 5th February 1906 he again made a third will by which he distributed his property to his three nephews i. e. the plaintiff, his brother, defendant 11 and another brother Venkat Rao now dead, the father of defendants 13 and 14 (Ex. 10). These were executed at Benares while the plaintiff was with him, and defendant 1 describes himself in his usual name and as the son of his natural father which he would not have done if he had become an ascetic and had assumed the name of Iswara Sanyasi.

As a matter of fact, defendant 1 described himself and was addressed by relations and friends including some of the important witnesses for the plaintiff by his ordinary name Avasarala Kamaraju, and the curious compound Iswara Sanyasi with its variant Iswaranandaswami and Iswara Sanyasiswami appears for the first time in the proceedings in this suit. Defendant 1 left Benares for his native place after executing Ex. 10 and made another will (Ex 1) on 22nd February 1906 at Pittapur and has been dealing with his property ever since as owner, and there can be no doubt he has been living like a grahasta or a house holder. He denies that he ever became a Sanyasi or behaved as such. That is so far as defendant 1 is concerned. The conduct of the plaintiff is however much more important. On 3rd October 1906, long after defendant 1 had begun to deal with his property as owner, he and defendant 11 claiming as legatees under the will, dated 5th February 1906, made a written demand of possession of certain properties from 3rd persons who held them under defendant 1 as tenants, or otherwise by transfers subsequent to 5th February. In these notices, one of which is produced and marked as Ex. 11 in the case the plaintiff and his brother, defendant 11 stated that defendant 1 became a Sanyasi after 5th February and thereafter ceased to have any interest in his properties and on that ground challenged the title of the persons in possession. That statement if unexplained is obviously fatal to the plaintiff's present claim and the only explanation which he gives is that he never made that statement, but that his brother fraudulently filled up a blank paper in which he obtained the plaintiff's signature. Unfortunately for the plaintiff, this is proved to be untrue, for the plaintiff is proved to have been well aware of the draft of this very notice (Exs. 9 and 9A). Defendant 11 who equally with the plaintiff insists that defendant 1 became a Sanyasi denies that he ever filled up a blank paper and there can be no doubt that he is speaking the truth in this matter. Further the plaintiff and defendant 11 long after this notice on 10th March 1907, obtained a muchilika from a tenant for some of the lands of defendant 1 and the plaintiff does not explain this transaction either, beyond stating that his brother fraudulently obtained this also without his knowledge.

Finally the plaintiff makes this remarkable statement namely, that he knew in October 1906 that his brother had made false recitals in the notice issued in his name—defendant 11 apparently was quite frank about it and told the plaintiff that he inserted those false statements to obtain a share of defendant 1's properties which wholly belonged to the plaintiff—yet he thought and was advised by a leading pleader that those statements were not prejudicial to his interest, so much so that he took no steps to correct them and had sufficient confidence in his brother to allow him to take a muchilika also jointly in the names of both. On 23rd February 1909, only three days before the plaint in this suit was filed, after he had made up his mind to claim the whole of the properties of defendant 1 as his sole legatee under the will Ex. A, plaintiff 1 sold a half of the suit properties to plain-

tiff 2 and in the sale deed, in setting out his title, fixed the same day 21st December 1905 for the Sanyasam and the will. Evidently even this version did not suit him as probably the Sub-Registrar who registered the will, who saw defendant 1 at his residence on that day between 5 and 6 p.m. may be in a position to contradict the story of Sanyasam on that day, any how the plaintiff is wholly unable to explain how this date came to be fixed in the sale deed as the date of the Sanyasam. In this re-examination by his own pleader he says this:

"Ex. E (i. e.) the sale is in my own handwriting. I do not remember if a draft of it was first prepared. The recital in Ex. E to the effect that the taking of Sanyasam and the execution of the will Ex. A took place at the same time was a mistake. I cannot say how it arose."

In his plaint he fixed no date but para. 5 of the plaint reads as if the making of the will and the Sanyasam were simultaneous. Even now the actual date is not fixed but it was said for the first time in March 1910 when the plaintiff's witnesses were examined in Benares that it took place on some day between 23rd and 26th December 1905. These unexplained variations in the date cast a strong suspicion on the truth of the plaintiff's case. There are two other transactions in which the plaintiff has taken part to which I shall refer now. He was present when a brother of his (one Lakshmipathi adopted to another family) lent Rs. 1,000 to defendant 1 on 3rd December 1906 when defendant 1, if the plaintiff's present case is true had no property at all, and also when the note was renewed in April 1908. The plaintiff obtained a transfer of this note on behalf of a minor ward of his, after a suit had been filed on the note and conducted that suit on his behalf. When asked to explain his conduct in allowing his brother to lend to a person who had no property and taking a transfer of the debt he was good enough to suggest that it was no concern of his if his brother foolishly lent to a person who had no property and denied that he had anything to do with the transfer of the debt or the conduct of the suit. But unfortunately for him he had been examined in the suit on the note and had admitted that he obtained the loan from his brother for his uncle and also that he negotiated and obtained the transfer; and explained that he did so because he and his uncle had settled their differences and that he was to succeed to his uncle after his death. He denies now that there was any such understanding, but he does not explain why if his uncle became an ascetic and he himself became the owner of all his properties, he took part in these transactions. His cross-examination as to these transactions is at pp. 93 to 95 of the paper book. A perusal of his evidence as a whole leaves the impression that he has not an honest case. The learned Judge in the Court below, however accepted as reliable the evidence of P. Ws. 1 to 4 who deposed that defendant 1 performed certain ceremonies and went through certain rites by which he became a Sanyasi; and he came to the conclusion that though defendant 1 did become an ascetic he did not give up or relinquish his property, that he got tired of his Sanyasam very soon and discarded even the symbols of his order. He evidently thinks that the vacillation of the plaintiff was due to his desire to obtain the co-operation of his brother in any action against his uncle or to settle with his perverse uncle who like a good Sanyasi would not quietly surrender possession of his property and go a-begging as he ought. It therefore becomes necessary to examine that evidence.

Of the four witnesses the first three were examined on commission at Benares and the fourth was examined on 12th January 1911 and the judgment was not delivered till the end of December 1913. Such a long interval considerably detracts from the value of the opinion of the Trial Judge on the credibility of the witnesses examined before him..... Assuming however that that evidence is true and the witness seaccurately describe what they saw, yet the evidence appears to be insufficient to prove that defendant 1 entered the holy order of Sanyasis by the performance of the necessary rites and ceremonies prescribed by the Sastras; in particular there is no evidence that defendant 1 pronounced the presha mantram which is absolutely essential for an orthodox Sanyasam. The ideal ascetic is he who having passed from order to order, having paid the three debts (that to the Rishis, to the pittris and to the devas) in the evening of his life tired of the world gives up everything and determines on passing the remainder of his days in holy meditation calmly awaiting his re-

lease. (Manu Ch. 6, verses 33 to 37 and 45, Jabala Sruti cited in Apararka's commentary on Yajnavalkya and Yajnavalkya, Ch. 3, verse 57).

The essence of such Sanyasam, as the word itself imports, is the relinquishment of all property and worldly concerns even of the desire for them. In the Taithireva Upanished, it is said:

" not by words, not by sons, not by wealth, but by relinquishing these some obtained immortality." "Getting out of the desire for sons, for wealth, and the world, a Brahmin goes into mendicant state: (Bikshacharyam charanti) Vajasaneya Brahmanam cited in Parasara Madhaviyam, Bombay Sanskrit Series Vol. 48, P. 152."

The rituals to be followed by a person desirous of becoming a Sanyasi are indicated in the Smritis and are set out in detail in the works of the commentators and text book writers (Manu Ch. 6, verses 38, 39, 41, 43; Baudayana 2, 10, 17, Parasara Madhaviyam, Pp. 146 to 178; Dharma Sindhu, Pp. 363 to 370, Bombay Edn.). The postulant for Sanyasam after learning the duties of a Sanyasi should first perform his death ceremonies —this, however, is by some not considered necessary—and the eight sradhas the last of which is his own sradhas; he must then distribute his wealth to his sons and Brahmins reserving enough for the homam (sacrifice in the fire) to be subsequently performed. Then he has to perform Prajapathiyeshti or agneshti and finally viraja homam. These are sacrifices in fire and are purificatory ceremonies. At the end of ceremonies, the postulant has no property at all for even the sacrificial vessels if they are of wood must be burnt in the fire and if they are of metal must be given to the priest. After these are done he takes leave of his sons, and standing in water takes some water in his hand and drops it saying that he has given up desire for sons, wealth, world and everything (Sarva Thyagam).

He makes a vow that he will not injure any living being. Finally there is the uttering of the "Presha Mantram". The literal meaning of the mantram is "have been given up by me" (Sanyastham maya). The mantram is to be pronounced low three times, and loud twice and till the mantram is pronounced the man does not become a Sanyasi. The above is common to all Sanyasams, but there is a difference of opinion as to the discarding of the sacred thread, as to the shaving of the tuft and as to the number of sticks in the staff. This is due to certain doctrinal differences which it is unnecessary to deal with for the present purpose beyond saying this; that the discarding of the holy thread which implies the giving up of all the duties prescribed not merely for the order (ashrama), but also for the caste (varna) including the obligatory Sandhyawandanam, is proper only to the highest kind of Sanyasi, Paramahamsa. It is said in the statement of defendant 11, that defendant 1 became a Paramahamsa, but if he did, he should not have resided in a house or in a village; he can enter a village only in the evening for begging for his meals. It is to be observed that the essential feature of Sanyasam is the actual relinquishment of all property and an actual abandonment of all worldly concerns, down to even a desire for them; and it is said in the most emphatic terms that a person adopting Sanyasam, without this abandonment of all desires (bairagyam) goes to fearful Narakam (Dharma Sindhu, P. 364).

It is clear that in this case defendant 1 did not abandon or relinquish his property and had no intention of doing so; and there is no evidence that he pronounced the "Presha Mantram" without which he cannot become a Sanyasi. The learned Subordinate Judge thinks that without relinquishing his property, a man may become a Sanyasi but the Sanyasam would be useless; and from the verse of Yajnavalkya, which prescribes a rule of inheritance for an ascetic's property, infers that a Sanyasi may possess property. Perhaps it is a question of words but it appears to me that to speak of a Sanyasi retaining his property is a contradiction in terms. The rule as to inheritance is explained by the commentators as applying to the staff, water pot, and sandals of a Sanyasi, which alone is permitted to him (Manu Ch. 6, verse 41 'Pavitropakitah'). The learned Judge is not right in thinking that an ascetic can make a board of things for a day, a month, or six months or a year, for that can be done only by a vanaprastha or hermit. On the other hand it is said in a verse cited in Parasara Madhaviyam (P. 184) that a Sanyasi should not even procure an extra staff for future use. Similarly in *Gouri Shankar Byas* v. *Niader Singh* (1), it appears to have been held that without actually relinquishing

1. (1891) 14 Mad 316.

or abandoning his property a man cannot become a Sanyasi.

If, however, defendant 1 became a Sanyasi, his heirs would take his property and probably his legatee even during his lifetime. In an interesting passage in Pollock and Maitland's "History of English Law" the learned authors describing the status of a monk say:

"A monk or nun cannot acquire or have any proprietary rights. When a man becomes professed in religion, his heir at once inherits from him any land that he has, and, if he has made a will it takes effect at once as though he were dead. If after this a kinsman of his dies leaving land which according to the ordinary rules of inheritance would descend, he is overlooked as though he were no longer in the land of the living; the inheritance misses him and passes to some more distant relative. The rule is not that what descends to him belongs to the house of which he is an inmate; nothing descends to him for he is already dead. In the eye of ecclesiastical law the monk who became a proprietarius, the monk that is, who arrogated to himself any proprietary rights on the separate enjoyment of any wealth, committed about as bad an offence as he could commit."

Except that the Smriti writers and commentators had no conception of a will, the above passage accurately represents the status of a Sanyasi under the Hindu law. It does not seem to be necessary that there should be an actual transfer to, or a relinquishment in favour of any particular person, but one about to become a Sanyasi may simply abandon his property in which case the law will vest it in his heirs.

In the Dayabhaga in the very beginning where the author discusses the meaning of the word "Daya" and origin of right to property, he points out that not merely by gift, but by death, Sanyasam, etc., the right of the previous owner is lost, and that of the successor begins. The same principle is applied in fixing the time for partition. The author explains that the phrase "the death of the father" does not necessarily mean actual death, but includes Sanyasam, etc., (Stoke's Hindu Law Books, Dayabhaga, Ch. 1, placitum 4 and 31. The Sanskrit word translated as 'retirement' is 'Pravrajita'). See also 2 Colebrooke's Digest, P. 197. This appears also to be the opinion of text writers (Strange, Pp. 164, 185, Trevelyan, P. 100; Mayne, P. 828, Vyavasha Chandrika, P. 20). It is, however, unnecessary to pursue this matter further as I have come to the conclusion that defendant 1 did not enter the fourth order as prescribed in the Darma Sastras; nor is it necessary to decide any other questions. The appeal must be dismissed with costs.

Abdur Rahim, J.—I agree.

S.N./R.K. *Appeal dismissed.*

A. I. R, 1918 Madras 407

SPENCER AND SESHAGIRI AIYAR, JJ.

Singa Pillai — Plaintiff — Appellant.

v.

Ayyaneri Govinda Reddi and *another* —Defendants—Respondents.

Second Appeal No. 1887 of 1915, Decided on 27th July 1917, against decree of Sub-Judge, North Arcot, in Appeal Suit No. 113 of 1914.

(a) Benamidar—Right to sue.

A benami mortgagee can maintain a suit on the mortgage and can also assign his rights; *Case law reviewed.* [P 407 C 2]

(b) Mortgage — Suit on mortgage is one to recover debt.

Per *Seshagiri Aiyar, J.*—Prima facie, a suit on a mortgage is one to recover a debt, although such a debt is charged on immovable property. [P 409 C 1]

C. V. Ananthakrishna Iyer — for Appellant.

P. Venkataramana Rao—for Respdts.

Spencer, J.—In the Calcutta and Allahabad High Courts it appears to have been settled by the judicial decisions that a benami mortgagee may maintain a suit upon a mortgage vide, *Kirtibash Das* v. *Gopal Jeo* (1), *Sachitananda Mohapatra* v. *Baloram Gorain* (2) and *Parmeshwar Dat* v. *Anardan Dat* (3). In this Court there is no reported case on the point so far as I am aware; but in *Chidambara Mandaroyan* v. *Singaram* (4) the same view was taken as in Calcutta and Allahabad, and three more unreported cases were therein referred to as authorities that precluded arguments being raised to the contrary. In *Kuthaperumal Rajali* v. *Secretary of State* (5) the decision in *Chidambara Mandaroyan* v. *Singaram* (4) was quoted with approval and its principle was explained as being that a benamidar's suit is equivalent to a suit by an agent of an undisclosed principal. If a mortgagor can successfully resist a suit brought by the beneficial owner of the bond on the ground that

1. A I R 1914 Cal 323=20 I C 499 = 27 I C 136
2. (1897) 24 Cal 644.
3. A I R 1915 All 10 = 26 I C 507 = 37 All 113.
4. S A No. 186 of 1903.
5. (1907) 30 Mad 247.

he is not the person named in the bond as mortgagee, it is difficult to see on what grounds he could also be successful against the ostensible owner of the legal estate when the real owner holds back. In case of dispute the remedy would be to join the person alleged to be the real owner as a party, so that he might be bound by the decision. If the benamidar can sue upon the bond, there is no reason why he should not assign his right of suit to another for proper consideration. In this case however there is a further difficulty. Both the lower Courts have found that the transfer to the plaintiff by Rangasami Mudali, the benamidar, was not a bona fide transaction.

The Subordinate Judge gives as one of his reasons for this finding that the transfer was made on the very date upon which defendant 2 sued to recover the consideration of the pro-note from the real mortgagee. If he meant that the transaction was one in fraud of creditors, it must be set aside in a suit framed for that purpose. So far as the parties to this suit are concerned, it is sufficient that Rangasami Mudali says he transferred his title to the plaintiff and received consideration for the transfer. His act must be taken as operating to pass whatsoever title he had to sue the mortgagor and I have held above on the point of law that he had a title to sue as mortgagee though he was a benamidar. I agree therefore that the lower Court's decree must be reversed and a decree passed for the plaintiff.

Seshagiri Aiyar, J.—Both the Courts below have found that the plaintiff's assignor was only a benamidar in respect of the mortgage sued on. We see no reason to differ from this conclusion. The further question whether a benamidar can sue in his own name on the mortgage is not free from difficulty. There is only a thin line of demarcation between a a benamidar and an agent or trustee. The element of confidence in the ostensible owner exists in all the three cases. In the case of an agent the law gives a qualified right of suit to him: see S. 230, Contract Act. In the case of a trustee the law recognises him alone as entitled to deal with the outside world, because the legal estate vests in him; and until discharge he represents that estate: The case of a benamidar is slightly different. He is not the legal owner because, although from the outset he is expected to screen the real owner from the public, he is to be only the alias of the latter until he chooses to reveal himself as the person entitled. Such an attitude is insufficient to create a relationship of principal and agent either.

In this view of his status, the question is whether he should be allowed to sue in his own name. The Judicial Committee of the Privy Council apparently held that he can sue to recover debts: *Gopeekrist Gosain* v. *Gangapersaud Gosain* (6). In regard to negotiable instruments, it was held in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (7) that he alone was competent to maintain a suit. An extension of this principle was made in *Sivasankaram Pillai* v. *Panchami Kesiyar* (8), where he was held entitled to sue for a debt due on a simple bond. A still further inroad upon the rights of the real owner was made in *Venkata Suryanaraina* v. *Gulaguri Bapiraju* (9). In that case it was held that a benamidar can sue to set aside a sale. It may here be mentioned that an attempt to bar his right to all cases of suits relating to immovable property in general did not meet with approval in Madras. see the observations in *Kuthaperuma Rajali* v. *Secretary of State* (5). Nonetheless it was held that he is not entitled to sue for rent: *Kuppu Konan* v. *Thirugnana Sammandam Pillai* (10). Suits in ejectment have been regarded as outside his rights: *Kuthaperumal Rajali* v. *Secretary of State* (5).

As regards the other High Courts, in Allahabad the benamidar is allowed to sue on the mortgage: *Permeshwar Dat* v. *Anardan Dat* (3). A suit in ejectment is also allowed by that High Court: *Nand Kishore Lal* v. *Ahmad Ata* (11). In Calcutta notwithstanding *Munshi Basiruddin Ahmed* v. *Mahomed Jalish Patwari* (12), the later decisions concede his right to sue on the mortgage: *Hara Gobinda Saha* v. *Purna Chandra Saha* (13) and *Kirtibash Das* v. *Gopal Jeo* (1), following *Sachitananda Mohapatra* v. *Baloram Gorain* (2). But he is not

6. (1854-57) 6 M I A 53(P C).
7. 1907) 30 Mad 88.
8. (1898) 8 M L J 302.
9. (1911) 34 Mad 143=7 I C 60.
10. (1908) 31 Mad 461.
11. (1896) 18 All 69.
12. (1908) 12 C W N 409.
13. (1909) 1 I C 522.

allowed to sue in ejectment: *Mohendra Nath Mookerjee* v. *Kali Prosad Johuri* (14). In Bombay also, the same view seems to prevail: see *Ravji Appaji* v. *Mahadev Bapuji* (15). Probably it would be more logical to permit the benamidar to sue in all cases, leaving it to the real owner to his remedies against him in a separate suit. The decisions, which apply this rule of res judicata against the real owner and even permit him to execute a decree obtained by the benamidar, are not inconsistent with this view. It may be that suits in ejectment stand on a different footing from other suits. In such suits the legal right of the plaintiff and his right to eject are directly in question. It may be said that the defendant can plead jus tertii. These considerations may not be altogether absent to other suits. However that may be it is not necessary at present to convass the correctness of his position in regard to suits for ejectment,

I think that prima facie a suit on a mortgage is one to recover a debt although such debt is charged on immovable property. Consequently the dictum of the Privy Council in *Gopeekrist Gosain* v. *Gangapersaud Gosain* (6) is applicable to such a suit. It was pointed out in *Chidambara Mandaroyan* v. *Singaram* (4) that the practice in this Presidency is to permit the benamidar to sue on a mortgage: and that practice is in consonance with what obtains in the other High Courts. A further argument was addressed to us on the finding of the Subordinate Judge that the transfer to the plaintiff by the first benamidar Rangasami was in fraud of the creditor, defendant 2. Even accepting this finding, it is not open to defendant 2 to resist the suit without first suing to set aside the transfer: vide *Palaniandi Chetti* v. *Appavu Chettiar* (16). Under these circumstances we must hold that the plaintiff must be allowed to sue in his own name. The decree of the Courts below must be reversed and the usual mortgage decree must be passed for the amount sued for. Time for payment will be six months from this date. Each party will bear his own costs throughout.

S N./R.K. *Appeal allowed.*

14. (1903) 30 Cal 265.
15. (1898) 22 Bom 672.
16. (1916) 34 I C 778.

* A. I. R. 1918 Madras 409

OLDFIELD AND BAKEWELL, JJ.

Subba Pillai—Appellant.

v.

Rangasami and *others*—Respondents.

Civil Misc. Appeal No. 160 of 1916, Decided on 22nd February 1917, against order of District Judge, Trichinopoly, in O. P. No 58 of 1916.

(a) Civil P.C. (1908), S. 146 and O. 22, R. 10—New party alleging acquisition of interest taking action after decree and before appeal—O. 22, R. 10 does not apply — Appeal can however be entertained under S. 146 if merits are in favour of appellant.

Order 22, R. 10, does not apply to cases wherein the new party alleging acquisition of an interest takes action after the decree and before the appeal against it is begun. The discretion of the Court to allow or refuse the substitution of a new party under the rule should be exercised only in connexion with pending proceedings in which the material considerations of immediate convenience are within its knowledge. The new party cannot apply, under the rule, to be impleaded only for the purpose of preferring an appeal against a concluded decree. [P 410 C 1]

The appeal can, however, be entertained under S. 146, if the merits are in favour of the appellant so that substantial justice may not be defeated. [P 410 C 2]

*** (b) Civil P. C. (1908), Ss. 96, 146 and O. 22, Rr. 10 and 11—Title of mortgagor to property negatived—Mortgagee not party to decree—Mortgagee purchasing property in execution resisted in taking possession — Mortgagee can appeal against decree passed against mortgagor.**

Where the title of a mortgagor to the mortgaged property is negatived by a decree in a suit to which the mortgagee is not a party and the mortgagee who purchases the property in execution of a decree for enforcement of the security is resisted in taking possession and driven to instituting a fresh suit to establish his mortgage, he can be permitted to appeal against the decree as representing the mortgagor or his representatives against whom the decree was passed. [P 411 C 1]

(c) Civil P. C. (1908), Ss. 96and 115—High Court can treat appeal as revision to meet substantial justice.

The High Court can, to meet substantial justice, treat an appeal presented to it as a revision petition where technical objections as to adequacy of court-fees etc., prevent its entertaining the appeal. [P 410 C 2]

T. R. Venkatarama Sastri — for Appellant.

N. Rajagopalachariar — for Respondents.

Judgment.—The question raised in this appeal is of some difficulty. But the answer is not of much importance because it is clear on which side justice lies and our powers will enable us to secure it. Appellant purchased certain

property at a sale held in execution of his own decree on a mortgage. But when he attempted to take possession he was obstructed by the present respondents 3, 4 and 5 and was referred to a suit under O. 21, R. 103, Civil P. C. That suit he has brought. But respondents 3, 4 and 5 are also defendants in Original Suit No. 27 of 1914. It was brought only by the present respondents 1 and 2, alleged by plaintiff to be the successors-in-title of his mortgagor and was dismissed whilst appellant's possession proceedings were pending. Against this dismissal he presented an appeal and with it an application purporting to be under S. 107 (2) and O. 22, Rr. 10, 11, Civil P. C., asking for the addition of his name as a plaintiff in Original Suit No. 27 of 1914 and for permission to appeal against the decree therein. The lower Court dismissed the appeal because it also passed an order against appellant on the petition. He now appeals against that order.

The appeal is opposed first on the ground that the lower Court's order cannot be regarded as passed under O. 22, R. 10 and therefore is not appealable under O. 43, R. 1, (l). This is supported by the wording of the former rule "during the pendency of the suit" and "suit" which must, for the present purpose, be read with reference to R. 11 as "during the pendency of the appeal" and "appeal" the inference being that the procedure is inapplicable to cases of devolution in which the new party takes action after the decree and before the appeal was begun. This view was expressed obiter in *Collector of Muzaffarnagar* v. *Husaini Begam* (1) and the differences between the relevant provisions of this and the former Codes are not sufficient to deprive that and other cases to be referred to of authority. The fact that the wording of O. 22, R. 10, excludes its application to cases such as the present may be explained on the ground that the investiture of the Court with discretion to allow or refuse the substitution of a new party is necessary only in connexion with pending proceedings in which the material considerations of immediate convenience are within its knowledge. We hold that O. 22, R. 10, and O. 43, R. 1 (L) are inapplicable.

The question is next whether the appeal is altogether incompetent and, if it is so, whether we can interfere on appellant's behalf, if the merits of his case would justify our doing so. As the order against him was not passed under O. 22, R. 10, it was not one which he was bound to ask for under that provision and if he was entitled to prosecute the appeal at all he could do so only by presenting it stating the character in which he did so and submitting his right to do so to adjudication at the hearing. This right to carry on the proceedings, if he could establish his position, was entailed by S. 146 and O. 22, R. 10, Civil P. C. being inapplicable no method by which he could do so other than that specified has been suggested. The objection then relied on is however that appellant not having appealed against the dismissal of his substantive appeal cannot have it displaced in these proceedings. But to this there are two answers. His mistake as to his remedy was not pointed out by the lower Court or respondents before it and the foregoing expression of our opinion would probably enable him to apply successfully for a review of the dismissal. Or more directly (and this is the course we take) we can adopt the principle of the decisions in *Indo Mati* v. *Gaya Prasad* (2) and *Motiram* v. *Kundan Lal* (3) and treat the order rejecting the applicatoin as one finally determining appellant's rights and as including the dismissal of the appeal which it entailed. The absence of any formal prayer for the grant of relief against the dismissal and of a properly stamped appeal memorandum have been relied on; but the circumstances would in our opi- justify the use of our powers of revision and it would be futile to insisit on payment of additional duty, refund of which would be obligatory on our order of remand being passed. We therefore consider next whether such an order would be justified on the merits.

It is not denied that appellant was the purchaser at Court sale of the property which is in dispute in Original Suit No. 27 of 1914 on the file of the Subordinate Judge of Trichinopoly, against the decree in which he desires to appeal. His right to it is contested in two distinct ways. Firstly, as respondents 3, 4 and 5's counter-statement in the lower Court shows, they deny that the mortgage sued

(1) [1896] 18 All. 86.

(2) [1897] 19 All. 142.

(3) [1900] 22 All. 380.

on by appellant his decree or his purchase is valid against them. Secondly, they deny that his mortgagor or respondent 1 and 2's legal representatives had any right in the mortgaged property. The latter contention was adjudicated on in Original Suit No. 27. The former is in issue for the first time in the suit lately filed by appellant Original Suit No. 28 of 1916, and he must no doubt secure its rejection if he is to be allowed to represent respondents 1 and 2. As to his prospects of doing so, no assumption is at present permissible. It is clear only that his doing so would entail his right to appeal as respondents 1 and 2 could have done and that, apart from the possibility of the decision against them becoming res judicata against him, the question whether he can establish his right must be considered.

Taking this view we set aside the lower Court's orders dismissing appellant's petition and appeal and remand them for re-admission and disposal in the light of the foregoing. The lower Court will pass a formal order of dismissal on the petition since its presentation was unnecessary. It will admit the appeal and if respondents 2, 3 and 4 desire it to do so, will consider whether appellant has a right to present it either itself inquiring into his right or, as may be more convenient, postponing its decision regarding it, until the result of Original Suit No. 28 of 1916 is known. Costs to date will be costs in the case.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 411 (1)

SPENCER AND SRINIVASA AIYANGAR, JJ.

Paramasivam Pillai—Plaintiff — Appellant.

v.

Subbaya Nadar — Defendant — Respondent.

Letters Patent Appeal No. 7 of 1917, Decided on 3rd April 1917, against the judgment and order of Seshagiri Aiyar, J. in Civil Revn. Petn. No. 940 of 1916.

Promissory note—Suit on — Court can pass conditional decree of indemnity and such decree is valid—Vendor and Purchaser.

Plaintiff sold a piece of land to the defendant and obtained from the latter a promissory note. During the pendency of a suit by a third person challenging the sale, the plaintiff sued defendant on the promissory note. The first Court gave plaintiff a decree conditional on his indemnifying the defendant in case the latter lost the property purchased by him:

Held: that the condition attached to the decree was just and proper and that the Court had power to pass such a decree. [P 411 C 2]

K. R. Guruswami Aiyar and *A. Subbarama Aiyar*—for Appellant.

N. S. Rangasami Aiyangar for *T. Narasimha Aiyangar*—for Respondent.

Facts.—The plaintiff sold to the defendant a certain piece of land. As part of the consideration for the sale the defendant executed to the plaintiff a promissory note. Meanwhile a third party sued the plaintiff and the defendant claiming that the land conveyed by the plaintiff was his. The plaintiff then sued the defendant on the promissory note. The first Court passed a decree conditional on the plaintiff executing to the defendant an indemnity bond for the amount due under the note. That decree was confirmed by the High Court in exercise of its powers of revision. Against that order the present Letters Patent Appeal was filed.

Judgment.—We agree with the learned Judge who heard the civil revision petition in thinking that the respondent was equitably entitled to protection on the facts of this case, as the question between the parties whether there was good consideration for the promissory note could not be finally decided so long as the respondents vendors' title to the land which formed the consideration was in jeopardy in another suit. In *Milligan* v. *Cooke* (1) the Court of Chancery in England ordered an indemnity to be given in a suit for specific performance of an agreement of a contract of sale of property the title to which might have become defective owing to a future contingency, and no illegality has been shown to us to a Court in India adopting a similar course when the equities arising between the parties demand it. We decline to interfere and we dismiss this Letters Patent Appeal with costs.

S.N./R.K. *Appeal dismissed.*

1. (1808) 33 E R 884.

A. I. R. 1918 Madras 411 (2)

SESHAGIRI AIYAR, J.

Muthuramalinga Sethupathi — Plaintiff—Petitioner.

v.

Mahalinga Raju— Opposite Party.

Civil Revn. Petn. No 413 of 1916, Decided on 17th April 1917, against decree of Dist. Munsif, Paramakudi, in Sm. C. Suit No. 1085 of 1915.

(a) **Madras Local Boards Act (1884), S. 73 —Payment of half road cess by tenant is statutory liability and is in nature of rent.**

The obligation on the part of a tenant to pay half of the road-cess paid by the landlord is not a common law duty but a statutory liability arising under S. 73, Local Boards Act, and the payment of the same is in the nature of rent. [P 412 C 2]

(b) **Limitation Act (1908), Art. 61—Recovery of cess from tenant by landlord—Art. 61 applies.**

A suit to recover the moiety of the cess paid by the landlord from the tenant is governed by Art. 61 : 3 *Mad.* 124; 16 *Mad.* 261 and 17 *I. C.* 437, *Dist.* [P 413 C 1]

(c) **Madras Estates Land Act (1908), S. 3 (11)—Collection of cess—Landlord can exercise all provisions of Act.**

The tenant is bound to pay the cess along with the rent and the landlord is entitled to exercise all the provisions of the Madras Estates Land Act in the collection thereof. [P 412 C 2]

(d) **Limitation — Statutory liability is governed by same articles as common law liability.**

A statutory liability will be governed by the same specific articles of the Limitation Act as a common law liability if only the words of the articles are capable of covering it : 20 *Cal.* 51 (*F. B.*), *Diss. from* ; 29 *Mad.* 305, *Foll.* [P 413 C 1]

L. A. Govindraghava Aiyar and *R. Krishnamachariar*—for Petitioner.

T. M. Krishnaswami Aiyar (*amicus curiae*)—for Opposite Party.

Judgment.—The case is one of first impression, but as the arguments have been addressed to me fully on the points arising for decision, I do not think that any useful purpose will be served by reserving my decision in this case. The suit was brought by a landholder to recover the road cess paid by him for two faslis. A decree was passed for half of the road-cess paid in Fasli 1322. As regards the other half the lower Court held that the landholder himself was bound to pay it. As regards Fasli 1321, the District Munsif held that the claim for half of the cess payable to the landholder was barred by limitation. In this Court Mr. L. A. Govindaraghava Aiyar does not claim that the whole of the road-cess was payable by the tenant, but confined the claim to half of the cess paid by his client. The only question for decision is whether the lower Court is right in the view that the payment made in 1321 by the landlord cannot be recovered as it is barred by limitation. Before proceeding further I must express my indebtedness to Mr. T. M. Krishnaswami Aiyar for the very able manner in which he has assisted me in this case on behalf of the counter-petitioner who has not been represented in this Court. There are three points for consideration. The first point is how does the obligation to pay the road-cess by the tenant arise? I agree with Mr. Govindaraghava Aiyar that it is under the Act that the obligation arises. It is not a common law duty. It is true that in the definition of "rent" given in S. 3, Cl. 11, Estates Land Act, any local tax or cess payable is included but the proportion to be paid by the tenant is fixed only by the Local Boards Act. I must take it that the liability to pay half of the cess is created by that Act; it is not by virtue of the Estates Land Act that the landholder is entitled to claim although he is entitled to tack on the local cess to the rent due from the tenant. The next question is, what is the nature of the payment to be made. There can be no doubt that it is in the nature of rent. The definition to which I have already referred shows that the tenant is bound to pay the cess along with the rent and the landlord is entitled to exercise all the provisions of the Act in the collection of it.

Under the Estates Land Act, a limitation of three years is fixed for the collection of the rent including the road cess. Under the general Limitation Act, there is only a limitation of three years. Although the suit is for arrears of the local cess, I have very little doubt that the nature of the liability on the part of the tenant is of the same character as if he were called upon to pay rent on his holding. The last question which is of considerable importance relates to limitation The broad proposition was advanced by Mr. L. A. Govindaraghava Aiyar that wherever there is a statutory liability to pay a certain sum of money, the residuary Art. 120 should apply to it and not the specific articles dealing with the questions and he relied upon the observations of Petheram, C. J., in *Secy. of State* v. *Guru Proshad Dhur* (1), in support of his position. In *Secy. of State* v. *Guru Proshad Dhur* (1), the suit was to recover the surplus of sale proceeds from the Secy. of State who had sold the holding for arrears of revenue. The learned Judges who constituted the Full Bench, came to the conclusion that the Secy. of State was not a trustee and that Art. 62 has

1. (1893) 20 Cal. 51.

no application. Petheram, C. J. says that :

"the Limitation Act does not prescribe any period of limitation for money due under a statutory liability to pay it, so the suit is, I think, within Art. 120."

With all respect I am unable to see why a statutory liability should not bring a claim under the specific articles if otherwise the words are capable of covering it. In the present case, as was pointed out by Mr. Krishnaswami Aiyar, I think that Art. 61 is applicable. Under that Article, money must have been paid by the plaintiff for the defendant. Mr. Govindaraghava Aiyar contended that as the defendant was not bound to pay to the Government, this article has no application. I am unable to follow this argument. Under S 73, Local Boards Act, the landlord is given power under the proviso 2 to recover from the tenant one half of the amount payable in respect of the land occupied by the tenant. As I have said at the outset, it is under this statutory liability that the plaintiff seeks to recover the amount. S. 76 makes it incumbent upon the tenant to pay the rent to the landlord. Otherwise I see no provision in the Estates Land Act or the Local Boards Act which compels the tenant to pay the local cess to the landlord. If the amount is payable by the tenant, I am clear that Art. 61, Lim. Act would cover the case. I am supported in the view I have taken by the case cited by Mr. Krishnaswami Aiyar which was decided in this Court, namely, *Ramakrishna Ayyar* v. *Subramania Ayyer* (2). In that case, it was held that money payable under the obligation created by the Transfer of Property Act would fall under Art. 132, Lim. Act. It was clearly a case of statutory liabilities. If Petheram, C. J.'s observations are followed, the decision in the Madras case must hold that Art. 132 has no application and that Art. 120 applies As I said before I am unable to follow the reasoning of the learned Chief Justice that all cases of statutory liabilities should be relegated to the residuary Article. The cases quoted by Mr. Govindaraghava Aiyar are distinguishable. *President of the Municipal Commission, Guntur* v. *Srikakulapu Padmarazu* (3) was a suit by the President of a Municipality to recover a tax. There is no Article of the Limitation Act which could apply to such a suit as that; and therefore it was held that the residuary Article applied. As regards *Nilakanta* v. *Imamsahib* (4) and *Mohideen Ibrahim* v. *Mahamed Meera Levvai* (5), they were cases where a Court purchaser whose purchase had been annulled sought to recover the money deposited by him. Neither Art. 61 nor Art. 62 could apply to such a case and therefore the residuary Art. 120 was applied. *Unichaman* v. *Ahmed Kutti Kayi* (6) has no application at all because that was under a registered contract and there was an implied obligation and it was held that the rule of six years' limitation applied. My conclusion therefore is that the proper article applicable to the suit is Article 61, and that the lower Court is right in holding that the payment made in Fasli 1321 is barred by limitation. Therefore this petition must be dismissed.

S.N./R.K. *Petition dismissed.*

2. (1906) 29 Mad 305.
3. (1881) 3 Mad 124.
4. (1893) 16 Mad 361.
5. (1912) 17 I C 437.
6. (1898) 21 Mad 242.

A. I. R. 1918 Madras 413

AYLING AND SADASIVA AIYAR, JJ.

Muthia Naik and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Rev. No. 187 of 1917, Criminal Rev. Pet. No. 149 of 1917, Decided on 19th July 1917, from judgment of Sub-Divisional Magistrate, Sivakasi, in Criminal Appeal No. 45 of 1916.

Criminal P. C. (1898). S. 345—Composition with one of several accused does not amount to acquittal of other accused.

The composition of an offence with one of several accused persons under S. 345, Criminal P. C., does not have the effect of an acquittal of all the accused persons: 7 *C. W. N.* 176, *Diss from.*

[P 413 C 2]

S. Ranganadha Aiyar for *S. Swaminathan*—for Petitioners.

Public Prosecutor—for the Crown.

Order.—Petitioner's vakil contends that the composition of an offence under S. 345, Criminal P. C., with one of several accused persons has the effect of an acquittal of all the accused persons. We can find nothing in the section to support this interpretation and if this is really the meaning of the learned Judges in *Chandra Kumar Das* v. *Emperor* (1), we must respectfully dissent. No other authority

1. (1903) 7 C W N 176.

is quoted by petitioner. The petition is dismissed.

S.N./R.K. *Petition dismissed.*

** A. I. R. 1918 Madras 414
Special Bench

WALLIS, C. J., OLDFIELD AND SESHAGIRI AIYAR, JJ.

Chikkam Ammiraju and *others*—Defendants—Appellants.

v.

Chikkam Seshamma and *another*—Plaintiffs—Respondents.

Letters Patent Appeal No. 121 of 1916, Decided on 23rd February 1917, against judgment of Sadasiva Aiyar, J. in Second Appeal No. 1357 of 1914.

** **(a) Contract Act (1872), S. 15—Threat to commit suicide to obtain execution of document amounts to coercion.**

Per *Wallis, C. J.*, and *Seshagiri Aiyar, J.*, (*Oldfield, J.*, dissenting).—A threat to commit suicide, in consequence of which a document is executed by a person, is the threatening to commit an 'act forbidden by the Penal Code' and amounts to 'coercion' within the meaning of S. 15, Contract Act, and the document executed in pursuance of the threat is invalid and inoperative. [P 416 C 2]

* **(b) Penal Code (1860), Ss. 305, 306, and 307—Suicide—Suicide is "act forbidden by the Code."—Contract Act S. 16.**

Per *Wallis, C. J.*—It is impossible to hold that an act which it is made punishable to abet or attempt is not forbidden by the Penal Code, especially as the absence of any section punishing the act itself is due to the fact that suicide is, in the nature of things, beyond the jurisdiction of the Court. [P 414 C 2]

Per *Seshagiri Aiyar, J.*—Though there is no provision in the Penal Code which forbids in terms the commission of suicide, there can be no doubt that the intention of the legislature is to forbid such an act simply because a man, by committing the act, is beyond the reach of the law. [P 416 C 1]

Per *Oldfield, J.*—S. 15, Contract Act, should be strictly construed, and the act of prohibition not being expressly forbidden by the Penal Code, the prohibition cannot be inferred from the prohibition of attempts to commit it. An attempt in the legal sense, can be recognized as such only after the criminal's intention has been frustrated not when it is expressed, i. e., when the threat is made. [P 415 C2 P 416 C 1]

(c) Contract Act (1872), S. 15—"Prejudice"—Proof of legal injury is necessary.

The word 'prejudice' in S. 15 does not mean mere sentimental prejudice. Some legal injury must flow before a person can be said to be 'prejudiced' under the section. [P 416 C 2]

(d) Contract Act (1872), S 15—Wife executing document on threat of suicide by husband—She is prejudicially affected.

A wife who executes a document in consequence of the husband's threat that he would commit suicide is prejudicially affected by the threat. [P 416 C 2]

Patanjali Sastri, for *P. Narayana Murthi*—for Appellants.

G. Venkataramiah—for Respondents.

Wallis, C. J.—It has been found by both Courts that the deed in question was obtained by coercion, the coercion consisting in a threat by the fifth witness for the plaintiffs to his wife and son that he would commit suicide if they did not execute the document. It is easy to set up such a defence and the evidence in support of it should therefore be very closely scrutinized before it is held to be made out. Here it has been found as a fact and we are not at liberty to interfere with the finding on second appeal. The case now comes before us on a Letters Patent appeal owing to a difference of opinion between Sadasiva Aiyar and Moore, JJ., as to whether the facts as found amounted to coercion within the meaning of S. 15, Contract Act.

The point mainly argued before us was that suicide was not an "act forbidden by the Penal Code" within the meaning of the section. With this I cannot agree. At Common law suicide was a form of homicide. "Homicide properly so called," says Hawkins (Pleas of the Crown, Book 1, Ch. 9), "is either against a man's own life or that of another." Wilful suicide was felony, and on a finding that the suicide was felo de se his chattels were forfeited to the Crown like those of other convicted felons. In S. 299, I. P. C., the offence of culpable homicide is defined in terms which are sufficiently wide to cover deliberate suicide, which is dealt with by Mr. Nelson in his Penal Code as a species of unlawful homicide, though, of course, S. 302 and the following sections which prescribe the punishment for the various kinds of homicide are only applicable to living offenders. These sections are immediately followed by Ss. 305 and 306, which make abetment of suicide punishable with death in some circumstances and with lesser penalties in others. Then after dealing in Ss. 307 and 308 with attempts to commit murder and to commit culpable homicide, the Code proceeds in S. 309 to provide for attempts to commit suicide. I find it impossible to hold that an act which it is made punishable to abet or attempt is not forbidden by the Penal Code, especially as the absence of any section punishing the act itself is due to the fact that the suicide is in the nature of things beyond the jurisdiction of the

Court, and it is no longer thought desirable to inflict a vicarious punishment on those who came after him by forfeiting his goods to the Crown.

As to the second point, the act threatened must be "to the prejudice of any person whatever," and would cover threats to a wife to murder her husband or to a son to murder his father. Here the threat was by the husband and father to kill himself, which must be taken to be an act to his own prejudice, which seems to me sufficient to satisfy the section. I may add that I think the threatened act would also be directly to the prejudice of the wife, as it must be taken to be to the prejudice of any wife to deprive her of her husband, especially of a Hindu wife who thereby incurs all the disabilities of a Hindu widow. For the same reason, I think the act must be taken to be to the prejudice of the son. I would, therefore, dismiss the appeal with costs. Under S. 36, Letters Patent, the appeal is dismissed with costs.

Oldfield J.—I have the misfortune to differ from the learned Chief Justice and therefore deal with the case at length. The question is whether a threat to commit suicide is a threat to commit an act forbidden by the Penal Code within the meaning of S. 15, Contract Act; and it is conceded that it is not forbidden either directly or in the sense that a penalty is provided for it. It, therefore, can be regarded as forbidden only by implication. It is accordingly in place to consider whether S. 15 can be construed by implication or should be read strictly.

Section 15 has given rise to few decisions, and none in which the policy of the portion we are concerned with has been defined. No definition of that policy has been suggested before us and advisedly. For it would be hard to argue that any general policy is in question, when the coercive character of an act depends on the applicability to it of a Statute, which, though wide, does not enumerate acts criminal in India exhaustively, which (as the illustration shows) need not have been enacted at all or need not have been in force at the date or place in question and which might make conduct punishable, although it would be so under no law binding on those concerned or of which they could even be presumed to have known. The test thus provided may commend itself as definite, but can be regarded only as arbitrary and not as intended to promote any general policy by reference to which a liberal construction can be supported. Taking this view, I am bound to scrutinize respondents' arguments closely.

The first is that a threat to commit suicide is indistinguishable from one to attempt to do so and that such an attempt is forbidden by S. 309, I. P. C. which penalizes it. The answer is that threats of these two discriptions are distinguishable, unless the word "attempt" is used throughout the argument in its ordinary sense as equivalent to "endeavour" and not, as it must be in the second place, where it occurs, in the legal sense, in which it is used in Ss. 305 and 511. Further, if the word is used in its legal sense throughout, a threat to attempt to commit suicide is not only different from one to commit suicide, but is, like other threats to commit an attempt, a contradiction in terms. For an attempt in the legal sense can be recognized as such only after the criminal's intention has been frustrated, not when it is expressed; that is, when the threat is made. The remaining contention relied on is that the Code implicitly forbids suicide, because in Ss. 306 and 309 it explicitly forbids abetment of it and attempts to commit it. But this will advance the argument, only if it corresponds with some general principle; and it does not as regards abetment. For, apart from the cases of abetment of children and lunatics, it is not suggested that acts done without guilty knowledge or intention (and, therefore, innocently), but which nevertheless can be abetted under S. 108, Expln. 3, are forbidden. The principle, if there is one, is, therefore, sustainable only subject to these exceptions. But even so, reference to it is useless. For it is not shown that it can be tested by application to any instance, except the case of suicide, with which we are concerned; and there is no more security for its validity when such test is impossible, than for the validity of respondents' argument as applied to that case alone.

Respondents must, therefore, succeed, if at all on the single and direct contention that in the case of suicide a prohibition can be inferred from the prohibition of attempts to commit it; and with all respect, having decided in favour of a strict construction of S. 15, Contract Act,

I cannot accept it. No doubt the only species of prohibition employed in the Code, the specification of a penalty, would be useless in this case. But it does not follow that the failure to employ the other, direct prohibition, or to make provision for the case of suicide in the Contract Act was due to inadvertence and that the omission should be supplied by inference. For, it is possible that provision was omitted deliberately, because cases for its application would be rare and their truth difficult to establish, the party alleged to be coerced having usually easier means of preventing the accomplishment of the threat than by entering into the agreement sought to be avoided.

Holding that respondents cannot succeed on S. 15, I turn to S. 16 on which they also rely. In this connection, the threat of suicide is irrelevant, since Swami, who made it, was not a party to the contract; and there is no finding of fact, which would support any exercise of undue influence by the parties to the contract, appellants. This plea, therefore, fails.

As the majority of the Court would dismiss the appeal with reference to S. 15, respondents' other contentions have not been heard. On the view I take, it would be necessary to consider them before the appeal could be disposed of.

Seshagiri Aiyar, J.—I agree with the judgment of the learned Chief Justice. I do not think that the evidence in this case is sufficient to warrant a finding on the question of undue influence. On the question of coercion, although I had some doubts in the beginning, I have come to the conclusion that the facts do bring the case within S. 15, Contract Act. Mr. Patanjali Sastri argued that threatening to commit suicide is not forbidden by the Penal Code. A man who commits suicide goes unpunished because the law cannot reach him, and not because the offence is not forbidden. The Code makes a person who abets the committing of suicide punishable. It also reaches a man who attempts to commit suicide. Although therefore there is no provision in the Penal Code which forbids in terms the commission of suicide, there can be no doubt that the intention of the legislature is to forbid such an act. I agree with Mr. Venkatarama Aiyah that the term "any act forbidden by the Indian Penal Code" is wider than the term "punishable by the Penal Code." Simply because a man escapes punishment it does not follow that the act is not forbidden by the Penal Code. For example a lunatic or a minor may not be punished. This does not show that their criminal acts are not forbidden by the Penal Code. On the same analogy a man who commits suicide escapes punishment because by committing the act, he is out of the reach of the law. Where the abetment of it and the attempt to do it are both made punishable by the Penal Code, I am prepared to hold that the act itself is one forbidden by the Penal Code.

The second contention of the learned vakil was, that the threat to commit suicide could not have prejudiced the plaintiff. I agree with him that mere sentimental prejudice is not what the law contemplates. As pointed out in *Reg* v. *Metropolitan Board of Works* (1), some legal injury must flow in order that the man may be said to have been prejudiced: see also *Clark* v. *London General Omnibus Co, Ltd.* (2), Accepting this test, I am unable to hold that the wife, to whom the threat was addressed by a husband that he would commit suicide in case she does not execute a document, is not prejudicially affected by such a threat. In my opinion, the possibility of the husband dying leaving the wife, and the child uncared for is sufficient in the eye of the law to furnish the ground of prejudice. On this ground I agree with Sadasiva Aiyar J., in thinking that Ex. A was brought about by the use of coercion and that it should be set aside. The appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

1. (1868) 3 B & S 710=32 L J Q B 105.
2. (1906) 2 K B 648=75 L J K B 907.

A. I. R. 1918 Madras 416

WALLIS, C. J. AND OLDFIELD, J.

K. Ramachandra Aiyar—Plaintiff—Appellant.

v.

C. Duraivelu Mudaliar—Defendant—Respondent.

City Civil Court Appeal No. 1 of 1917, Decided on 1st May 1917, against the decree of City Civil Judge, Madras, in Original Suit No. 165 of 1916.

Madras City Municipal Act (1901), Ss. 129, 145 and 148—Construction of lease—Lessee

covenanting to pay taxes on buildings and lessor to pay quit rent—Subsequently corporation levying separate taxes on lands and buildings—Lessee's liability is not affected.

Under the terms of a lease, the lessee undertook to pay all Municipal taxes payable for buildings erected on the land demised and the lessor agreed to pay only quit rent. Subsequent to the lease, the Madras Corporation began to levy separate assessments on the buildings and the lands:

Held: that, on the construction of the lease, the lessee was bound to pay all taxes leviable under Ss. 129, 145 and 148, and that the liability was not affected by any arrangement the Corporation may have subsequentsly introduced to levy the taxes separately on the lands and the buildings standing on the lands. [P 418 C 1]

K. R. Subramania Sastri and *V.K. Venugopala Naidu*—for Appellant.

V. Sivaprakasa Mudaliar—for Respondent.

Wallis, C. J.—The question raised in this appeal is whether the lessor or lessee is bound to pay the taxes levied by the Madras Municipality under Ss. 129, 145 and 148, City Municipal Act, 3 of 1904 "on all buildings and lands," in so far as they are imposed on lands as distinct from the buildings standing on them. The taxes to which land in the Municipality is subject are quit rent and land revenue leviable under the Madras City Land Revenue Act, 1851, and the Municipal taxes alike are by law payable by the lessor as owner. The covenant of the lessee in the lease Ex A is that

"he the said lessee will pay and discharge all taxes, rates and assessments whatsoever that may hereafter, during the said term, become payable for and in respect of any building hereafter, to be erected upon the said lands hereby demised or any part thereof, save and except only the land tax or quit rent payable to Government which shall be paid by the lessor,"

and the corresponding lessor's covenant is that

"the said lessor during the said term pay and discharge the quit rent or land tax payable to Government now or hereafter to become payable for or in respect of the said pieces or parcels of land, hereby demised or any part thereof."

Having regard to the fact that both the Government and Municipal taxes were payable by the lessor as owner, the insertion of this express provision that, as between the lessor and the lessee, the lessor should pay only the quit rent shows that it was the intention of the parties to supply any defect in the previous enumeration of the taxes that the lessee had to pay, and to make it clear that the lessee was to pay the taxes now in question which are described in the Act as taxes "on buildings and lands." S. 129 imposes an annual tax not exceeding ten per cent of the annual value as determined under the Act on all buildings and lands, and Ss. 145 and 148 impose further taxes on buildings and lands at rates not exceeding 6 1/2 per cent and two per cent by way of water and drainage tax and lighting tax respectively. These three taxes, which may amount to 18 1/2 per cent of the annual value, are the Municipal taxes on buildings and lands leviable under the Act, and their existence must be taken to have been perfectly well known to every one who has had anything to do with landed property in this City including the lessor and the lessee in the present case. These three taxes are described as house, water and drainage, and lighting taxes in the Corporation notice of demand Exs. B, B-1 and D-1, and we may take it that house tax was the name by which the tax under S. 129 was popularly known, although it is a tax leviable not only on buildings but also on lands. It is the less surprising that they should be referred to in the lease as taxes in respect of buildings; but as I have already said, assuming this description here to be defective, the subsequent provision that the lessor should only pay the quit rent makes the intention clear. Further, the lease contains no provision as to how it was to be determined, how much of the tax on lands and buildings was to be considered to be in respect of the buildings and how much in respect of the lands on which the buildings stood.

It is not suggested that in October 1910, when the lease was executed, the Corporation had put separate assessments on the buildings and the lands. On the contrary the allegation in para. 7 of plaint is that the Corporation for purposes of their own introduced a system of this kind in 1911, a year after the execution of the lease. If so, it has no bearing on the construction of the lease which must be construed with reference to the state of things when it was entered into. The evidence of this new system is to be found in the notices of demand for house, water and drainage taxes for the first and second halves of 1914-15, when the building on the premises had not been completed. It is said to be in respect of land, and is for Rs. 40-11-9 being as stated in the notice 17 3/4 per cent on the annual valuation of Rs. 459. As regards the first half of 1915-16, April to September, 1915, the only document exhibited is a notice of

assessment, Ex. C, served on 30th July 1915, in which the property is referred to as a terraced and tiled bungalow. The fact that the tax is only made payable from 15th May 1915 instead of 1st April, shows that that was the date on which the bungalow was taken to have been completed. No annual valuation is given against 1914-15, but the proposed valuation is for 1915-16 and is Rs. 840 and the tax leviable as to this from 15th May to 30th September 1915 is Rs. 56-10-9. It was admitted that in respect of the land Rs. 40-11-9 was levied for this half year, as for previous half years, being 17 3/4 per cent on Rs. 459, the annual value of the land. The total valuation would thus appear to be Rs. 1,299 of which Rs. 459 represent the land and Rs. 840 the premises standing on it. Thus the result of accepting the plaintiff's contention would be to throw more than one-third of the taxes leviable under Ss. 129, 145 and 148, on the lessor, who under the express provision of the lease was to be liable only for the quit rent payable to Government and this out of the annual rent of Rs. 240 reserved by the lease. I think, for the reasons already stated, that this liability was imposed upon the lessee by the lease and was not affected by any arrangement the Corporation may have subsequently entered into to collect the taxes leviable under Ss. 129, 145 and 148 separately on the lands and the building standing on the lands. This is the conclusion arrived at by the City Civil Judge and accordingly the appeal fails and is dismissed with costs.

Oldfield, J.—I agree.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 418 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Ramalinga Annavi—Appellant.

v.

Narayana Annavi and *others*—Respondents.

Letters Patent Appeal No. 222 of 1916, Decided on 26th February 1917,- against judgment of Oldfield, J., in Civil Misc. Petn. No. 3750 of 1915.

Limitation Act (1908), S. 12—Review—Time spent in obtaining copy of judgment must be excluded—Civil P. C. (1908), O. 47, R. 3.

In computing the period of limitation within which an application for review must be filed, the time spent in obtaining a copy of the judgment sought to be reviewed must be deducted, though the copy is not required by law to be filed with the review application: 17 *All.* 213 and 35 *I. C.* 348, *Rel. on.* [P 418 C 2]

K. Jagannadha Aiyar—for Appellant.

S. Ramaswami Aiyar, T. M. Ramaswami Aiyar and *S. Anantharama Aiyar*—for Respondents.

Judgment. — Following *Wajid Ali Shah* v. *Nawal Kishore* (1) and *Gangadhar Karmakar* v. *Shekharbasini Dasya* (2) we hold that the time for obtaining a copy of the judgment sought to be reviewed should be deducted though the copy is not required by law to be filed with the review application. The cases of this Court cited on appellant's behalf do not deal directly with that portion of S. 12, Lim. Act, which applies to review applications under the Civil Procedure Code and the inferences which the appellant's learned vakil wishes us to draw as logically following from dicta (partly obiter) found in those decisions which deal with appeals allowed under the provisions of special Acts cannot override the plain language of S. 12, Lim. Act.

The Letters Patent Appeal is dismissed with costs of respondents Nos. 1 to 3.

S.N./R.K. *Appeal dismissed.*

1. (1895) 17 All. 213.
2. (1916) 35 I C 348.

A. I. R. 1918 Madras 418 (2)

AYLING AND NAPIER, JJ.

Kandasami Pillai — Petitioner—Appellant, In re

Letters Patent Appeal No. 17 of 1917, Decided on 2nd February 1917, against order of Sadasiva Aiyar, J., in Cr. R. C. No. 903 of 1916.

Criminal P.C. (1898), S. 250—Single Judge refusing to interfere with order under—No appeal lies under Letters Patent (Mad.), S. 15.

An order for compensation passed under S. 250 is one passed in a criminal trial, and no appeal lies under S. 15, Letters Patent, to a Division Bench against an order of a single Judge of the High Court refusing to interfere with such order: 17 *M. L. J.* 158 (*F.B.*), *Dist.* [P 418 C 2]

K. R. Gurusami Aiyar and *A. Subramania Aiyar*—for Appellant.

Ayling, J.—No appeal lies. An order of compensation under S. 250, Criminal P. C. is an order "passed or made in a criminal trial" and under Cl. 15, Letters Patent no appeal lies against the order of the learned Judge of this Court declining to interfere with it. We have been referred to the decision of the Full Bench

in *Rajah of Kalahasti* v. *Narasimha Nayani Varu* (1), but there is nothing either in the decision or the reasoning supporting it inconsistent with this view, which is based on the natural interpretation of the words of the clause. I would dismiss the petition.

Napier, J.—I agree. The distinction between this case and proceedings under S. 145, Criminal P. C. is apparent. The Full Bench in *Rajah of Kalahasti* v. *Narasimha Nayani Varu* (1) has held that the matter dealt with under S. 145, Criminal P. C., is civil, being as stated in the heading of the Chapter "a dispute as to immovable property." The proceedings in which this order was made were a charge of theft, which is obviously a criminal trial. The order, whatever its nature, was therefore passed in a criminal trial and is covered by the exception to Cl. 15, Letters Patent.

S.N./R.K. *Appeal dismissed.*

1. (1907) 17 M L J 158=5 Cr L J 343 (FB.)

A. I. R. 1918 Madras 419

WALLIS, C. J., OLDFIELD AND SESHAGIRI AIYAR, JJ.

Thavasi Ammal and *others*—Plaintiffs—Appellants.

v.

Salai Ammal and *others*—Defendants—Respondents.

Letters Patent Appeals Nos. 198 to 200 of 1916, Decided on 2nd October 1917, from judgment of Phillips, J., in City Civil Courts Appeals Nos. 21, 23 and 24 of 1915.

(a) Landlord and Tenant — Permanent tenancy—Burden of proof is on tenants.

Where in a suit for eviction a landlord sets up a specific tenancy which is not proved but the defendants admitting that they are tenants set up a permanent tenancy, the burden is on the tenants to prove the permanent character of the tenancy. In the absence of such proof, the tenancy must be deemed to be a monthly one, and if the necessary notice under S. 108 has been given, the plaintiff must succeed. [P 419 C 2]

(b) Landlord and Tenant —Improvements —Tenant is not entitled to compensation.

In the absence of a contract, a tenant is not entitled to compensation for permanent structures erected on the land unless the landlord encouraged the tenant to erect them. [P 419 C 2]

S. Srinivasa Aiyangar, *T. Ethiraja Mudaliar* and *M. Purushottam Naidu*—for Appellants.

M. A. Tirunarayanachariar—for Respondents.

Seshagiri Aiyar, J.—As the City Civil Judge has expressed no opinion upon the facts as regards these appeals, it is desirable that he should be asked to give a specific finding on the question of equitable estoppel. The view taken by the learned City Civil Judge that because the particular tenancy set up by the plaintiffs has not been proved therefore the suits should be dismissed, is open to serious objection. There can be no question that the defendants admitted in these cases that they were tenants. Their defence was that they were entitled to a permanent right of occupancy. On the pleadings, therefore, the burden is on the tenants. The position stands thus. The plaintiffs sue the defendants as tenants; the defendants admit that they are tenants, but say that they have a right to be on the soil permanently. The result is that if no further evidence were let in, by virtue of S. 106, T. P. Act, the tenancy should be held to be a monthly one. Consequently although the plaintiffs might have failed to prove the particular tenancy set up by them, if sufficient notice as required by S. 108 had been given, they would be liable to be evicted.

It is not disputed that such a notice was given in these cases. Therefore, the right of eviction is established in favour of the landlords. The further question as to whether the tenants are entitled to compensation would depend upon the evidence adduced in the case. As I have said before, there is evidence, at any rate in some of the cases, of a kind which, if believed, might lead to the conclusion that the landlord encouraged the tenant to erect a permanent building. That is a matter upon which the opinion of the City Civil Judge should be given. I am therefore of opinion that the cases should be sent back for a finding whether the landlords encouraged the defendants to build, and if so, what is the compensation to which the tenant in each of these cases is entitled. One month will be allowed for the return of the finding and seven days for objections.

Wallis, C. J. and Oldfield, J.—We concur with the order proposed by Seshagiri Aiyar, J.

In compliance with the order contained in the above judgment, the City Civil Judge, Madras, found that, in two of the cases, there was no express promise on the part of the plaintiffs to allow defen-

dants to erect a superstructure, and in the other case that there was such a promise and fixed the compensation at Rs. 300.

These Letters Patent Appeals coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following

Judgment.—In two of the three cases covered by this finding, the learned City Civil Court Judge has found that it is not proved that there was any express agreement or encouragement given by the plaintiffs to the defendants in question to erect tiled houses, and we see absolutely no reason to differ from this conclusion. In these circumstances we think that our former judgment concludes the case and therefore these appeals must be allowed. We reverse the decrees and give judgment for the plaintiffs as prayed for, with costs throughout.

As regards the third case, the City Civil Court Judge has found that there was such an agreement or encouragement. We feel reluctant in the circumstances of the present case to differ from that finding. But we do not think that the evidence upon which the learned Judge has acted is such as can safely be relied upon. It consists of the evidence of the defendant and her husband who are interested, and they are also supported by two witnesses who are apparently in the same position as the defendant, as they also own tiled houses on the sites belonging to the plaintiffs. They are therefore distinctly interested. Then, there are certain discrepancies to which the learned Advocate General has called our attention. It is alleged in the particulars put in on behalf of the defendant that the agreement was entered into in 1903 when the house was built. But the evidence of two witnesses goes to show that this agreement took place two or three years later, whereas one of the witnesses puts it even earlier than 1903. Then there is the fact that in the particulars which were given in connection with this case, the alleged agreement is said to have been made by plaintiffs 2 and 3 in the presence of plaintiff 1. The evidence now is that it was made by plaintiff 2 in the presence of plaintiff 1 and that plaintiff 3 was not there at all. It is obvious that oral evidence of this kind is exceedingly easy to procure, and on the other hand it is impossible to rebut it effectively. All that the plaintiffs can do is to deny the evidence on the other side. In the circumstances of the case we reluctantly come to the conclusion that this evidence cannot safely be acted upon. We are unable, therefore, to accept the finding of the City Civil Court Judge, and in the result we must give the same decree in this as in the other suits. Six months' time will be allowed for removal of superstructures in all cases.

S N./R K. *Appeal allowed.*

A. I. R. 1918 Madras 420

ABDUR RAHIM AND KUMARASWAMI SASTRI, JJ.

T. Krishnamurthi Iyer — Appellant.

v.

Parvati Ammal — Respondent.

Appeal No. 224 of 1916, and Civil Revn. Petn. No. 929 of 1916, Decided on 30th July 1917, against order of Dist. Judge, Tanjore, in O. P. No. 646 of 1915.

(a) Guardians and Wards Act (1890), S. 39 —"Instrument"—Meaning of, stated.

The word "instrument" in S. 39, must be confined to insruments ejusdem generis with a will and it does not cover a decree of Court embodying a compromise. 18 *Bom.* 375, *Foll.*

[P 420 C 2; P 421 C 1]

(b) Guardians and Wards Act (1890), Ss. 7 and 39—Effect of appointment of guardian under S. 7 is to remove by implication any guardian not appointed in a way under S. 39.

Under S. 7, if the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both, it can do so, and the result of such an order is to remove by implication any guardian who has not been appointed in any of the ways mentioned in S. 39 of the Act.

[P 421 C 1]

T. V. Muthukrishna Aiyar — for Appellant.

S. Varadachriar and *K. R. Narayanasami Aiyar*—for Respondent.

Judgment—The appellant put in a petition under Ss. 7 and 39, Act 8 of 1890. So far as the application under S. 39 is concerned we think the facts of the case reported in *Bai Harkor* v. *Bai Shangar* (1) are exactly similar to those of the present case and the ruling of Sir Charles Sargent, C. J., in that case was that the word "instrument" in S. 39 must be confined to instruments ejusdem generis with a will, and it does not cover

3. (1894) 18 Bom 375.

a decree of Court embodying a compromise. We think that this interpretation is correct. But under S. 7 which was not noticed by the learned District Judge if the Court was satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both, it could do so and the result of such an order would be removal by implication of any guardian who has not been appointed in any of the ways mentioned in S. 39. There being no guardian appointed by the Court or by will or by any other instrument, the petitioner was entitled to ask the Court to appoint a guardian of the person and property of the minor. It is contended by the learned pleader for the respondent that the main properties mentioned in the petition for the appointment of a guardian do not belong to the minor, but belong to the respondent herself under the terms of the compromise decree. It is not for us at this stage to express any opinion on this point. The lower Court will deal with the question if it be necessary, when properly disposing of the application made by the appellant. We set aside the order of the learned District Judge and direct that the petition be disposed of according to law. Cost will abide the result. No order is necessary on Civil Revision Petition 929 of 1916.

S.N./R.K. *Appeal allowed.*

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*A I. R. 1918 Madras 421

Full Bench

AYLING, SESHAGIRI AIYAR AND BAKEWELL, JJ.

Subramania Ayyar and *another* — Plaintiffs—Appellants.

v.

A. L. V. R. R. M. Muthia Chettiar and *others*—Defendants—Respondents.

Second Appeal No. 691 of 1916, Decided on 18th September 1917, from decree of Sub-Judge., Coimbatore, in Appeal Suit No. 14 of 1916.

***(a) Transfer of Property Act (1882), S. 53 —Suit under O. 21, R. 63, Civil P. C.—Plea of fraudulent alienation is not available to attaching creditor—Civil P. C., O. 21, R. 63.**

In a suit under O. 21, R. 63, by defeated claimant to enforce a sale by the judgment-debtor, an attaching creditor cannot plead in defence that the sale is illegal under S. 53, T. P. Act, so long as the sale is not declared void by decree of Court in a suit instituted by him. The sale continues in force till it is set aside in proceedings properly instituted for the purpose. 34 *I. C.* 778, *Foll* 14 *I. C.* 715, *Diss from.* [P 422 C 1]

(b) Transfer of Property Act (1882), S. 53 —Suit whether must be representative one —*Quaere*

Per *Ayling, J.* (*Quare*)—Whether a suit by a creditor to avoid an alienation as infringing against S. 53, must be brought in a representative capacity on behalf of the body of creditors. [P 421 C 2]

A. Krishnaswami Aiyar for *L. S. Veeraraghava Aiyar*—for Appellants.

V. C. Seshachariar and *M. Raghavachariar*—for Respondents.

Ayling, J.—In this case the appellants (plaintiffs) are purchasers of the suit property from defendant 2 by a sale deed Ex. A, dated 20th June 1904. Defendant 1 subsequent to this sale obtained a decree against defendant 2 in Small Cause No. 1960 of 1905, and in 1913 attached the suit properties in execution. Plaintiffs preferred a claim, on the dismissal of which they filed the present suit for declaration of their title, and for cancellation of the summary order on their claim. The suit failed in both the lower Courts, the Subordinate Judge holding in first appeal that the sale was a fraudulent transaction intended to defeat or delay defendant 2's creditors, though not a mere sham transaction. It is now argued in second appeal that it is not open to defendant 1 to set up such a defence in the present suit; and that the sale must be held good against him unless and until he obtains a decree setting it aside in proceedings suitably instituted for that purpose. Mr. A. Krishnaswami Aiyar relies on a recent ruling of this Court reported as *Palaniandi Chetti* v. *Appavu Chettiar* (1) and the second appeal appears to have been specially ordered to be heard by us with a view to the correctness of this ruling being considered by a Bench of three Judges.

Speaking for myself, I have carefully considered the judgment in the case referred to and the arguments of Mr. Seshachariar who has endeavoured to show us that the decision is wrong. The facts are absolutely analogous to those in the present case. It is unnecessary for us in the present case to consider whether a suit by a creditor to avoid an alienation as infringing against S. 53, T. P. Act must be brought in a representative capacity on behalf of the body of creditors; but, apart from this, I have no hesitation

1. (1916) 34 I C 778.

in concurring in the views expressed by Coutts-Trotter and Seshagiri Aiyar, JJ., in that case. The only case quoted by Mr. Seshacharriar which has not been dealt with in their judgment and which appears to have any bearing on the question, is a Calcutta case not reported in the regular series [*Abdul Kader* v. *Ali Meah* (2)]. With all respect, I cannot agree with the decision. I do not find in it sufficient authority for the proposition advanced by Mr. Seshacharri that anything which can be made the basis of a suit can be pleaded as a bar in action: and I agree with my learned brother Seshagiri Aiyar, J., in the case of *Palaniandi Chetti* v. *Appavu Chettiar* (1) that a sale such as the one we are considering must be held to continue in force until it is set aside in proceedings properly instituted for the purpose. It follows that the decrees of the lower Courts in the present suit should be set aside and plaintiffs be given a decree as sued for with costs throughout.

Seshagiri Aiyar, J.—I agree. The further arguments addressed to us by Mr. Seshacharriar have not convinced me that my view in *Palaniandi Chetti* v. *Appava Chettiar* (1) is wrong and that an attaching creditor as defendant can obtain a declaration that the sale by his judgment-debtor, which he has not sued to set aside is in fraud of his and other claims against the common judgment-debtor, and that on that ground the suit should be dismissed.

Bakewell, J.—I agree.

S.N./R.K. *Appeal allowed.*

2. (1912) 14 I C 715.

A. I. R. 1918 Madras 422

SADASIVA AIYAR, J.

S. R. V. S. V. S. V. Ramakrishna Iyer —Petitioner.

v.

Official Receiver, Tinnevelly—Opposite Party.

Civil Misc. Petn. No. 2243 of 1916, Decided on 16th January 1917, for review of judgment of High Court dated 4th February 1916, in Appeal Against Order No. 407 of 1914.

(a) Presidency Towns Insolvency Act (1909), Ss. 17 and 83—Position of Official Assignee in Madras, differs from that of Official Receiver in muffasil—Provincial Insolvency Act (1907), Ss. 61 and 67.

The position of an Official Assignee in Madras differs from that of an Official Receiver in the muffasil. The Official Assignee may sue and be sued by the name of the Official Assignee of the property of the insolvent without mentioning his own name under S. 83, Presidency Towns Insolvency Act, whereas there is no corresponding provision in the Provincial Insolvency Act.

[P 423 C 2 P 424 C 1]

(b) Provincial Insolvency Act (1907), Ss. 61 and 67—Resignation by Official Receiver—Whether successor can continue proceedings without name being brought on record.

Quaere—Whether on the resignation of his office by an Official Reciver maintaining a suit or appeal his successor can continue the proceedings without his name being brought on the record.

[P 423 C 2]

(c) Provincial Insolvency Act (1907), Ss. 61 and 67—Resignation by Official Receiver—Appointment of successor—Change of personal intimated to Court—Court still pronouncing decision on merits—Record must be deemed to have been amended.

Where the change of personnel on resignation of his office by the Official Received and appointment of his successor is intimated to the Court, which proceeds notwithstanding, to pronounce a decision on the merits, the record must be deemed to have been amended by the substitution of the name of the new officer in place of the one who had vacated office. [P 424 C 2]

T. R. Venkatarama Sastri, E. S. Chidambaram Pillai and *S. Anantarama Aiyar*—for Petitioner.

M. D. Devadoss—for Opposite Party.

Judgment.—This is a petition for review of the judgment pronounced by myself and Moore, J., on 4th February 1916 in Appeal against Order No. 407 of 1914. That appeal was preferred by one Mr. Gopaliah (then Official Receiver of Tinnevelly) against the order passed by the District Judge of Tinnevelly refusing the Receiver's application made under S. 37, Provincial Insolvency Act 3 of 1907 to annul certain alienations made by an adjudicated insolvent in favour of one of his creditors (namely, the firm represented by the respondents 1 and 2) within three months before the adjudication. Pending Appeal against Order No. 407 of 1904 in this Court, Mr. Gopaliah, the Official Receiver resigned his post and a new Receiver was appointed by the Local Government for the Tinnevelly District. The appeal came on for hearing before myself and Moore, J., on 4th February 1916. Mr. Devadoss had filed the appeal for Mr. Gopaliah, the then Official Receiver. I accept Mr. Deva Doss's statement that on 4th February 1916 he represented to us that Mr. Gopaliah had resigned his post of Official Receiver and that another gentleman (Mr. Subramania Iyer) had been appointed a

Official Receiver that a doubt was suggested before us by the learned counsel whether it was necessary to have a name of the new Official Receiver substituted for that of Mr. Gopaliah in the appeal records before the appeal could be heard and that we intimated that all that was necessary was that instead of the appellant being described as Mr. P. A. Gopaliah, Official Receiver of Tinnevelly, thereafter, he might be described simply as the Official Receiver of Tinnevelly. I also accept Mr. Deva Doss's statement that he represented to us that he had instructions to continue the appeal on behalf of the Official Receiver.

After hearing both sides fully, we allowed the appeal and declared the alienations made by the insolvent to the firm of the respondents 1 and 2 void as against the Official Receiver. In drawing up the fair copies of our judgment and order, the office has repeated the name of Gopaliah before the description of the appellant as the Official Receiver of Tinnevelly. That is a clerical error which must be corrected. This petition of review is filed by the firm of S. R. M. V. S. S. V. Ramkrishna Aiyar who are the respondents 1 and 2 in the appeal. The Official Receiver of Tinnevelly is the respondent in this review petition which does not mention the officer's individual name. The only arguable ground on which this review petition is sought to be supported is the 1st ground which is as follows:

"The decision of the learned Judges is vitiated in law in that the appellant had resigned and so had no locus standi to appear and the new Receiver was not brought on record before the case was heard."

It is argued in support of this ground, that the decision in *Akula Paradesi* v. *Dheli Jagannadha Row* (1) constrains me to hold that the appeal was heard in the absence of the proper party as appellant and that the devolution of interest to the next Receiver was of such a kind that the old Receiver could not continue to represent the interests involved in the appeal even for the purpose of the further conduct of the appeal. The Calcutta case reported as *Rai Charan Mandal* v. *Biswanath Mandal* (2) considers devolutions of interest through transfers of the interests of private parties and so far as such litigation is concerned, the original parties can continue the litigation effectively. The decision in *Akula Paradesi* v. *Dheli Jugannadha Row* (1), however draws a distinction between the continuation of litigation by a private person whose interest has ceased through assignment or devolution and the continuation of litigation by one whose right to conduct the litigation was based solely on his character of a Receiver or Trustee appointed by the Court and whose character as such ceased during the pendency of the litigation. The learned Judges say that in the latter case "the law necessarily implies the absence of all interest in the subject of litigation," when the official capacity of the party litigant whose name is on the record terminates and that his continuance of the litigation after such termination would be futile save in very exceptional cases as

"where the right of action accrued by virtue of mere possession or by virtue of their being contracting parties themselves"

and so on. Mr. Deva Doss argued contra that the case of *Akula Paradesi* v. *Dheli Jagannadha Row* (1) related to a Receiver appointed under S. 503, old Civil P. C. for a particular suit or particular suits and that the ratio of that decision could not apply to an Official Receiver in whom ex officio all the properties of the insolvent become vested and who by reason of the office becomes entitled to institute and continue suits. Mr. Deva Doss relied upon the analogy of the Official Assignee on the Original Side of the High Court, of the Advocate-General, the Administrator General and so on who bring and defend suits in their official designations and whose successors are entitled to continue the conduct of the litigation (according to what Mr. Deva Doss alleged was the uniform practice) without their successors' names being brought on the record.

I am not well acquainted with the practice as regards suits brought by or against the Official Assignee of Madras or the Advocate-General or the Administrator General where there has been a change of officers pending the litigation and I shall not express any opinion as regards the legality of the practice alleged by Mr. Deva Doss assuming it to exist. It seems however that a distinction might be fairly drawn between the position of the Official Assignee in Madras and the position of an Official Receiver in the

1. (1905) 28 Mad 157.
2. A I R 1915 Cal 103=26 I C 410.

Moffusil. Whereas under S. 17, Presidency Towns Insolvency Act 3 of 1909 the effect of the order of adjudication is at once to vest in the Official Assignee all the properties of the insolvent, under the Provincial Insolvency Act of 1907 (S. 19, Cl. 2 read with Ss. 16 and 18), the properties of an adjudicated insolvent vest in the Official Receiver in the Moffusil only when the Court appoints a receiver for the property of the insolvent under S. 18, Cl. 1: *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (3). S. 18, Cl. 1 is as follows:

"The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver.

It is also to be noted that under S. 83, Presidency Towns Insolvency Act, the Official Assignee may sue and be sued by the name of "the Official Assignee of the property of the insolvent" without mentioning his own name. Under S. 61, again, of the Presidency Towns Insolvency Act, "the property of the insolvent shall pass from Official Assignee to Official Assignee . . . for the time being during his continuance in office, without any transfer whatever".

There seem to be no provisions in the Provincial Insolvency Act corresponding to Ss. 83 and 61, Presidency Towns Insolvency Act (at least none was pointed out to me). It is however open to argument that S. 61, Presidency Towns Insolvency Act, was enacted merely through abundant caution and that the provision which makes the property of the insolvent vest in the Official Receiver implies that on the change of the personnel of the Official Receiver the property vests ipso facto in the new Official Receiver. I think it is unnecessary for me to pursue the matter further as I think that this review petition might be disposed of on another ground which I shall at once proceed to state. At the hearing of the appeal before myself and Moore, J., it is admitted (see ground No. 2 of the review petition itself), that the resignation of the receiver Mr. Gopaliah was brought to our notice and also the fact that a new receiver had been appointed. Supposing an amendment of the records became, in consequence, necessary, I think it must be taken that myself and Moore, J., treated the record as amended by striking out the name of Mr. Gopaliah from the record and by retaining only the words "Official Receiver, Tinnevelly" and that we held further that such a description represented the new receiver sufficiently.

Respondents 1 and 2 in the appeal (who are the petitioners in review) did not object to the hearing of the appeal on the footing, as if the appellant on the record was the new receiver who was continuing the conduct of the appeal filed by the old receiver and did not object that the new receiver's name should be formally and expressly entered on the record or that his description as Official Receiver was not legally sufficient. I think that under these circumstances it must be taken that our decision was given in favour of the new Official Receiver and must be held to accrue for the benefit of the Official Receiver for the time being. I therefore dismiss this petition for review with costs.

S.N./R.K. *Petition dismissed.*

3. (1916) 34 I C 60.

A. I. R. 1918 Madras 424

SADASIVA AIYAR, J.

Somadurai Mudaliar and *others*—Accused—Petitioners, In re.

Criminal Revn. No. 33 of 1917, and Criminal Revn. Petn. No. 28 of 1917, Decided on 16th February 1917, from judgment of First Class Sub-Divl Magistrate, Mayavaram, in Criminal Appeal No. 35 of 1916.

(a) Penal Code (1860), S. 441—Criminal trespass—Intent to annoy is essential—Existence of some other intention—Offence is not negatived.

An intent to annoy, essential to constitute an offence under S. 441, is not necessarily negatived by the existence of some other intention : 35 *Mad* 186, *Foll.* [P 425 C 1]

(b) Penal Code (1860), S 441—Breaking open house in possession of complainant—Accused held guilty under S. 441.

A person breaking open a house which has been delivered through Court to the complainant must be presumed to know that serious mental annoyance will be caused by his act and is guilty of an offence under S. 441. [P 425 C 1]

P. R. Srinivasa Aiyangar—for Petitioners.

FACTS appear sufficiently from the following judgment of the lower appellate Court. "The appellants have been found guilty of house-breaking and house trespass—Ss 453 and 448, I. P. C. P. W. 1 purchased the house of appellants 1 and 2 in Court auction as per Ex. A and the house was delivered to him by the Court Amin, P. W 2, with the aid of the police P. W 3. The records show that appellants 1 and 2 would not make a peaceful

delivery of the house and on the motion of P. W. 1, the Sub-Court ordered the Amin, P. W. 2. to take police aid and deliver the house and it was accordingly done by P. W. 2 as per Ex. B. P. W. 1 took charge of the house and had it locked with his own lock and went away to another village. When he returned some days after, he found appellants 1 to 4 in the house and when he questioned them how they happened to break open the lock put on the street door by him and and get inside, they threatened to beat him. It is also said that some of the planks in the house had been removed during the absence of P. W. 1.

It is idle to contend that the house was not delivered to P. W. 1 and that some of the inmates—Ponnu Ammal and Sivagami Achi—objected when the Amin came to deliver the house and it was stopped. The evidence of P. Ws. 2, 3, 4, 5 and 6 fully supports the prosecution that P. W. 2 delivered the house to P. W. 1 and that the latter put his lock over it. The Exhibits filed in the case entirely corrobrate the delivery. If it were a fact that the two females objected to the delivery, it is inexplicable why they did uot take any further steps in the matter by filing an objection petition in the Court and pressing forward their claims. It is proved by P. Ws. 4 and 5 that the appellants did break the lock put upon the street door and made a forcible entry into the house when P. W. 1 was absent elsewhere. The fact that the appellants set at nought the Court's order and got forcible possession of the house by housebreaking and threatened P. W. 1 to beat him when he questioned them about their conduct, shows clearly their intention to annoy the complainant. The lower Court has fully discussed the interested nature of the defence evidence and I consider it unnecessary to go through again. I find that the lower Court has rightly found appellants guilty under Ss. 453 and 448, I. P. C. These sentences inflicted is by no means severe, seeing that the appellants paid no regard to authority and took the law into their own hands. The appeal will be dismissed under S. 423, Criminal P. C."

Order.—In some of the cases quoted by the appellants' learned counsel, the lower Courts did not find the intention to annoy. In the present case, the appellate Magistrate finds "clearly their" (the accused's "intention to annoy the complainant." As regards other cases quoted by petitioner's counsel (mostly Calcutta cases) in which the Judges have held that an intention to annoy should be positively proved and that if some other intention is also evident an intention to annoy should not be presumed, I respectfully differ from those cases and agree with the judgment of Benson, J., in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppen* (1). The inevitable consequence of the act of the accused in this case in breaking open a house which had been delivered (with the aid of the police) through Court to the complainant must be serious mental annoyance to the complainant, and the intention to cause such annoyance follows the knowledge of the accused as human beings that such annoyance must be caused. I dismiss this petition.

S.N./R.K. *Petition dismissed.*

1. (1912) 35 Mad 186=9 I C 152.

* A. I. R. 1918 Madras 425

WALLIS, C. J. AND SPENCER, J.

Theethalan—Defendant—Appellant.

v.

Eralpod Rajah and *others* — Plaintiff and Defendants—Respondents.

Second Appeal No. 1035 of 1914, Decided on 17th January 1917, against decree of Temporary, Sub-Judge, Palghat, in Appeal Suit No. 211 of 1913.

(a) Landlord and Tenant—Rent—Liability Usufructuary mortgagee of lease-hold has not privity of contract for rent with landlord.

"A mortgagee with possession of a lease-hold interest is not liable to the lessor for rent on the English doctrine of privity of estate. [P 426 C 1]

***(b) Transfer of Property Act (4 of 1882), S. 108 — Mortgagee with possession is not liable to pay rent to landlord.**

It was not the intention of the legislature by enacting S. 108, T. P. Act, to bring the sub-lessee and the mortgagee from the lessee into direct relations with the lessor. Mere possession, in the absence of privity of estate, will not make the mortgagee liable to the lessor : 30 *Mad.* 410 and 10 *Cal.* 443, *Dist.*

[P 427 C 2; P 428 C 1]

*** (c) Transfer of Property Act (4 of 1882), S. 57—Privity of estate what is and where arises stated—Mortgagee of lease-hold has no privity of estate with lessor.**

Per *Wallis, C. J.*—Privity of estate is a technical term of English law and, under that law, no such privity arises unless the whole of the lessee's interest is assigned over. Where a subsidiary interest is carved out of the lessee's interest, no fresh privity arises. For instance, there is no privity of estate between a lessor and a sub-lessee. In India under S. 57, T. P. Act, a mortgage of a lease-hold interest is not an

out and out transfer of the mortgagor's interest, and therefore on the English doctrine no privity of estate can arise. [P 426 C 1]

*** (d) Transfer of Property Act (4 of 1882), S. 108 — Lessee does not cease to be liable for rent merely on account of assignment— But if rent is once accepted from assignee lessee ceases to be liable—Privity of contract to transfer and not possession is material.**

One effect of S. 108, T. P. Act, is that the lessee does not cease to be liable on the lease by reason only of an out and out assignment, but he will, as in England, cease to be liable if the lessor accepts rent from the assignee and thereby creates a privity of contract between himself and the assignee. The liabilities of the transferee arise in India, as in England, on and by reason of the transfer, and do not depend on the question whether the transferee has obtained possession. [P 426 C 2]

(e) Transfer of Property Act (4 of 1882), S. 65 (d)—S. 65 (d) deals with relations between mortgagor and mortgagee and not lessor and lessee — S. 108 (j) applies to it— Privity of estate is personal and does not apply to assignee.

Per *Spencer, J.*—S. 65 (d), T. P. Act, deals only with the rights and liabilities of the mortgagor and the mortgagee as between themselves. The rights and liabilities as between the mortgagor and his lessor are regulated by S. 108 (j). Privity of contract is personal privity and extends only to the person of the lessor and the person of the lessee, and the mere creation of a mortgage by the latter does not create a personal privity between the lessor and the mortgagee. [P 428 C 2]

K. R. Subramania Sastri — for Appellant.

T. R. Ramachandra Aiyangar and *T. R. Krishnaswami Aiyar* — for Respondents.

Wallis, C. J.—The question raised in this appeal is whether mortgagees with possession from lessees are liable to the lessor for rent. The Subordinate Judge has held that they are liable on the ground that privity of estate exists between them. In this I think he is clearly wrong. Privity of estate is a technical term of English law, and it is clear that under that law no such privity arises unless the whole of the lessee's interest is assigned over. Where a subsidiary interest is carved out of the lessee's interest, no fresh privity arises. For instance, there is no privity of estate between a lessor and a sub-lessee. Where the lessee mortgages his whole lease-hold interest, privity arises in English law, because there the mortgage is by conveyance with a right to a reconveyance, and therefore the whole interest of the lessee is assigned to his mortgagee ; but, as this is not considered a desirable state of things, conveyancers present such privity of estate from arising by making the mortgage by way of sublease of something less than the whole interest of the lessee. In India a mortgage such as this is not an out and out transfer of the mortgagor's interest (S. 58, T. P. Act) and therefore on the English doctrine, no privity of estate can arise. We have however to consider the provisions of the Transfer of Property Act as to leases which should be followed in India in preference to English decisions, even where it does not in terms apply, as to agricultural leases. S. 108 (j), provides :

"The lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property . . . . . The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease."

One effect of this provision is, that the lessee does not cease to be liable on the lease by reason only of an out and out assignment, but he will, as in England, cease to be liable if the lessor accepts rent from the assignee and thereby creates a privity of contract between them. It is also to be noted that the liabilities of the transferee arise, as in England, on and by reason of the transfer, and do not depend on the question whether the transferee has obtained possession: *Monica Kitheria Saldanha* v. *Subraya Hebbara* (1), *Randipur azil Kunhisow* v. *Alukandiyil Parkum Mulloli Chathu* (2). If the transfer is absolute, it has been held that the transferee becomes liable to the lessor, *Kunhanujan* v. *Anjelu* (3), as in that case, privity of estate arises under the English decisions. The section however says nothing about privity of estate, and the question really is, what is the intention of the legislature as regards transfers by the lessee by way of mortgage in the Indian form or by sub-lease, in which cases there would clearly according to the English decisions be no privity of estate on which the liability could be rested. The case of *Kunhanujan* v. *Anjelu* (3) does not afford much assistance, for that was a case of an assignment or absolute transfer of the lease, and all that was held was that there was nothing in the section to prevent the transferee being liable on the doctrine of privity of estate as in England.

1. (1907) 30 Mad 410.
2. (1915) 38 Mad 86=17 I C 933.
3. (1894) 17 Mad 296.

It is quite another thing to hold that in the case of a mortgage or sub-lease by the lessee the transferee becomes liable directly to the lessor, as such liability cannot be based on any recognized doctrine of privity of estate. The decision in *Kannye Lall Sett* v. *Nistoriny Dossee* (4) appears to have proceeded on the footing that the mortgage in that case amounted to an assignment or transfer of the lease-hold interest in which case privity of estate would arise, and is of no assistance in the present case, where the transfer by mortgage did not amount to an assignment or out and out transfer. This is clearly pointed out by Farran, C. J., in *Timmappa Kuppaya* v. *Rama Venkanna Naik* (5) where, however, as has been pointed out in *Vithal Narayan* v. *Shriram Savant* (6), the word "contract" both in the head-note and the judgment is a slip, what was meant being not privity of contract but privity of estate.

"A sub-lease differs from the assignment of a lease in that it creates no privity of contract (read, estate) between the sub-tenant and the landlord. The landlord has to deal with his lessee and not with the sub-tenants of the latter. The English authorities show conclusively that a landlord putting an end by a proper notice to the tenancy of his tenant thereby determines the estate of the under-tenants of the latter, This is undoubted law."

Later on the learned Judge observes:

"An assignee of a lease is of course in a different position, for he is brought by his assignment into direct relations with the landlord"

that is to say, in the language of the English law, that privity of estate arises between them. It appears clear that the learned Chief Justice did not consider that, in India, sub-lessees could be sued for rent by the lessor under S.108 (j), T. P. Act or for any other reason. To so hold, would be a very serious innovation. We cannot hold that in India the mortgagee in possession is to be directly liable to the lessor for rent without applying the same doctrine to the sub-lessee. Both are governed by thesame S. 108 (j), T. P. Act, and, if actual possession of the land is to make the one liable for rent, it must also be the case with the other. It was no doubt held in *Vithal Narayan* v. *Shriram Savant* (6) that a mortgagee of a lease-hold interest if in possession is liable for rent to the mortgagor: and one reason given is that the distinction between legal and equitable estates does not exist in India. As already pointed out, it is owing to that distinction that in England a legal mortgagee of lease is held liable for rent to the lessor where the mortgage is an assignment creating privity of estate, but an equitable mortgagee is not so liable; and to avoid this untoward consequence, it is usual to create a legal mortgage by way not of an assignment having this effect, but by way of sub-lease of something less than the lessee's interest so that no privity of estate and no liability on the part of the mortgagee arises. This is the invariable practice as stated in the standard works of Coote, Fisher and Robbins.

The decision in *Kanneye Loll Sett* v. *Nistoriny Dossee* (4) proceeded, as already pointed out, on the view that the mortgage was an out and out assignment of the lease, which it is not in the present case or ordinarily in India. The judgment of Lord Mansfield in *Eaton* v. *Jaques* (7) which was also referred to is, if anything, an authority the other way. What Lord Mansfield held was, that the mortgagee of a lease-hold interest, even when the mortgage was by way of assignment of the whole term, was not liable for rent by virtue of privity of estate, unless he obtained possession as well, a point on which he was overruled by ten Judges in *Williams* v. *Bosanquet* (8). Both cases, however, proceed upon the view that the mortgagee is not liable at all to the lessor unless the mortgage be by way of assignment of the term. "All this", Lord Mansfield observed:

"arises from a mere slip in the attorney, in making the conveyance; for if he had made it an under-lease, by leaving a reversion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee."

It is thus clear that what Lord Mansfield was arguing against was the mortgagee being held liable unless there were both privity of estate and possession, and that his judgment is no authority for the position that possession in the absence of privity of estate will make the mortgagee liable: see also *Cox* v. *Bishop* (9) and *Ananda Chandra Roy* v. *Syed Abdulla Hossein* (10). I am, therefore of opinion with great respect that the authorities referred to in *Vithal Narayan* v. *Shri-*

4. (1834) 10 Cal 443.
5. (1897) 21 Bom 311.
6. (1905) 29 Bom 391.
7. (1780) 2 Dougl 455=99 E R 290.
8. (1819) 1 Brod & B 238=129 E R 714.
9. (1857) 8 De G M & G 815=26 L J Ch 389.
10. A I R 1914 Cal 335=41 Cal 148=20 I C 679.

ram Savant (6) do not support the decision. No such liability is imposed by English law on sub-lessees or on mortgagees from lessees either, except as pointed out by Lord Mansfield owing to the mere slip of an attorney, and if it is to be imposed in India, it must be by virtue of S. 108 (j), T. P. Act and not by virtue of possesssion. The latter part of the section shows that sub leases and mortgages created by the lessee do not affect the rights of the lessor against the lessee, still less do they affect the rights of lessee against his sub-lessee or mortgagee.

There appears to be no sufficient reason for supposing that it was the intention of the legislature by this section to bring the sub-lessee and the mortgagee from the lessee into direct relations with the lessor. I read the judgment of Farran, C. J., in *Timmappa Kuppaya* v. *Ram Venkanna Naik* (5) as holding that it had no such effect as regards sub-lessees, and can see no reason for applying a different rule to mortgagees from the lessee. To hold otherwise would, it need hardly be pointed out, introduce all sorts of complications as to apportionment, notice to quit, etc. For these reasons I think the lower Courts were wrong and would modify the decree by dismissing the suit as against the appellant and defendants 8 and 9 with costs throughout.

Spencer, J.—I concur. The only case in which a mortgagee of a lease-hold interest in India becomes after entering into possession liable to pay the rent, appears to be where his possession is attributable to his having obtained a decree for foreclosure, the reason being that in such a case the lessee parts with the whole of his interest, and the entire interest both of the lessee and of the mortgagee become by operation of law merged in the person of the latter: vide *Macnaghten* v. *Bheekaree Singh* (11) and *Ananda Chandra Roy* v. *Syed Abdulla Hossen* (10). Here defendants 7 to 9, who are mere transferees of a kanom interest, are clearly possessed of something less than the anubhavam interest under the lease in favour of defendants 1 to 6s' predecessors. Consequently, the agreement in Exs. 3, 4 and 7 between the lessees and the mortgagees and their assignees inter se, that the mortgagees should pay the michavaram or rent, will not affect the right of the lessor to look to his lessees for the recovery of his rent, and to them alone.

Even if the mortgage document were silent as to the rent, S. 65 (d), T. P. Act, provides that the mortgagor shall pay the rent reserved by the lease so long as the mortgagee is out of possession of the mortgaged property, which may be read as implying that the mortgagee should pay it if he gets into possession. But this section deals only with the rights and liabilities of the mortgagor and the mortgagee as between themselves. The rights and liabilities as between the mortgagor and his lessor are regulated by S. 108 (j). The Subordinate Judge who heard the first appeal obseved that there was not only privity of estate but privity of contract also. He has given no reasons for his opinion, but simply states that plaintiff can enforce the provision in his favour in Ex. 7 though he was not a party to it. Privity of contract is personal privity and extends only to the person of the lessor and to the person of the lessee: vide *Walker's* case (12). It has not been suggested that there is any foundation in the records of this case for a personal privity existing between the lessor and the mortgagees. The appellant is entitled to succeed in his appeal with costs throughout.

S.N./R.K. *Appeal allowed.*

11. (1878) 2 C L R 323.

12. (1587) 3 Co Rep 22a=76 E R 676.

A. I. R. 1918 Madras 428

SADASIVA AIYAR AND NAPIER, JJ.

Sundaram Iyar —Plaintiff—Appellant.

v.

Deva Sankara Bhat—Defendant—Respondent.

Second Appeal No. 2661 of 1913, Decided on 23rd November 1915, from decree of Temporary Sub-Judge, Tanjore, in Appeal Suit No. 1028 of 1911.

Madras Estates Land Act (1 of 1908), S. 3 (2) (d)—Tanjore Palace Estate.

The Tanjore Palace Estate, which is a grant by government of land revenue only to persons not owning the kudivaram thereof, is not an "estate" even within S. 3 (2) (d). [P 430 C 1]

T. R. Venkatarama Sastri—for Appellant.

G. S. Ramchandra Iyer—for Respondent.

Napier, J.—This was a suit by the Receiver of the Tanjore Palace Estate to

recover possession of certain lands in the possession of the defendant alleged by the plaintiff to be held on a tenancy from year to year. The defendant relied on the terms of the muchilika Ex. A dated 13th June 1889, given to him by the P. W, D. authorities, as creating a permanant tenancy and alternatively contended that he was entitled to permanant rights of occupancy under the Madras Estate Land Act. The lower appellate Court found that the defendant had a right of occupancy and the plaintiff appeals. Both defences are relied on in this Court. With regard to Ex. A, it is sufficient to say that it is no more than a license to cut Nanal jungle on the right bank of the Vannar river from year to year and in no sense a lease of the land far less a permanaent lease. The P. W .D. clearly had neither the intention nor the authority to grant any such lease. The Government order of 25th, February 1889, in pursuance of which the so-colled lease was executed, informed the P. W. D. authorities that the Tanjore Palace Estate was entitled to the grass grown on the padugais and directed the crediting to estate funds of grass cut there. In consequence of these directions the right to cut grass was leased by the Executive Engineer for the benefit of the estate and the lease was in 1895 transferred to the Palace Estate. This contention, therefore fails. The next contention has raised very large question as to the nature of the interest vested in the Tanjore Royal Family in these lands by their rsstoration to the family and the effect of the Act of State on the rights of the tenants in possession.

We do not propose to consider these questions, as we are satisfied that the estate does not come within the purview of the Madras Estates Land Act at all, whether the kudivaram interest is vested in the estate or not. It is clearly not within Cl. (a), (b) and (c); S. 3. The only clause that could possibly apply is Cl. (d), any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed or recognized by the British Government. The history of the grant is well known and it is to be found in the reports in *Secy. of State* v. *Kamachee Boye Sahaba* (1) and *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (2). The Governor-in-Council in exercise of the sovereign rights of the Crown made over the estate to the senior widow with succession to the daughter of the late Rajah or failing her, the next heirs of the late Rajah vide *Jajoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (2). It was held in that case this grant was a grant of grace and favour by Government (vide p. 445) and this language does accord with the natural meaning of the word inam. We are satisfied however that we have not to look to the natural meaning of the word in construing the clause. "Granted in inam" is a phrase with which the Courts are very familiar and inam has acquired a definite meaning since the Inam Settlement. It was pointed out in argument that a forfeited zemindari when re-granted is, broadly speaking, "granted in inam" but it is never called an inam. One peculiar feature in inams has always been the intention of the Government to reserve a reversionary right, whether the grant be personal, service or religious. When the grant is personal, that right has been the subject of enfranchisement by the Commission. Could it be suggested that Government has at any time contemplated the position that enfranchisement would give a better title for the heirs of the late Rajah? Both the circnmstances of the grant and its subsequent treatment are against any such supposition. The language of the Despatch of the Secretary of State of 23rd October 1862, was that

> "His Majesty's Government wss willing to relinquish to the surviing members of the late prince's family the benefits accruing from these possessions."

The word relinquish is, I think, indicative. Nowhere is the grant termed inam whereas later on in the same Despatch the Secretary of State approves of the decision of the Madras Government that "Certain alienations of the nature of inam should be dealt with by the Inam Commissioner." In the District Manual, the mokhasa (as it is there, rather loosely termed), although stated to be treated for all practical purposes as an unenfranchised inam, is carefully distinguished from inams properly so-called. To couclude, the nature of the estate is far more analogous to a permanently settled estate though there is, of course, no revenue liability on it. We cannot include

1. (1857-59) 7 M I A 476=13 Moo PC 22 (P C).

2. (1866-67) 3 M H C R 424.

it in the class dealt with in Cl. (d) merely because of the literal meaning of the word inam. The respondent therefore cannot treat it as an estate and his claim to permanent rights of occupancy fails. The second appeal will be allowed with costs, plaintiff being given a decree for possession with mesne profits at Rs. 7 per annum from 1st April 1908, till delivery in execution or three years from the date, whichever first occurs.

Sadasiva Aiyar, J.—I concur.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 430

OLDFIELD AND BAKEWELL, JJ.

Vaithilinga Odayar and *another*—Defendants—Appellants.

v.

Ayyathorai Odayar and *others*—Plaintiffs and Defendants—Respondents.

Civil Misc. Appeal No. 231 of 1916, Decided on 16th January 1917, against order of Sub-Judge, Mayavaram, in Appeal Suit No. 56 of 1915.

Caste Disabilities Removal Act (21 of 1850), S. 1—Scope—It applies to convert himself and not to his descendants—Descendants of Christian cannot claim as reversionaries.

The removal of disabilities on rights of inheritance by an apostate provided for by Act 21 of 1850 applies only to the convert himself and not to his descendants. [P 430 C 2]

The descendants of a convert to Christianity, therefore, cannot maintain a reversionary suit to the estate of a deceased Hindu: 11 *All.* 100, *Diss. from.* [P 431 C 1]

Per *Oldfield, J.*—The 'renunciation' and 'deprivation' referred to in S. 1 of the Act apply only to rights which have accrued and not to persons who were born in another religion before the succession opened. Under the section protection is, in terms, given only to one person, the one who has renounced or been excluded or deprived, and it cannot be extended by construction to others. [P 430 C 2; P 431 C 1]

Per *Bakewell, J.*—The words "having been excluded and being deprived of caste" connote an act directed against a particular person, and do not apply to an individual who is not a member of a particular community because by reason of his birth he is included within another community. [P 431 C 2]

T. V. Muthukrishna Aiyar—for Appellants.

T. R. Venkatarama Sastri and *Aravamudu Aiyangar*—for Respondents.

Oldfield, J.—The plaintiffs, Christians, sued to recover the estate of a deceased Hindu, as his reversioners. That is, they claimed in virtue of their own relationship to him, not through any earlier reversioner, such as Saminada Odayar, the member of their branch of the family, who first embraced Christianity. The lower appellate Court following *Bhagwant Singh* v. *Kallu* (1) held that they were relieved from all religious disability by Act 21 of 1850 and remanded the suit for decision on its merits. The question is whether this decision is right. The persons relieved by the Act are those, who (1) renounce (2), have been excluded from the communion of a religion, (3) are deprived of caste. Renunciation and deprivation are applicable only to rights, which have accrued, and therefore are irrelevant in the case of plaintiffs, who were born Christians, before the succession opened. They therefore are not covered by descriptions (1) and (3). As regards (2) there is more difficulty. For the word "exclude" is applied in ordinary parlance to refusal of rights newly claimed and also deprivation of rights already enjoyed, the meaning as given in Webster's Dictionary being

"(1) to shut out; to hinder from entrance or admission; to debar from participation or enjoyment; the opposite to admit and (2) to thrust out; to expel."

It is an argument against the interpretation of "exclude" in the Act in the first of these senses that it is used in the context between two terms, which, as I have pointed out, express a different idea. It is further material that, if the Legislature had intended the result entailed by plaintiffs' contention, the perpetual right of the descendants of a convert to rely on the law of his birth for purposes of inheritance from unconverted relatives, it could and would have effected it by shorter and more explicit language. These arguments are supported by the fact that plaintiff's contention entails consequences repugnant to reasonableness and consistency. In the case of the original convert, his status will be fixed at the date of his conversion and his original law will be invoked only in order to determine whether his relationship entitles him to inherit, not whether that relationship exists. No anomalies, therefore, beyond the initial one, involved in the application of his original law, will be entailed. With his descendant that case is different. He, having to establish both the points referred to above, will find the concession involved in plaintiffs' interpretation of the Act

1. (1889) 11 All 100.

illusory, since his descent will have to be traced through some Christian marriage, which will not be valid according to the law under application and can be established, only if the claimant is allowed to apply both his abandoned and his present law as may suit each portion of his case. And if it be said that this is contemplated, the suggestion is so startling that a clearer expression of it than the Act contains may fairly be required.

The only decision of a High Court on the point *Bhagwant Singh* v. *Kallu* (1) is no doubt in plaintiffs' favour. It is based on considerations first of the preamble and then of the body of the Act. In respectfully dissenting from it. I observe first that the preamble set out a part only of S. 9, Bengal Regulation 7 of 1832, to which it refers. Reference to the whole and to S. 8 of which it is a continuation, shows that (1) their object was to settle all cases of conflict of laws, one omitted portion restricting the operation of S. 8 to "bona fide professors" of the religion in the question at the time of the trial and the whole having no special reference to the particular case of conversion, (2) the settlement consisted, not only in exempting either party from disabilities entailed by the Hindu or Mahomedan law, but also, as provided in the other omitted portion, in applying the principles of justice, equity and good conscience. This recognized, the attempt to identify the purpose of the Act with that stated in the preamble or to explain the one with reference to the other must be abandoned. As regards the argument from the body of the Act the learned Judges, I think, overlooked the fact that protection is in terms given only to one person, the one who has renounced or been excluded; and, with all due deference, they were not justified in extending it by construction to others. As the Act will not bear the construction proposed by plaintiff, the appeal must be allowed, the District Munsif's decision dismissing their suit being restored with costs throughout.

Bakewell, J.—I agree with regard to the construction of Act 21 of 1850, the plaintiffs are not "excluded from the communion of any religion or deprived of castes" by reason of their own conduct or by anything except what was done or suffered by their remote ancestor. The consequence of this Act is that his descendants form part of a community separated from his other relations by the observance of a different religion and other usages and governed by a different system of law. In my opinion the words "having been excluded and being deprived of castes" connote an act directed against a particular person, and do not apply to an individual who is not a member of a particular community because by reason of his birth he is included within another community. The plaintiffs and defendants belong to different communities governed by different laws of inheritance and the former desire to bring themselves within both systems, in so far as they can deprive benefit from so doing and argue that the provisions of the Mitakshara which exclude them have been repealed. I do not think that the wording of the Act supports this contention.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 431

SADASIVA AIYAR AND PHILLIPS, JJ.

Mayarkara Illath Narayanan Moosad Petitioner.

v.

Koori Kathil Itticherry Amma—Opposite Party.

Criminal Revn. No. 293 of 1917, and Criminal Revn. Petn. No. 236 of 1917, Decided on 30th August 1917, against order of Sub-Divil. Magistrate, Palghat in Misc. Case No 125 of 1916.

(a) Criminal P. C. (1898), S. 488 — Maintenance proceedings before a Magistrate — Declaration by civil Court, pending Magistrate proceedings that relationship of husband and wife never existed — Judgment of civil Court is binding on Magistrate who cannot then pass maintenance order.

One *N* was directed by a Magistrate to pay Rs. 15 a month for the maintenance of the complainant and her daughter, who found that the woman was either kept or married by *N*, and the child was born to him. The High Court set aside the Magistrate's order directing him to find out the circumstances of the woman's tarwad and then fix the maintenance. Pending this maintenance case before the Magistrate, *N*. filed a suit in the Munsif's Court for a declaration that the relationship of husband and wife had never existed between the parties. That declaration was granted. When the case again came up before the Magistrate, the petitioner produced the judgment of the Munsif and requested the Magistrate to drop all further proceedings. The Magistrate refused to do so and passed a fresh order, affirming his finding that the complainant was kept by the petitioners, basing this finding on the fact of the petitioner having attempted

to compromise the complainant's claim and obtained a release deed:

Held: that in view of the agreement between the parties evidenced by the release deed, as well as on the ground that the Magistrate's order was passed after the decree of the District Munsif, the Magistrate's order must be set aside. [P 434 C 1]

Per *Sadasiva Aiyar, J.*—The Magistrate ought to have held that the decision of the District Munsif was conclusive of the question of relationship between the parties as declared by that decree and should have refused to pass any order for maintenance.: (*Case-law discussed*). [P 434 C1]

(b) Criminal P. C. (1898), S. 488 — Maintenance order passed — Civil Court cannot interfere by injunction.

Per *Phillips, J.*—A civil Court cannot pass a decree interfering with a prior maintenance order by way of Injunction or other similar order. [P 434 C 2]

(c) Criminal P. C. (1908), S. 488 — Maintenance order passed—Civil suit—No change of relationship between parties between date of order and suit — Order cannot be set aside by civil Court.

A party cannot get a magisterial order for maintenance set aside by a civil Court where there has been no change of relationship between the parties between the date of the order and the date of suit in the civil Court : 18 *All.* 29, *Appr.* 14 *Cal.* 276; 5 *Cal.* 558; 7 *Bom.* 180 and 27 *All.* 483, *Dist.* [P 434 C 2]

K. R. Subramania Sastri — for Petitioner.

Public Prosecutor—for the Crown.

Sadasiva Aiyar, J.—The petitioner in revision, Narayana Moosad, was at first directed by the Magistrate to pay Rs. 15 a month for the maintenance of the respondent's (Itticheri Amma's) elder child who seems to have been born in 1914. This order was passed on 12th May 1916, notwithstanding the petitioner's denial that he kept or married the woman or that the child was born to him. Against that order there was a previous revision petition to this Court (Criminal Revision Case No. 491 of 1916), and the Magistrate's order was set aside by Mr. Spencer, J. on 4th December 1916 in order that the Magistrate might consider the circumstances of the woman's tarwad and then fix the maintenance. Pending this maintenance case before the Sub-Divisional Magistrate, the petitioner filed a suit (Original Suit No. 295 of 1916) in the District Munsif's Court of Tirur, for a declaration that the plaintiff was never his wife and the child was not born to him and for another relief (not relevant to this case). That declaration was granted by the District Munsif. When the criminal maintenance case came up again before the Sub-Divisional Magistrate, the petitioner produced the judgment and decree of the District Munsif and requested the Magistrate to drop all further proceedings in the maintenance case. The Magistrate refued to do so and passed a fresh order on 3rd April 1917, directing the petitioner to pay the complainant, Itticheri Amma a sum of Rs. 8 per mensem for the maintenance of the boy Krishnan, and another sum of Rs. 7 for a child named Parvati aged 9 months, that child having been in the womb when the first order of the Magistrate (12th May 1916) was passed. The learned Magistrate affirms his finding that the complainant was kept by the petitioner and the first child was born to him. And one of his reasons is that the petitioner made an attempt to compromise the complainant's claim and obtained a release deed, Ex. 1, from her for a consideration of Rs. 200. Though the Petition No. 20 of 1916 (which seems to have been numbered after the remand as No. 125 of 1916) prayed for allowance for the maintenance of the elder child alone, the Magistrate as I said before, has given her Rs. 7 for the maintenance of the younger child born about July 1916. In the evidence of the complainant taken again on 30th January 1917, the complainant says:

"The second delivery was after the former case. I claim maintenance for the second child. Accused is the father. It is a female child."

She admits in her evidence that she executed the release deed, Ex. 1, because he threatened steps against her civilly and that she also got a promissory note for Rs. 150, Ex. A, from the petitioner. Then he says: "if this Court passes an order of maintenance I do not want the pro-note." There is nothing to show the rate at which she claimed maintenance for the second child or that the petitioner was called upon to show cause why he should not pay maintenance for the second child or to state what according to him, would be a reasonable rate of maintenance. The learned Subdivisional Magistrate has ordered the Rs. 15, which he had in his first order allowed for the maintenance of the eldest child, to be now treated as the maintenance rate for both children dividing it into 8 and 7. As to why the learned Subdivisional Magistrate refused to accept the District

Munsif's decree declaring that the complainant was not the petitioner's wife nor was the child born to him, the Magistrate makes the following observations:

"At the risk of pronouncing an obiter dictum I cannot help remarking that the possibility of such thing happening."

(namely, a civil Court declaring the petitioner not to be the father of the child and granting him damages for bringing a false complaint and the petitioner inducing the High Court to order the Subdivisional Magistrate to re-try the case)

"does not conduce to the dignity of justice either civil or criminal. Some means of co.ordination should exist. In this case the procedure of this Court by comparison with that of the civil Court is certainly not summary. I understand that the Munsif is now engaged in revising his own order."

I might here add that the learned Subdivisional Magistrate himself has revised his former order because he says in para. 7 of his present order: "The sum of Rs. 15 is perhaps rather excessive for one child." I understand that the District Munsif dismissed the review petition put in by the complainant in the civil case. As regards the comparison indulged in by the learned Subdivisional Magistrate between the procedure of his Court and the procedure of the District Munsif's Court, it seems to me not relevant, and I may perhaps be permitted to state that the manner in which the Subdivisional Magistrate has, on the bare statement of the complainant in the witness-box in January 1917, allowed her a sum of Rs. 7 for the maintenance of the second child whose maintenance was not the subject of the complainant, shows that his procedure is rather summary. The learned Magistrate is quite right in saying that some means of co-ordination should exist between the civil and criminal Courts. I think that such means of co-ordination has been laid down by competent authorities long ago. In *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* (1) decided by Prinsep, J., (a very learned civilian Judge of high authority in criminal matters) and Beverley, J., which was argued by Mr. Ameer Ali for the lady who claimed maintenance, the learned Judge states as follows: "Having found" (in the civil litigation)

"that the relationship of husband and wife no longer exists between the parties, it remains for us to consider the effect of our finding on the proceedings before the Magistrate. The plaintiff asks for an injunction to restrain the Magistrate from enforcing the order for maintenance. We are of opinion that we cannot pass shch an order. The plaintiff wiil be at liberty to satisty the Magistrate that, by an order of this Court in its civil jurisdiction, it has been declared that no relationship exists between him and the defendant and he can ask the Magistrate, on the authority of the case of *Abdur Rohoman* v. *Sakhina* (2) and *Abdul Ali Ishmailji*, In re (3), to abstain from giving any further effect to his order for maintenance."

In High Court Proceedings 11th September 1877, No. 2067 (2), the Magistrate passed an order for maintenance and then a suit was brought and the District Munsif's Court cancelled the order of the Magistrate. The learned Judges say:

"It is obvious that the District Munsif had no jurisdiction to entertain a suit for such a purpose. The decree can only enure as a decree inter partes determining ths right of the parties inter se, but not directly affecting the order of the Magistrate which the High Court alone are empowered to set aside. What the District Munsif decided was that the woman had been living apart from the husband for more than 12 years. It is not decided that she did so voluntarily nor is it found that she has been living an unchaste life or has done anything to disentitle her to maintenance. If it had been so decided, the Magistrate who passed the original order would have been bound in the interests of justice to take the judgment into consideration before passing a fresh order to enforce the former order, because such a decision would, as between the parties be strong if not conclusive evidence of what it decided."

In this decision of September 1877, the question was not finally decided as it was unnecessary to decide it for the purposes of that case. Then we come to the case noted in the very next p. 615, *Veeran* v. *Ayyammah* (4), which was decided by Wilkinson and Shephard, JJ., in August 1889. I shall quote the whole of the judgment as this has always been considered as laying down the law in Madras:

"By the decree made by the District Munsif of Palghat in February 1889, the plaintiff Veeran is declared not to be liable to pay separate maintenance to his wife. The orders for such maintenance previously made by the Head Assistant Magistrate did not take away the jurisdiction of the civil Courts to make the declaration, under S. 42, Specific Relief Act. The District Munsif's decree being final it is binding upon the parties to it and the husband is entitled to insist that the Magistrate does not enforce the order of maintenance, which assumed that the obligation negatived by the decree existed. It is not open to the Magistrate to ignore a final decree on the ground that it rests on reasons which do not appear to him satisfactory, the jurisdiction vesting in him under S. 488, Criminal P. C. being auxiliary to that of the civil Courts. The order of the Magistrate must be cancelled on the ground that there was no sufficient reason for the wife

1. (1887) 14 Cal 276.
2. (1880) 5 Cal 558.
3. (1883) 7 Bom. 180.
4. 2 Weir 615.

to refuse to live with the husband and that the decision of the District Munsif is conclusive on that point. This will not however preclude the interferenee of the Magistrate if there should arise any fresh causes for such interference."

I shall now consider the case of *Deraji Malinga Naika* v. *Marati Kaveri* (5), decided by Sir Arnold White, C. J., and Miller J. The cases of *Veeran* v. *Ayyammah* (4) and *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* (1) are referred to, approved and followed. It distinguishes the case of *Subhudra* v. *Basdeo Dube* (6). In *Syed Saib* v. *Meeram Bee* (7) Munro and Abdur Rahim, JJ:, held that

"the Magistrate is bound to abstain from enforcing his previous order for maintenance when it is once established that the relationship of husband and wife ceased to exist since the date of the order."

In *Ghana Kanta Mahanta* v. *Gereli* (8) it was held in the converse case that the Magistrate's finding against the sonship of a person for whom maintenance was claimed by the mother was not a bar to a suit in the civil Court to establish the sonship and to recover maintenance: see also *Trinayuni Dasee* v. *Srichandan Bhuiyah* (9). In *Nur Muhammad* v. *Ayesha Bibi* (10) Aikman, J. following *Bulakidas*, In re (11), says that a decree of a civil Court for restitution of conjugal rights passed after an order of maintenance in favour of the wife superseded the maintenance order and ought to be cancelled, and we accordingly cancel it. I am therefore clear that the learned Magistrate ought to have in the language of the case in *Veeran* v. *Ayyammah* (4) held that the decision of the District Munsif is conclusive on the question of relationship as declared by that decree and should have refused to pass any order for maintenance. His order is therefore cancelled in the exercise of the powers of this Court under S. 439, Criminal P. C. I might add that the women having given a registered release-deed Ex. I, and obtained the promissory note Ex. A, and her evidence clearly showing that she refused to be bound by the agreement only because she expected an order from the Magistrate more favourable than she got under the release (she was not willing to give up her claim under the promissory note unless she got maintenance order from the Magistrate), the learned Magistrate ought to have dismissed her petition on that ground also: see *Viramma* v. *Narayya* (12).

Phillips, J.—On the ground that the Joint Magistrate has failed to consider the effect of the agreement between the parties evidenced by Exs. A and I *vide Yerukula Jagabandhu Subuddhi* v. *Jamuna Bayi* (13) and on the ground that the Magistrate's order was passed after the decree of the District Munsif I agree in the order proposed. The suit in which the District Munsif's decree was passed was filed after the original maintenance order had been passed and the District Munsif was clearly wrong in awarding damages to petitioner against respondent on the ground that the latter had obtained a maintenance order from the Magistrate, for it has been repeatedly held that a civil Court cannot pass a decree interfering with a prior maintenance order by way of injunction or other similar order: *Deraji Malinga Naika* v. *Marati Koveri* (5) and *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* (1). The District Munsif's decree had the effect of nullifying the prior magisterial order, and I am not prepared to hold on the very limited arguments in this case that a party can get a magisterial order for maintenance set aside by a civil Court when there has been no change of relationship between the parties between the date of the order and the date of suit. vide *Subhudra* v. *Basdeo Dube* (6). In the other cases such as *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahib* (1) *Abdur Rohoman* v. *Sakhina* (2) and *Abdul Ali Ishmailji*, In re (3), the relationship between the parties had altered; and in *Nur Muhammad* v. *Ayesha Bibi* (10) the civil decree was a consent decree which provided for maintenance; and in no decided case to which I have been referred has a maintenance order been allowed to be set aside by a decree based upon the same facts and material as the magisterial order.

S.N./R.K. *Petition allowed.*

5. (1907) 30 Mad 400.
6. (1896) 18 All 29.
7. (1909) 4 I C 140.
8. (1905) 32 Cal 479=2 I C 550.
9. (1912) 15 I C 603.
10. (1905) 27 All 483.
11. (1899) 23 Bom 484.
12. (1883) 6 Mad 283.
13. 2 Weir. 631.

A. I. R. 1918 Madras 435
Full Bench

WALLIS, C. J. SADASIVA AIYAR AND SESHAGIRI AIYAR, JJ.

S. Sundram Ayyar—Plaintiff—Petitioner.

v.

Ramchandra Ayyar—Defendant—Opposite Party.

Civil Revn. Petn. Nos. 427 to 435 of 1916, Decided on 18th January 1917, against decrees of Dist. Judge, Tanjore, in Appeal Suits Nos. 721 to 727, 432 and 425 of 1915.

(a) Madras Estates Land Act (1 of 1908), S. 3 (2)—Tanjore Palace Estate is estate within S. 3 (2) (d)—It does not exclude villages in granted revenues—*A. I. R.* 1918 *Mad.* 428, *Overruled*.

The Tanjore Palace Estate, which is a grant by Government of land revenue alone to persons not owning the kudivaram right, is an "estate" within the meaning of S. 3 (2) (d). S. 3 (2) of the Act does not exclude villages in the granted revenues of which the Government reserves no reversionary interest: *A. I. R.* 1918 *Mad.* 428, **Overruled**. [P 437 C 2]

(b) Grant — Construction—Inam includes jagirs and grants of dignified character.

The word inam should not be given a restricted meaning and includes all jagirs and grants of a dignified character which for that reason are styled makhasa and covering a number of villages in which Government do not claim a reversion. [P 437 C 2; P 438 C 1]

(c) Madras Estates Land Act (1 of 1908), S. 77—Rent suits under S. 77 are cognizable by Revenue Courts.

Suits for rent due to the Tanjore Palace Estate under S. 77 of the Act are cognizable by the Revenue Court. [P 438 C 1]

(d) Madras Estates Land Act (1 of 1908), S. 3 (2) (d) and (e)—Scope of Cls. (d) and (e), compared.

Per *Wallis, C. J.*—Cl. (d), S. 3 (2), Madras Estates Land Act, restricts the operation of the Act by including only the inams therein mentioned thereby excluding the so-called minor inams, but the definition as a whole clearly shows the general intention of the Legislature to include all large estates held directly under Government and Cl. (e) extends it to estates consisting of one or more villages not held directly under Government but as a permanent under-tenure. [P 437 C 1]

(e) Grant—Inam—Jagirs are species of Inam.

All jagirs are a species of inams, though there are many kinds of inams that are not jagirs. [P 437 C 2]

Per *Sadasiva Aiyar, J.*—When a Madras Statute uses the word "inam," it does not signify a gift of whatever kind of property by a superior individual of whatever status to an inferior. [P 437 C 1]

K. V. Krishnaswami Aiyar—for Petitioner.

G. S. Ramachandra Aiyar and *A. V. Viswanatha Sastri*—for Opposite Party.

Order of Reference

Ayling, J.—These petitions involve the consideration of a single point only, but one of great and far-reaching importance, namely, whether the Tanjore Palace Estate is an estate within the meaning of S. 3 (2), Madras Estates Land Act, 1 of 1908. The suits out of which they arise were filed under the provisions of S. 77 of that Act in the Court of the Revenue Sub-divisional Officer of Kumbakonam. No question of jurisdiction was raised in that Court but on appeal to the District Judge, the latter, apparently of his own initiation, raised the point and decided that the Tanjore Palace Estate was not an estate within the meaning of the Madras Estates Land Act and that in consequence, the Revenue Court had no jurisdiction. He accordingly returned the plaints for representation to the proper Court. This is the order which is sought to be revised. The District Judge relied solely on a recent unreported decision of a Bench of this Court in *Sundaram Iyer* v. *Deva Sankara Bhat* (1) which on the face of it is clear authority on the point. The petitioner's vakil was forced to contend that the decision was wrong: and some argument was addressed to us on both sides regarding this.

Speaking for myself, I do not think I should have felt justified, as a result of that argument, in refusing to follow that decision, if it had been reported in the authorised series. But at the very end of the argument, we found that the learned Judges had declined to allow the case to be reported on the ground that it had not been fully argued. In these circumstances, we felt some difficulty as to the best course to adopt. The argument addressed to us was certainly not of such a nature that we should like to base the decision of an important point on it. Both the learned vakils were clearly to some extent influenced by the existence of the previous decision. I should not be prepared to come to a different conclusion without a much more exhaustive consideration of the question The importance of the point has already been referred to. The Tanjore Palace Estate embraces nearly 200 villages and extends over a large tract of country. I believe it has been assumed, from the very enactment of Act 1 of 1908, that it came within the scope of

1. A I R 1918 Mad 428.

the latter's operation as an "estate:" and the number of decisions of this and subordinate Courts based on this assumption must be very large. In fact the dislocation and confusion which would be the logical result of the unreported decision being followed are so great that the necessity of resort to legislation might have to be considered. In these circumstances I think we are justified in referring the question to a Full Bench and would state it as follows: Whether the Tanjore Palace Estate is an "estate" within the meaning of S. 3 (2), Act 1 of 1908?

Seshagiri Aiyar, J.—The short point is whether the Tanjore Palace Estate is an estate within the meaning of that expression in S. 3 (2), Act 1 of 1908. There can be no doubt that it is not covered by Cls. (a), (b), (c) and (e). Does it come under Cl. (d)? The proprietor, by whatever name he might have been known in the past does not own the kudivaram right in the village in his possession. It is conceded that the grant to him was only of the land revenue. It was a grant, if any, by the British Government. The further question is whether the villages were granted in inam. Before dealing with this question it may be stated that it is not conceded that there was any grant by the Government. Mr. G. S. Ramachandra Aiyar suggested that it was a case of a retention of a portion of the Raj and the relinquishment of the rest to the British Government. It may also be put the other way: see Hickey's book on the Tanjore Palace Estate, App. C-3, and also *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (2). Assuming that there was a grant, was it an inam grant? In *Sundaram Iyer* v. *Deva Sankara Bhat* (1), Sadasiva Aiyar and Napier, JJ., held that the villages belonging to the estate did not come under Cl. (d). In that case the point was conceded in the Courts below and was only incidentally raised in the High Court. Consequently the question was not fully argued. I was informed by one of the learned Judges that the decision requires reconsideration. The other learned Judge in refusing to give permission to publish the decision in the Indian Law Reports has left a note that the case was not fully argued. Nonetheless, the decision has been followed by the District Judge in the present case, and we are informed that a large number of cases await the decision of this case.

The matter in controversy relates to the meaning to be attached to the term 'granted in inam.' The learned Judges inclined to the view that unless there is the incident of resumability there can be no inam. The meaning given in Wilson's Glossary does not support this view. In *Unide Rajaha Raje Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidu* (2) the Judicial Committee seem to contemplate an inam which may not be resumed. I am not prepared to accept Mr. Krishnaswami Aiyar's contention that there can be no inam unless it be conferred by the Government. I do not understand *Raghojirao Saheb* v. *Lakshmanrao Saheb* (4) laying down such a proposition. The learned vakil argued that it is of the essence of an inam that it is permanent. It may be that permanency and heritability attach to an inam so long as it is not resumed. The observations of Bashyam Aiyangar, J., in *Gunnaiyan* v. *Kamakchi Ayyar* (5) were relied upon for the proposition that the Government has no right to resume even a service inam. As at present advised I am not prepared to accede to this proposition. What was held in that case was that by the enfranchisement there was no resumption and re-grant. I do not understand that decision as laying down that the Government could not have resumed the land under any circumstances: see *Boddupalli Jagannadhan* v. *Secy. of State* (6) and *Subramaniam Chettiar* v. *Secy. of State* (7) and *Tadikonda Buchi Virbhadrayya* v. *Sonti Aenkanna* (8).

On the other hand, there is no authority for saying that, unless a grant possess the characteristics of resumability, it should not be regarded as an inam. In the fifth report of the Madras Presidency, Vol. 2, p. 14, the nature of the inam or beneficial grant is stated at some length. It is clear that the Moghul Government made non-resumable inam grants.

(2) [1866-67] 3 M. H. C. R. 424.

(3) 1857-59] 7 M. I. A. 128=4 W. R. 121 (P. C.).
(4) [1912] 36 Bom. 639=39 I. A. 202=16 I. C. 239 (P. C.).
(5) [1903] 26 Mad. 339.
(6) [1904] 27 Mad. 16.
(7) [1915] 28 I. C. 639.
(8) [1913] 20 I. C. 769.

That the British Government, in the earlier years of its administration, granted many inams is evident from numerous grants made by them. This practice was objected to by the Board of Directors in 1822 and 1829 and was practically abandoned since then. There is no reason for supposing that the grants by the British Government always partook of the character of resumability.

It is not necessary to discuss the matter much further, as, in my opinion, the question is one of great importance and should be settled by a Full Bench of this Court. I agree, therefore, that the question suggested by my learned brother should be referred to the decision of a Full Bench.

Opinion

Wallis, C. J.—The repealed Rent Recovery Act, 8 of 1865, contained in S. 1 a comprehensive definition of "landholders," and proceeded to regulate the relations of certain classes of landholders enumerated in S. 3 with their tenants, as those holding under them were called, leaving other landholders unrestricted. The classes who were made the subject of this special legislation were broadly speaking, with one exception, assignees of land revenue, and ordinary Government ryots paying the full assessment direct to Government were unaffected. In the present Act the line is drawn by the definition of "estate" in S. 3 (2), which has been adapted from the definition of "estate" in S. 4, Madras Proprietary Estates Village Service Act, 2 of 1894. Clause (d) restricts the operation of the Act by including only the inams therein mentioned, thereby excluding the so-called minor inams, but the definition as a whole clearly shows the general intention of the Legislature to include all large estates held directly under Government, and clause (e) extends it to estates consisting of one or more villages not held directly under Government but as a permanent undertenure. The presumption therefore, is that it was the intention of the Legislature to apply the provisions of the Act to the numerous villages constituting the Tanjore Palace Estate, though it is, of course, necessary to show that they come within one or other of the classes of the definition. The villages in question formed part of the territories of the Raja of Tanjore, as to which he agreed by the treaty of 1799 to cede the collection of the revenues and the administration of justice to the East India Company. By some arrangement come to at the time the Company refrained from enforcing its rights under the treaty to the revenue of these villages, and they remained in the enjoyment of the Rajahs until the death of the last Rajah, when his territories were taken possession of on behalf of the Crown by an act of State. It was expressly decided in *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Partab Sahee* (9) that these villages, forming the so-called private estate of the Rajah, then became the property of Government; and some years later they were granted as a matter of grace and favour to the widows of the late Rajah and after them to his daughter, or failing her his next heirs, as held by this Court in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (2). It is admitted that the kudivaram right in the suit village, and in almost all the other villages, does not belong to the estate; and these villages are therefore, villages of which the land revenue alone has been granted by the British Government to persons not owning the kudivaram right, and they, therefore, come within clause (d) if they can be said to have been granted "in inam", within the meaning of the section.

The definition of the word "inam" in Wilsons' Glossary expressly covers irresumable revenue-free grants or assignments of revenue such as this. The word "inam" as held by the Privy Council in *Raghojirao Saheb* v. *Lakshmanrao Saheb* (4) is a term of wide signification, wide enough, as held in *Sam* v. *Ramalinga Mudaliar* (10) to include jagirs which however, are separately mentioned in Cl. (c) of the definition. The meaning of the term jagir is discussed in that case, and I agree with the observation of Coutts Trotter, J., that all jagirs are a species of inams, though there are many kinds of inams that are not jagirs. The terms jagir and jagirdar were terms of some dignity, and were used in the grants themselves or by the grantees for that reason. The grant now in question appears to have been commonly spoken of as a mokhasa grant, and though it cannot be said to have been granted as what is understood as mokhasa tenure, the use

9. (1867-69) 12 M I A 1=9 W R 15 (P C).
10. (1917) 40 Mad 664=34 I C 803.

of the word goes to show that it was regarded as an inam of a dignified character. There was no distinctive word for a peculiar inam of this kind and it was probably thought better to use the word mokhasa, though not strictly applicable, rather than to describe the grantees merely as inamdars, a term which includes large numbers of petty grantees in very humble circumstances. There is, in my opinion, no sufficient ground for supposing that it was intended to exclude from the operation of S. 3 (2) (d) grants which were irresumable as the fact that they were irresumable would not be a ground for excluding them having regard to the policy of the Act. I am not satisfied that the rules for the adjudication and settlement of inam lands of 1859 have any bearing on this question. Under R. 4 personal or subsistence grants, such as this if inquired into would have simply been confirmed according to their tenor, that is to say, as revenue-free and irresumable. However this may be, I do not think these rules afford any ground for putting a restrictive construction on the word "inam" as used by the legislature in Act of 1908, especially when the result of so doing would be to exclude from the operation of the Act a large estate which there is no other reason for excluding. I would answer the question in the affirmative.

Sadasiva Aiyar, J.—I take it that, though the question referred to us is as regards the whole of the Tanjore Palace Estate consisting among other things of about 190 villages, our answer is to be confined to the mokhasa Ullikadai village within whose limits are situated all the subject-matters of the suits out of which these revision petitions have arisen. As regards this village, it seems to have been conceded by the respondents' vakil before the referring Bench that the land revenue alone belonged to the Tanjore Palace Estate. I concur entirely with my Lord as regards the whole estate that there was a new grant in 1862 to the Rajah's senior widow by the British Government. That new grant related to the Government revenue alone (according to the admission above mentioned) so far as the arable lands of the Ullikadai village were concerned.

The next question is whether the grant of the revenue of this village can be called a "grant in inam" by the British Government and whether the definition of estate found in Cl. 2 (d), S. 3, Madras Estates Land Act, applies to this village. I concurred with Napier, J. in his judgment in Second Appeal No. 2661 of 1913 in which he held that in the phrase "granted in inam" the word "inam" should be given a definite and restricted meaning which (according to my said learned brother) that word had acquired in the Madras Presidency since the days of the first Inam Settlement. That restricted and definite meaning (if I understood his judgment aright) was a grant of lands or land revenue made in such a manner that a reversionary right could be claimed by the British Government in the subject of the grant on the occurrence of certain events. As no such reservation was intended in the case of the grant of revenue of any of the villages of the Tanjore Palace Estate, we held in *Sundaram Iyer* v. *Deva Sankara Bhut* (1) that it did not consist of villages whose revenues were granted in "inam." The Government never seems to have contemplated the registration of these villages as inam villages or to include them in the list of inam villages to be entered in the Registration Records relating to such villages. There seems to have been no intention to instruct the Inam Commissioners or the Inam Settlement Officers to deal with any of these Palace Estate villages by way of confirmation or of modification of the grant of 1862. No doubt the word "inam" means "gift or benefaction" in the widest and most popular sense of that Arabic term, which has passed practically into every one of the vernacular languages of India. It is a gift by a superior to an inferior and is applied in popular language to any gift whether of moveables or immovables and of however petty a value. But it has also got several restricted meanings such restricted meanings varying in different parts of India. Wilson says:

> "In India and especially in the south and amongst the Marathas, the term was specially applied to grants of land held rent free and in hereditary and perpetual occupation."

Then he says:

> "the tenure came in time to be qualified by the reservation of a portion of the assessable revenue or by the exaction of all proceeds exceeding the intended value of the original assessment."

He says further on that

> "the term was also vaguely applied to grants of rent-free land without reference to perpetuity or any specified conditions."

He likewise mentions very numerous distinctions among the tenures called "inams" (see also pp. 38 to 41, of Mr. Rama Doss' Book on the Estates Land Act.)

It is thus clear that when a Madras Statute uses the word 'inam,' it does not signify a gift of whatever kind of property by a superior individual of whatever status to an inferior. Some restriction of the above very wide general significance being assumed (the inam rules found in the Board's Standing Orders, Vol. 2, para. 52, the Proceedings of the Inam Commissioner and the Regn. 4 of 1862, all these also evidently implying such a qualification), Napier J.'s opinion was that the legislature when talking of a grant "in inam" could have had in its contemplation only grant in the subject of which the Government had retained some reversionary interest to be enforced in certain contingencies. I am free to admit that the knowledge of my learned brother Napier, J., as regards revenue matters and revenue regulations and his long official experience of such questions (through official contact with the higher Revenue Officers of the Government) being much more extensive than I could profess to claim, I without much hesitation deferred to his opinion on the question. Even after the full arguments which I have heard in this Full Bench Reference, I cannot say that the view which Napier, J., and myself took in *Sundaram Iyer* v. *Deva Sankara Bhut* (1) is wholly unsupportable.

But as my Lord the Chief Justice whose experience and whose knowledge of the history, policy and progress of the legislation which resulted in the passing of the Madras Estates Land Act is, if I may say so with respect, unique, is of opinion that the legislature could not have intended in the definition in Cl. (d), S. 3 (2) to exclude villages in the granted revenues of which the Government reserved no reversionary interest, I agree that the opinion contra expressed in the decision in *Sundaram Iyer* v. *Deva Sankara Bhut* (1) should be overruled especially because (as pointed out by Ayling, J., in his referring judgment) the preponderating balance of convenience is in favour of not restricting unduly the meaning of the phrase "granted in inam."

Seshagiri Aiyar, J. — The further arguments addressed to us have confirmed me in the view I took in the Order of Reference. I entirely agree with the opinions expressed by the learnad Chief Justice.

S.N./R.K. *Reference answered in the affirmative.*

A. I. R. 1918 Madras 439

AYLING AND NAPIER, JJ.

Piramu Nadathi and *others*—Accused, In re.

Criminal Misc. Petn. No. 422 of 1916, Decided on 11th January 1917.

Registration Act (16 of 1908), S. 83—Prosecution by private person—Permission of officers is not preliminary requisite for institution of proceedings.

The permission of the officers specified in S. 83, Registration Act, is not a preliminary requisite for the institution of proceedings by a private person for offences under the Act; 11 *Cal.* 566 and 11 *Mad.* 500, *Rel. on*; 10 *Cal.* 604; 38 *All.* 354; and *A.I.R.* 1915 *All.* 114, *not Appr.* [P 440 C 1,2]

The words 'may be commenced' in the section are not prohibitory and do not preclude complaints by private persons. [P 441 C 1, 2]

Public Prosecutor—for the Crown.

G. Venkataramiah, B. N. Sarma and *L. S. Veeraraghava Aiyar*—for Accused.

Ayling, J.—This is a reference by the Assistant Sessions Judge, Tinnevelly, recommending that the commitment of certain accused for offences falling under S. 82, Registration Act, should be quashed under S. 215, Criminal P. C., as bad in law. No permission was obtained for the prosecution in this case from any of the officers mentioned in S. 83, Registration Act, and in the view of the Assistant Sessions Judge this fact is fatal to the institution of the case. It has been held by a Full Bench of the Calcutta High Court in *Gopinath* v *Kuldip Singh* (1) that no sanction is necessary before the institution by a private person of the charge under S. 82, Registration Act, and it may be inferred from the judgment of this Court in *Queen-Empress* v. *Vythialinga* (2) that the learned Judges were inclined to take the same view. The wording of S. 83 is far from clear, but on a consideration of the section, the cases quoted before us and the argument on both sides, I am inclined to take the same view. One cannot but be pressed by the marked difference between the wording of S. 83, Registration Act, and that of the corresponding sections in various other Acts, which unequivocally

1. (1885) 11 Cal 566.
2. (1888) 11 Mad 500.

and in the clearest terms lay down that previous sanction or permission is required for the institution of proceedings : vide S. 70, Stamp Act, S. 72 (a), Post Office Act, S. 36, Income Tax Act and S. 29, Arms Act. Had it been the intention of the legislature to bar prosecution for offences under the Registration Act by private persons without sanction or permission of the Registration Authorities, it is difficult to see why the intention could not have been expressed in the same way so as to put the matter beyond doubt. Our attention has moreover been drawn to the corresponding section, S. 95, Act 20 of 1866, which runs thus:

"A prosecution for any offence under this Act coming to the knowledge of a registering officer in his official capacity may be instituted by the Registrar General, the Branch Registrar-General, the Registrar, or (with the sanction of the Registrar to whom he is subordinate) the Sub-Registrar in whose territories, district or sub-district, as the case may be, the offence has been committed. All prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate or Subordinate Magistrate of the first class; and all fines imposed under this Act may be recovered in the manner prescribed in S. 61, Criminal P. C., [25 of 1861]."

It seems to me that the intention of the section was merely to prevent official prosecutions for offences under the Act being instituted by an officer below a certain grade. Even a Sub-Registrar had to get the sanction of the Registrar to whom he is subordinate. I do not see anything in this section to suggest that it is intended to bar private prosecutions and I should be loth to infer that the changes introduced in Act 3 of 1877 were intended to extend the operation of the section to such prosecutions, Mr. Venkataramiah invites our attention to the words "with the permission of" in the latter Act. But the natural effect of these words is simply to enable, for instance, the Sub-Registrar to depute a clerk to lay a complaint of an offence, instead of going to the Magistrate's Court himself for that purpose as he would have to do under the older Act. The words which occur in all the Acts "an offence coming to the knowledge of a registering officer" admittedly tend against the view put forward by the Assistant Sessions Judge. I am inclined to hold that permission of the Registration Officers is not a preliminary requisite for the institution of proceedings by a private person for offences under the Registration Act and that the committal in this case may stand.

Napier, J.—I agree with my learned brother in his judgment for the reasons given by him, but will add a few observations of my own because I also agree with him that the question is one on which it is possible to arrive at a different conclusion as will be seen from the decision of the Calcutta High Court. Now the section is 83 of the Registration Act. It is admitted before us that the language of this section is not clear. Speaking for myself I am inclined to think that it should be paraphrased in this way :

"When an offence under this Act comes to the knowledge of a Registering Officer in his official capacity he may commence a prosecution, etc."

"The persons who are authorised to prosecute are as follows, ... and they may, in addition give permission to some other person to prosecute."

If the language had been in that form I should have very little doubt that it was simply permissive and giving power to the officers of the department. But it has been urged before us that the words "prosecution for any offence may be commenced" are analogous to proceedings provided in Bankruptcy and other Acts, in which the words "may be commenced" and "may be instituted" have been held to be directory and exclude the right of any person other than the person mentioned in the Act. As there is this ambiguity in the section we are permitted, under the authority of the House of Lords and the Privy Council, to examine the history of the provision and I therefore turn to the provision in the old Act of 1866; here we find the language is simpler and is as follows :

"A prosecution for any offence . . . . coming to the knowledge of a registering officer in his official capacity may be instituted by the Registrar-General, the Branch Registrar-General, the Registrar or (with the sanction of the Registrar to whom he is subordinate) the Sub-Registrar."

Now it is somewhat curious that there is no reported decision of any prosecution under this Act. Mr. Venkataramiah argues that under this Act there was no power in any private person to lay a complaint of an offence under the Act, his argument being that as the Act created the offence and as it designates

the persons who are entitled to institute proceedings, so the right to institute must be confined to those persons. And he relies on the analogies of various other Acts to which he has drawn our attention. Those Acts have been referred to in the judgment of my learned brother and I will not recapitulate them. But there are two distinctions between those Acts and this. Those Acts create offences which do not primarily affect or injure any private person. They are offences against laws passed by Government either for protection of the public or are financial provisions, for instance, the public is not in the slightest degree interested in the recovery of stamp duty or offences against Stamp Acts. The second point to be considered is this, that in all those Acts, if I am not mistaken, the form of the section is prohibitory. I will take the Stamp Act as an example, S. 70 :

> "No prosecution in respect of any offence punishable under this Act shall be instituted without the sanction."

and I think the language is in the same form in every one of the other Acts. It is argued by Mr Venkataramiah that the provisions of S. 82 creating offences are also provisions dealing with offences against public servants and that, on the face of them, they do not purport to affect either the public or any particular person; and that he is entitled to rely on the analogy of S 195 (1) (i), Criminal P. C., where sanction of the public servant is required for contempt of his lawful authority. But I think on examining the section a little more closely it becomes apparent that although the false statement—I am taking Cl (i)—has been recorded before an officer and therefore in one sense it is an offence against that officer, still it is recorded under sections of the Act which exist for the protection of a private person and is, therefore really a portion of an offence against the private person. I would only mention Ss. 34 and 74, Registration Act. S. 34 provides that no document shall be registered unless the person executing it appears before the Registering officer and the registering officer shall thereupon enquire into certain matters, "satisfy himself as to the identity," etc., etc. S. 74 provides that where a denial is made before a Registrar, he shall, as soon as conveniently, enquire whether the document has been executed or whether the requirements of the law, for the time being in force, have been complied with.

It follows therefore that these enquiries into these false statements made are entirely for the benefit of a particular person who may be injured or otherwise affected by the registration of the document and it seems to me that one cannot treat these sections as being in the same class as sections which impose penalties for offences in contempt of the authority of public servants or offences against Government. That being so, I see no reason why a private person should not be allowed to lay a complaint of an offence under the Act. There is no doubt that the private person is more seriously injured by the action of an offender who not only forges a document but endeavours to give it higher authority by registering it and, therefore, as he is put in a more dangerous position by this action, I can see no reason why he should not be entitled to institute the proceedings on which higher penalties are provided for the offence. My learned brother has referred to the Full Bench decision in *Gopinath* v. *Kuldip Singh* (1). It is quite true that there are decisions the other way. They are *Queen-Empress* v. *Bateswar Mandal* (3), *Hussain Khan* v. *Emperor* (4) and *Emperor* v. *Jiwan* (5). I cannot but express my regret that we have not the advantage of the reasoning of the learned Judges in those cases and so we are compelled to treat this matter as a case of first impression. I admit that I have had great difficulty in arriving at a conclusion : but I have come to a conlusion which is in agreement with my learned brother's decision and I have thought it necessary to give my additional reasons somewhat at length, so that when this matter comes before this Court on another occasion, the Court may have whatever assistance will be afforded to it by the reasons which we have given.

S N./R.K. *Order accordingly.*

3 (1883) 10 Cal 601.
4. (1916) 38 All 351=36 I C, 145.
5. A I R 1915 All 111=27 I C 203=37 All 107.

✻ A. I. R. 1918 Madras 442

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

M. R. M. A. Subramania Chettiar—Defendant—Appellant.

v.

B. Raja Rajeswara Sethupathi —Plaintiff—Respondent.

Appeal No. 195 of 1917, and Civil Revn. Petn. No. 521 of 1917 and Civil Misc. Petns. Nos.1684 and 1685 of 1917, Decided on 10th August 1917, from order of Sub-Judge, Ramnad, in Execution Appeal No. 515 of 1917.

(a) Civil P. C., (1908), O. 41, R. 5 (3)—Immovable property given as security under O. 41, R. 5—Property can be realized by sale in execution—Separate suit is not maintainable.

Where immovable property is given by a judgment-debtor as security for the due performance of the decree pursuant to an order of Court under O. 41, R 5 (3), the property can be realized by the decree-holder in execution and no separate suit is necessary or maintainable for such realization 30 *Cal* 1060 and 2 *I. A.* 219 (*P. C.*), *Foll*; 32 *Cal* 494, *Dist.* [P 442 C 2]

(b) Civil P. C., (1908), S. 47 and O. 41, R. 5 (3)—Immovable property given as security under O. 41, R. 5 (3)—Realization is question relating to execution, discharge or satisfaction under S. 47.

The realization by a decree-holder of immovable property given by the judgment-debtor as security for the due performance of the decree, pursuant to an order of the Court under O. 41, R. 5 (3), is a question relating to the execution discharge or satisfaction of the decree arising between the parties to the decree within the meaning of S. 47, Civil P. C., 1908 2 *I. A* 219, (*P. C.*) *Foll*, [P 442 C 2]

✻(c) Civil P. C. (1908), O. 41, R. 5 (3) and S 73—Immovable property given as security—Property is solely for discharge of decree—Sale proceeds are not liable to rateable distribution.

The effect of immovable property being given as security is something more than attachment and the property given as security is applicable solely in discharge of the judgment-debt and is not liable to rateable distribution, though the mode of realisation by the Court of such security is by sale in execution in the same way as in the case of attached property. [P 442 C 2]

A. Krishnaswami Aiyar and *Patanjali Sastri*—for Appellant.

S. Srinivasa Aiyangar and *R. Krishmachariar*—for Respondent.

Judgment.—The question raised in the appeal which is of some importance is, when immovable property has been given by the judgment-debtor as security for the due performance of a decree pursuant to an order made under O. 41, R. 5 (3) (c), Civil P. C., whether that property can be realized by the decree-holder in execution or can only be realised in a separate suit. We have been referred to a decision in *Tokhan Singh* v. *Girwar Singh* (1) that a separate suit is necessary. But the learned Judges who decided that case proceeded upon the prohibition in S. 99, T. P. Act, as it then was, against bringing mortgaged property to sale except by means of a suit under S. 67 of that Act. That section has been repealed and the prohibition has been limited in O. 34, R. 14, Civil P. C., and that decision, is therefore, inapplicable to the present case and affords no reason for refusing to follow the earlier decision of the same Court in *Shyam Sundar Lal* v. *Bajpai Jainarayan* (2). Further in that case, the point was not taken before the learned Judges that such a sale comes within the provisions of S. 47 (formerly S. 244), Civil P. C., which provides that

"all questions arising between the parties to the suit in which the decree was passed, . . ., and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

If we look at the question on principle and independently of authority, it is difficult to see how the realization of the security given to the Court, pursuant to an order of the Court for the purpose of satisfying the decree-holder, can possibly be said to be a matter not relating to the execution, discharge or satisfaction of the decree or not to be a question arising between the parties to the decree. The fact that the bond is given to the Court does not make it a question arising between the judgment-debtor and a third party so as to take it out of the section. This bond was given to the Court in the case in *Sadasiva Pillai* v. *Ramalinga Pillai* (3), and yet the case was held to come within the section of the Code corresponding to S. 47. If the section is applicable, then that being the special provision governing these matters, it would have overridden any general provision contained in S. 99, T. P. Act. We are therefore clearly of opinion that apart from authority altogether, it is a matter arising in execution within the meaning of S. 47, Civil P. C. The effect of immovable property being given as security is something more than attachment, because it makes the property applicable solely in discharge of the judgment-debt

1. (1905) 32 Cal 494.
2. (1903) 30 Cal 1060.
3. (1874-75) 2 I A 219=15 B L R 383 (P C).

and not liable to rateable distribution among other judgment-creditors. But the realization by the Court of such security in execution is of the same nature as sale by the Court of the immovable property attached, that is to say, it transfers the right, title and interest of the judgment-debtor who has given security.

There is no need in such a case that there should be anything in the nature of a mortgage suit for sale under S. 67, T. P. Act, with all the expense and delay which would be thereby involved. It would be a most mischievous state of law if such a thing were necessary and it would fetter the discretion of the Court in accepting immovable property as security for the execution of the decree. This view is in accordance not only with *Shyam Sundar Lal* v. *Bajpai Jainarayan* (2), but also with *Mukta Prasad* v. *Mahadeo Prasad* (4) and the dictum of two learned Judges of this Court in *Saminatha Pathan* v. *Soranatha Ammal* (5). What is more important is that it is strongly supported by the decision of their Lordships of the Judicial Committee in *Sadasiva Pillai* v. *Ramalinga Pillai* (3), where security of immovable property given for mesne profits, which were not awarded by the decree, was held to be realizable in execution for such mesne profits, instead of leaving the parties to recover them in a separate suit. Their Lordships observe at p. 232 (of 22 *M. L. J.*) that the security bonds were

"proceedings in Court importing a certain liability to be enforced in the suit against the defendant to that suit."

They further observed at p. 233 of 22 *Mad. L. J.* that the liability incurred under those bonds amounts to a "question relating to the execution of the decree," within the meaning of the latter clause of S. 11, Act 23 of 1861. If the question in that case was one relating to the execution of the decree, a fortiori it is so in the present case where security has been furnished to the Court pursuant to an order of Court under O. 41, R. 5 (3) (c), Civil P. C. It is unnecessary in this case to deal with cases of security given by third parties under S. 145, Civil P. C., or with the decisions on that question. The second objection taken to the order under appeal is that it was for the enforcement of the security for a larger amount than that provided for in the bond. Now we think that that bond has already formed the subject of adjudication, because the property has been ordered to be sold for the full decree amount and that order was allowed to become final. Further on the basis that this security was enforceable for the full amount of the decree, the Court refused to enforce the decree personally against the judgment-debtor as it would have otherwise been bound to do, except to the extent of Rs. 7,000, the balance of the decree amount over the estimated value of the immovable property given as security. In these circumstances, we think the appeal also fails on this point.

In the result, the appeal fails and is dismissed with costs. The Civil Revision Petition is dismissed. As regards the Civil Miscellaneous Petitions Nos. 1684 and 1685 of 1917 for stay, no order is necessary.

S.N./R.K. *Appeal dismissed.*

4. (1916) 38 All. 327=33 I C 982.
5. (1911) 12 I C 692.

A. I. R. 1918 Madras 443

ABDUR RAHIM AND KUMARASWAMI SASTRI, JJ.

Tadepalli Peda Nagabhushanam and *another* —Petitioners—Appellants.

v.

Tadepalli Pitchayya and *others* — Counter-Petitioners— Defendants— Respondents.

Appeal Against Order No. 170 of 1916, Civil Rev. Petn. Nos. 462, 463, and 924 of 1916, Decided on 26th July 1917, against order of Temporary Sub-Judge., Masulipatam, in Civil Misc. Pet. No. 215 of 1915.

Stamp Act (2 of 1899), S. 2 (15)—Instrument of partition—Award or decree directing partition is instrument of partition and party executing decree must pay Court-fee for his share—Defendants getting share under decree for partition must pay Court-fee for his share for executing decree.

An award or decree directing a partition is an instrument of partition within the meaning of S. 2 (15), Stamp Act and a party executing the decree must pay the proper Court-fee payable on his share. [P 444 C 1]

If a defendant, under a decree or award for partition, gets a share of a property allotted to him, he must, if he wishes to execute the decree, pay his share of the Court-fee payable on the entire decree: 12 *Bom.* 98 *Dist.* [P 444 C 1]

B. Narasimha Rao and *T. Ramachandra Rao*—for Appellants.

V. Ramesam, *V. Viswanatha Sastri* and *H. Suryanarayana*—for Respondents.

Judgment—Section 2, Cl. 15, Stamp Act, 1899, lays down that an award or decree directing a partition is to be treated for the purpose of the Stamp Act as an instrument of partition. That being so, there can be no doubt that the parties must pay a fee on the value of the properties as required by the Stamp Act. Further, there is a provision in the decree that each of the defendants is to get his share on paying the necessary Court-fee. The contention is that there is no provision in law for the defendants to pay any Court-fee But if a defendant under a decree or award for partition, such as we are concerned with in this case, gets a share allotted to him of the property and if he wishes to execute the decree, it seems to be reasonable that he should pay his share of the Court-fee leviable on the entire decree The decision in *Fulchand* v. *Bai Ichha* (1), which has been referred to, does not relate to a case of partition. That was in a suit for possession of property and recovery of mesne profits. We hold that each of the defendants who wants to execute the decree must pay the Court-fee not merely on the item of which he seeks possession, but on the entire share allotted to him. The learned pleader for the respondents concedes that the decree is executable and there is no objection on that score. We set aside the order and direct that execution do issue on payment by each defendant of the Court-fee on the entire share allotted to him. The appeal and the rivision petitions are allowed. Each party will bear his own costs.

S N /R K. *Appeal allowed.*

1. (1888) 12 Bom 98.

A. I. R. 1918 Madras 444

OLDFIELD AND BAKEWELL, JJ.

P. R. Srinivasa Aiyar—Plaintiff—Appellant.

v.

A. Sesha Iyer and *another*—Defendants—Respondents.

Letters Patent Appeal No 233 of 1916, Decided on 14th March 1917, against order of Burn J., D/ 6th October 1916.

(a) Contract Act (1872), S. 23—Marriage brokage contract is void—Suit for recovery of money paid lies only in absence of performance of substantial part of agreement.

Payment of money to induce a prospective bridegroom to marry is payment made in pursuance of a marriage brokage contract, and whether such money can be recovered back or not depends upon whether there has been performance of a substantial part of the contract or not. *A* entered into a contract with *B* and *C* to give his sister in marriage to *D* son of *B* and brother of C, all members of a joint undivided Hindu family, and to pay him Rs. 1,000 and actually paid him Rs. 400. A did not give his sister in marriage to *D* and sued to recover back the amount paid by him to *D*, under the agreement:

Held: (1) that the contract being in effect a marriage brokage contract and as such, opposed to public policy, was void; (2) that a suit to recover the money paid under the agreement could lie only in the absence of the performance of a substantial part of the agreement; 43 *Cal.* 115; *Diss. from*; *Taylor* v. *Bowers*, (1876) 1 *Q.B.* 291: *Rel. on. Case law discussed.*

[P 445 C 1; P 446 C 1; P 447 C 1]

(b) Contract Act (1872), S. 65—"Discovered to be void," explained.

Per *Bakewell, J.*—The words "discovered to be void" in S 65, Contract Act, are more apt to describe an agreement which was void abinitio but was not then known by the parties to be so, than an agreement of which the illegality must be taken to have been always known to the parties.

[P 447 C 2]

K. Pandalai—for Appellant.

T. R. Venkatrama Sastri and *K. S. Ramalhadra Aiyar*—for Respondents.

Oldfield J.—Plaintiff, hereappellant, sued defendants for Rs. 400 alleged to have been advanced to them out of Rs. 1,100, payable under an agreement as consideration for the marriage of his minor sister with Raman, defendant 1's son and defendant 2's brother. There were three defences, that (1) there was no cause of action, because defendant 1 entered into the agreement only on behalf of Raman and defendant 2 was not a party to it at all; (3) the agreement was not broken by defendants: (3) it was invaiid, as being against public policy, and the money, advanced under it, was therefore irrecoverable. Of these defences, the first was not dealt with either at the trial or by the learned Judge in this Court, though one would have supposed that a decision regarding the existence of a cause of action would have been reached, before enquiry began into the validity of the agreement set up as constituting it or the responsibility for breaking that agreement. It is said that the plea was abandoned. But the trial was under Small Cause Procedure and no issues were framed. Raman was, according to P. W 2 and defendant 1, of age at the date of the agreement. The latter said

that he took away the Rs. 400 paid under it.

It is not the case that no evidence to support the defendants' pleas was adduced; and it was admitted before us that they were relied on in this Court. although the learned Judge did not mention them.

It is not possible in these circumstances to hold that they were abandoned or that defendant cannot support the learned Judge's decision with reference to them, if they can be established and if it is not sustainable on other grounds. The learned Subordinate Judge's finding on the second defence that plaintiff, not defendants, broke the agreement, is one of fact and must be accepted. It is however to be observed that, coupled as it was with a plea that the agreement was unlawful and therefore unenforceable, it could justify no legal conclusion. For the plea in effect that defendants were absolved by plaintiff's refusal to perform his part from any duty under the agreement was irreconcilable with the contention that such performance would have been in conflict with public policy. Shortly, they could not complain of plaintiff's refusal to do what they alleged would have been wrong. On the remaining question, there is no doubt that the agreement was unlawful and therefore void. As set up in the plaint, it involved no suggestion that the money to be paid was for settlement on the bride or her issue or was anything but remuneration to defendants for bringing about the marriage; and, as plaintiff's grounds of Appeal Nos. 5 and 6 and defendant 1's written statement para. 8 and defendant 2's para. 13 show, both sides are agreed that such an agreement would be unlawful, *Kalanagunta Venkata Kristnayya* v. *Kalanagunta Lakshmi Narayana* (1) and *Devarayan Chetty* v. *Muthuraman Chetty* (2). The question is, then, whether plaintiff is entitled to recover what he paid under such an agreement and whether defendants can retain an advantage received under it. This question was not raised in the plaint, the Subordinate Judge refusing to deal with defendants' allegation that the agreement was unlawful, because he had found in their favour as to responsibility for its breach. On this account the learned Judge held that plaintiff could not raise that contention here also expressing the opinion that his claim was unsustainable with reference to S. 65, Contract Act. That section however is not applicable. *Dayabhai Tribhovandas* v. *Lakshmichand Panachand* (3), *Gulabchand Parachand* v. *Fulbai Harichand* (4) and *Ledu Coachman* v. *Hira Lal Bose* (5). The Indian Contract Act affording no direct guidance, the conclusions of the learned Judge must be tested with reference to authority. He has supported his conclusion against the existence of any right to recover what has passed in connexion with an unlawful agreement by citation of three cases.

But in one of them *Girdhari Singh* v. *Neeladhar Singh* (6), it was conceded that, if the contract was contrary to public policy, the plaintiff was not entitled to recover; and the case is, therefore, no authority against the contention, advanced before us, that the general rule is subject to an exception in the plaintiff's favour when no portion or when no substantial portion of the unlawful purpose has been carried out. So also the next case of *Nathu Khan* v. *Sewak Koeri* (7), since it was one of completed performance. The third case of *Ledu Coachman* v. *Hira Lal Bose* (5) cannot be dismissed so shortly, since it directly negatives the contention just referred to by the statement.

"It is plain that, although where money has been paid under an unlawful agreement, but nothing else is done in performence of it, the money may be recovered back, yet this exception will not be allowed, if the agreement is actually criminal or immoral where the contract is illegal, because contrary to private law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered or money paid on it."

The distinction drawn would appear to be between agreements contrary to law or pulic policy and others, which would merely have an unlawful object and would also, therefore, be void under S. 23, Contract Act. But there is no warrant for it in that section, since all alike are made unlawful, or (with all respect) in the cases referred to by the learned Judges, who moreover take no account of other cases in which the excep-

1. (1909) 32 Mad 185=3 I C 554.
2. A I R 1914 Mad 551=37 Mad 393=18 I C 515.
3. (1885) 9 Bom 358.
4. (1909) 33 Bom 411=3 I C 748.
5. (1916) 43 Cal 115=29 I C 625.
6. (1912) 16 I C 1004.
7. (1911) 9 I C 161.

tion was applied without reference to the distinction proposed. Of the cases referred to by them, *Taylor* v. *Chester* (8) was a case of completed performance and *Howson* v. *Hancock* (9), one of a claim to recover money paid on a wager, in which no further performance was possible. *Tappenden* v. *Randall* (10) is relied on only for a dictum, which apparently has not affected later decisions. So also the learned Judge's quotation from *Colline* v. *Blanterm* (11), though it is reproduced in *Kearley* v. *Thomson* (12), and *Barclay* v. *Pearson* (13), to be referred to later. Of the Indian cases cited, *Bai Vijli* v. *Nansa Nagar* (14) is not of importance, since this point and the authorities regarding it were not considered. The learned Judge's reason for rejecting two decisions in the opposite sense, *Bakshi Das* v. *Nadu Das* (15) and *Gulabchand Paramchand* v. *Fulbai Harichand* (4), that they relate to marriage brokage contracts, is in any case not available to us in the present connection.

On the other hand the exception to the general rule, based on the absence of any or of any substantial performance, is clearly recognized without reference to the distinction proposed in a case later than the majority of those relied on by the learned Judges, *Taylor* v. *Bowers* (16), in which the object of the agreement, a fraud on creditors, would, if persisted in, have resulted in the frustration of the Insolvency Law. Distrust of the decision in *Taylor* v. *Bowers* (16) was, no doubt, expressed in *Kearley* v. *Thomson* (12), but not on the ground that it overlooked the distinction drawn by the learned Judges, which was not in fact referred to although the object of the agreement was described as to defeat justice. The principle of *Taylor* v. *Bowers* (16), was moreover adopted fully in *Barclay* v. *Pearson* (13), already referred to, though the agreement related to what was regarded as a lottery, the opinion being expressed that those who had paid money under it could recover. Of the Indian cases those must be distinguished, in which the title sued on could be established only on the foundation of the validity of the unlawful agreement; as for instance in *Yaramoti Krishnayya* v. *Chundra Papayya* (17). In benami cases, however for example *Banka Behary Dass* v. *Raj Kumar Dass* (18), and *Govinda Kuar* v. *Lala Kishun Prosad* (19), the decision has always turned not on the extent to which the agreement, if it were performed, would conflict with law or public policy, but on whether it was performed and the unlawful purpose was effected wholly or substantially or not. The decisions of the Privy Council in *Petherpermal Chetty* v. *Muniandy Servai* (20) may in particular be mentioned, firstly, because it refers to the weight of the decision in *Taylor* v. *Powers* (16), as unimpaired by *Kearley* v. *Thomson* (12), and secondly, because the contention that there had been a fraudulent arrangement to defeat creditors and a step taken to carry it out

"which would on the trial of an indictment fo conspiracy have amounted to a overt act of con spiracy",

was brushed aside as irrelevant and the effecting of the contemplated fraud alone was regarded as material. Authority standing thus, it is (with all due deference) not possible to follow the decision in *Ledu, Coachman* v. *Hira Lal Bose* (5), or to confirm the decision, which is under appeal.

It is however argued by Mr. Venkatarama Sastri for defendants, firstly, that the exception above referred to, to the general rule depends, not on whether there has been performance of the unlawful agreement, but on whether the transfer of an advantage under it was merely ostensible or was intended to be real recovery of the advantage being allowed only in the former class of cases. That is not the test recognized in the authorities already referred to or in *Great Berlin Steamboat Company*, In re (21), in which the transfer was treated as irrevocable, though it was clearly ostensible. It is then urged with reference to *Kearley* v. *Thomson* (12), that plaintiff cannot recover because though the whole of the unlawful agreement has not been performed, a substantial portion has been;

8. (1869) 3 Q B 109.
9. (1800) 8 T R 575.
10. (1801) 2 Bos and P 467.
11. (1765) 2 Wilson 341.
12. (1890) 24 Q B D 742.
13. (1893) 2 Ch 154
14. (1886) 10 Bom 152.
15. (1905) 1 C L J 261.
16. (1876) 1 Q B 291.
17. (1897) 20 Mad 326.
18. (1900) 27 Cal 231.
19. (1901) 28 Cal 370.
20. (1903) 35 Cal 551=35 I A 93 (P C).
21. (1884) 26 Ch D 616.
22. (1816) 7 Taunt. 246.

and on the view already expressed, a remand on this point may, no doubt, be fairly claimed. The last question raised is whether plaintiff can rely on defendant's admission that the agreement was unlawful either generally or when, as in this case, he did not refer to its unlawfulness in his plaint. The answer, however, to the question in both forms is the same, that in the words of Mellish, L. J., in *Taylor* v. *Bowers* (16), plaintiff does not

"as the rule is laid down in *Simpson* v. *Bloss* (22) require any aid from the illegal transaction to establish his case. He is not bringing the action for the purpose of enforcing the illegal transaction .... To hold that plaintiff is enabled to recover does not carry out the illegal transaction, but the effect is to put every body in the same situation as they were before it was determined on",

Or, as the point was put by James, L. J.,

"It is the defendant, who has got really to show the fraud", the element vitiating the agreement in the case under consideration . . . "It is the defendant, who has got to make out his title to the goods from the transaction, which is a fraud to and which it seems he was a party . . . and there would be no title in the defendant independently of that"

To adapt these principles to the present case, the plea that the agreement is unlawful is not plaintiff's but defendants. Defendants, as already pointed out, cannot, relying on it, also complain of plaintiff's default. They can (and this is the point at present material) rely on it, only if they further allege and prove that the unlawful agreement or a substantial part of it has been performed. On this point their written statements contained nothing; and it was, therefore, not plaintiff's but their pleading, which was defective. If the Subordinate Judge had considered the unlawfulness of the contract, plaintiff would (for all that appears) have pointed this out. The contention on his side is one purely of law and in the circumstances there is no adequate reason for depriving him of the benefit of it. Defendants have further proposed to support the lower Court's judgment with reference to the counter-claim made in their written statements to damages on account of loss of reputation. It has not however been shown how this claim can be sustainable as arising out of the breach of an admittedly unlawful agreement or how it can be reconcilable with defendants' denial that they were parties to that agreement. The questions for consideration are therefore only:

(1) Whether the plaint agreement was entered into with defendants or either of them or with Raman with or without defendant 1 as his agent? (2) Whether with reference to the authorities above referred to, the agreement or a substantial part of it was performed? The Letters Patent Appeal must be allowed and the Subordinate Judge's decision set aside with a direction to restore the Small Cause suit to file and re-hear it, admitting any additional evidence tendered, in the light of the foregoing. Costs to date in both Courts will be costs in the cause and will be provided for in the decree to be passed.

Bakewell, J.—In India marriage is not generally matter of contract between the parties thereto but is a status or condition imposed upon them by persons who are under a social duty to do so. The authorities which have been cited support, I think, the proposition that they who undertake this duty must have regard solely to the interest of their wards and must not stipulate for a profit for themselves. The pleadings in this case are not clear but I think that the plaint alleges an arrangement between the parties that a marriage portion should be paid out of the estate of the deceased father of the prospective bride and that certain jewels should be presented to her by the relations of the prospective bridegroom; and apart from other averments in the written statement of defendant 1, it might be inferred that his case was that the marriage portion was to be paid to the bridegroom, the sum of Rs. 400 now claimed, being portion thereof had been in fact paid to him and that the defendants gained no benefit from this payment because the bridegroom had been adopted into another family. I fail to see anything contrary to public policy or morality in an agreement between third parties, which is intended solely for the benefit of the married couple or either of them. Having regard, however, to the defendants' admission that the agreement was illegal, and that they had some interest in the sum now claimed, I do not think that it is open to the defendants at this stage to maintain that the agreement was valid. The words 'discovered to be void' in S. 65, Contract Act are more apt to describe an agreement which was void ab initio but not then known by the parties to be so, than an agreement of

which the illegality must be taken to have been always known to them, and I agree that in this case it is safer to rely upon the authorities cited by my learned brother. These authorities show, I think, that in a suit for money had and received to the use of the plaintiff, the defendant may plead that it has been applied in accordance with their agreement, and the plaintiff cannot reply that the agreement was illegal because he is particeps criminis. If the agreement is will wholly excutory and no material part of the illegal purpose has been accomplished, defendant cannot plead that he holds the money for that purpose: see *Barclay* v. *Pearson* (13), *Petherpermal Chetty* v. *Muniandy Servai* (20) and the cases there cited. These propositions apply when the parties are in pari delicto and to agreements void under Civil law; different considerations may arise in the case of an agreement to commit an offence against the Crown. I agree to the order proposed by my learned brother.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 448

SESHAGIRI AIYAR AND BAKEWELL, JJ.

W. Kalamatappa and *others*—Plaintiffs—Appellants.

v.

Joish Narayana Bhat and *others*—Defendants—Respondents.

Second Appeal No. 1846 of 1915, Decided on 18th April 1917.

(a) Criminal P. C. (1898), S. 144—Order under S. 144 does not affect civil rights—Party suing to vindicate rights must prove necessary facts.

An order of a Magistrate under S. 144, Criminal P. C, leaves the civil rights of the parties unaffected and does not by itself give a right of suit to the parties. Consequently, if either of the parties sues to vindicate its rights, it must allege and prove facts which, apart from the pronouncement of the Magistrate, would enable it to obtain a decree, [P 448 C 2]

(b) Public Rights — Vindication—Special damages must be proved—But not when private right is infringed

If the right sought to be established is a public right then special damage must be alleged and proved; if it is an individual right such damage need not be proved 32 *Mad* 527; and 29 *I. C.* 248, *Foll.* 32 *Mad.* 478; 2 *Mad.* 140; and 18 *Bom.* 693, *Dist.* [P 448 C 2]

T. Rangachariar and *Ranganadha Aiyar*—for Appellants.

T. R. Ramachandra Aiyar, *T. R. Krishnaswami Aiyar* and *V. S. Narasimhacharier*—for Respondents.

Judgment—We think this second appeal can be disposed of on a simple ground. The suit was based on an order of the Magistrate passed under S. 144, Criminal P. C. That order confines itself to stating that the procession claimed by the plaintiffs should not be permitted as there was danger of a breach of the public peace. Such an order was within the competence of the Magistrate and was perfectly legal. We fail to see how this order can furnish a cause of action for the suit, although it may be the occasion for instituting the suit. The order of the Magistrate leaves the civil rights of the parties unaffected. Consequently, if the plaintiffs sue to vindicate their rights, they must allege and prove facts which, apart from the pronouncement of the Magistrate, would enable them to obtain a decree. If the right sought to be established is a public right, then special damage must be alleged and proved; if it is an individual right such a damage need not be proved.

Mr. Rangachariar has quoted certain authorities for the proposition that the promulgation of the order by the Magistrate dispenses with the necessity of proving special damage. On examining the cases, we are unable to find that this general statement receives any support from them. In cases where the Magistrate exceeds his powers and passes an order which is not warranted by S. 144, it may be that proof of special damages is not necessary. That is how we understand the decision in *Kandasawmg Mudali* v. *Subraya Mudali* (1). The decisions in *Muthialu Chetti* v *Bapun Saib* (2) and in *Kazi Sujaudin* v. *Madhavdas* (3) make this position clear. As regards *Andi Moopan* v. *Muthuvirama Reddy* (4) it is enough to point out that in that case the Court found that the right claimed was an individual right and it was the infraction of that right that led to the suit. In that view no question of special damage arose. In *Maunada Mudali* v. *Nallayya Goundan* (5), an illegal order was passed prohibiting the plaintiff from obstructing the passing of a procession.

In our opinion, an order within the jurisdiction of the Magistrate and which

1. (1909) 32 Mad 478=1 I C 716.
2. (1878-80) 2 Mad 140.
3. (1891) 18 Bom 693.
4. (1915) 29 I C 248.
5. (1909) 32 Mad 527=4 I C 870.

is passed soley in the interest of the public peace without detriment to the civil rights of the parties, would not give plaintiff a right to dispense with the proof of special damage, if he is agitating a public right. On this ground, we hold that the suit was misconceived and dismiss it. At the same time, we think the decree which denies certain rights to the plaintiffs should be vacated In dismissing the plaintiff's suit, the Courts below were not entitled to declare any right in favour of the defendants. There will be a simple decree dismissing the suit. In this Court each party will bear his own costs. The order as to costs in the Courts below must stand.

S.N./R.K. *Suit dismissed.*

A. I. R. 1918 Madras 449

ABDUR RAHIM AND KUMARASWAMI SASTRI, JJ.

Thiagarayan—Plaintiff—Appellant.

v.

Kannusami Pillai— Defendant—Respondent.

Appeal No. 135 of 1916, Decided on 2nd October 1917, against appellate order of Dist. Judge, Tanjore, in A. S. No. 120 of 1916.

(a) Limitation Act (1908) Art 182—Mortgage decree providing for sale of property on default in payment of decretal amount is decree for payment of money within Civil P C (1882), S 230—Application for sale of non-hypothecated property is governed by Art. 182.

A decree providing for payment of the amount claimed, interest and costs and for sale of the hypothecated property in default of such payment is a decree for payment of money within the meaning of S 230, Civil P. C., of 1882 : 28 *Mad* 473 and 12 *I C* 689, *Foll.* [P 449 C 2]

An application therefore for execution of the decree against the judgment-debtor personally or by sale of the non-hypothecated properties is governed by Art. 182, Sch. 1 Lim, Act. [P 449 C 2]

(b) Limitation Act (1908), Art. 182—Application not continuation of previous proceedings illustrated.

Where by an application a remedy is sought against properties not comprised in a previous application or against other defendants, it cannot be said to be a continuation of the previous proceedings. [P 449 C 2]

(c) Civil P. C. (1908), O. 6, R. 17—High Court will not allow amendment in second appeal which would defeat bar of limitation.

Though the High Court has power, under very exceptional circumstances, to allow amendments in second appeal, it will not ordinarily allow an amendment which would defeat the bar of limitation, as by substituting in a later application in the column of relief the property comprised in a previous application. [P 450 C 1]

Judgment.—The decree provides that "defendants do pay plaintiff Rs. 400, the amount claimed" and for payment of interest and costs and it further provides that, upon the defendants paying to the plaintiff the principal, interest and costs, the documents, etc , should be made over and in default of the payment, the hypothecated property should be sold. This form of the decree was in accordance with the practice prevalent at the time, and the main question is whether such a decree is a decree for payment of money within the meaning of S. 230 of the old Code. The argument before us is that the decree gives relief originally against the properties hypothecated, and the judgment-debtor could not, for instance, be arrested before the remedies against the properties were exhausted. Supposing it is established that the personal remedy, so far as the arrest of the judgment-debtor is concerned, could not be enforced until the decree-holder had exhausted his remedies against the mortgaged properties, it does not necessarily follow that the decree is not a decree for payment of money. We have no doubt that the decree in this case is one for payment of money and the matter in fact is concluded by the decision of a Full Bench, *Vaidhinadasamy Ayyar* v. *Somasundram Pillai* (1). There are also other decisions of this Court to the same effect. One of them being *Rajah of Kalahasti* v. *Venkata Perumal* (2).

The next argument advanced before us is that the present application of the decree-holder may be taken to be a continuation of the previous application for sale. But the present application is seeking remedy against property other than that which was the subject of the previous application and against other defendants. Under these circumstances, it is impossible to say that the present application is a continuation of the previous proceedings. Then it is asked that we may allow the application to be amended so that the petitioner may proceed against the property which was the subject of the previous application of 1910. The application is made expressly to enable the petitioner to get over the bar of limitation. This application was never made to the First Court nor to the lower appellate Court and is made before us for

1. (1905) 28 Mad 473.
2. (1911) 12 I. C. 689.

the first time in second appeal, We do not think that we should be justified in allowing such an amendment in the circumstances of the case. We may have power, as pointed out in *Meldon* v. *Neal* (3), in very exceptional circumstances to allow an amendment which would defeat the bar of limitation, but we agree with the learned Chief Justice's observation in *Kumara Venkata Perumal* v. *Velayuda Reddi* (4) that ordinarily the Court ought not to allow an amendment which would prejudice the right of the other party.

The learned vakil for the appellant wanted to argue that the time, which elapsed between the date of the proceedings initiated by the application and the date of the order on that application, i. e., 14th April 1913 of the appellate Court setting aside the order of the First Court refusing to set aside the sale, should be deducted either under S. 14, Lim. Act, or under the principle stated in *Lakhan Chunder Sen* v. *Madhusudan Sen* (5). But the question was not raised before and as it is one of mixed fact and law, we think that we should not be justified in permitting it to be raised for the first time at this stage.

In the result the appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

3. (1887) 19 Q B D 394.
4. A I R 1915 Mad 449=24 I C 195.
5. (1908) 35 Cal 209.

A. I. R. 1918 Madras 450

ABDUR RAHIM AND OLDFIELD, JJ.

Gollanapalli Subbayya—Defendant—Appellant.

v.

Sankara Venkataratnam and *others*—Plaintiffs—Respondents.

Civil Misc. Appeal No. 207 of 1916, Decided on 14th September, 1917, against order of Sub-Judge, Bezwada, in Appeal Suit No. 100 of 1916.

(a) Civil P. C. (1908), O. 21, R. 63—Dismissal of claim to attached property—Attachment removed at instance of another person—Claimant need not institute declaratory suit for title to property.

The language of O. 21, R. 63, implies that the object of the suit by the party aggrieved by an order passed under the preceding R. 61 is to have the attachment removed, i. e, to have it declared that the property is not liable to attachment at the instance of the decree-holder. This presupposes the existence of a subsisting attachment which the claimant wishes to get rid of.

[P 451 C 1]

The person, therefore, who claims the property the attachment of which is removed, though at the instance of another peeson, need not institute a suit for a declaration that the property is his and is not therefore, liable to attachment, the attachment or the order upholding the attachment being the cause of action in such cases. The withdrawal of the attachment ipso facto bars all operation against the defendant claimant: 26 *I. C.* 532 and 3 *C L J* 381, *Foll*; 23 *Cal.* 829 and 40 *Mad.* 733, *Dist.* [P 451 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 58 and 63—Subsequent attachment on dismissal of claim—Limitation runs from date of subsequent order.

The dismissal of a second claim by the same party consequent on a subsequent attachment gives a fresh cause of action and the claimant has one year from the date of the latter order to institute a suit under O. 21, R. 63. [P 451 C 2]

V. Ramadoss—for Appellant.

Ramesam—for Respondents.

Judgment.—Respondent 1 in this appeal put in a claim under O. 21, R. 58, Civil P. C., to certain property which had been attached at the instance of another person. There was another claim filed by defendant 2 in the suit and both claims were disposed of on the same date. Respondent 1's claim was dismissed, it being found that he was not in possession of the property as alleged; the claim of defendant 2 cn the other hand was allowed and the attachment of the property was removed. Then the decree-holder instituted a suit to establish his right to attach the property belonging to the judgment-debtor and ultimately succeeded in the suit. Thereupon, respondent 1 put in a fresh claim and, that being dismissed, he instituted this suit.

The question is whether the suit is in time. The contention of the appellant is that once the claim of respondent 1 to the appeal was dismissed, although attachment was removed on the same date at the instance of another person, respondent 1 was bound to institute a suit within one year of the dismissal of his claim in order to establish his right to the property and failing that, the order against him was conclusive. This view of the law was upheld by the District Munsif, but the Subordinate Judge has taken a different view. The question we have got to decide depends upon the proper interpretation of the rules relating to claims and especially of R. 63, O. 21, Civil P. C. R. 63 says:

"Where a claim or an objection is preferred, a party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the

result of such a suit, if any, the order shall be conclusive."

This seems to imply that the suit is to be instituted with a view to have the attachment removed, that is to say, to have it declared that the property is not liable to attachment at the instance of the decree-holder, inasmuch as it belongs to or is in possession of the claimant. This presupposes the existence of a subsisting attachment which the claimant wishes to get rid of. It seems difficult to perceive any good reason why a person who claims property, the attachment of which is removed though at the instance of another person, should have to institute a suit to have it declared that the property is his and is not, therefore, liable to attachment. It is really the attachment or rather the order upholding the attachment that is the cause of action in such cases. Once the attachment goes the order dismissing his claim cannot be said in any way to prejudice the claimant. It ipso facto bars all operations against him. Supposing the decree-holder himself withdraws the attachment after the order has been passed against the claimant, it would be unreasonable to say in such a case that the person claiming the property is still bound to institute a suit to establish his right though there is no one claiming to attach the property against him. The attachment may be removed because the decree is satisfied. Would it not be going much too far to hold that even then the person claiming the property must sue to get rid of the order setting aside his claim which was passed before the attachment was removed?

The question was considered by a Bench of this Court in *Ponaka Balarami Reddi* v. *Haji Mahomed Abdul Aziz* (1) and the view taken there seems to us to be the correct view. That was also the view taken by the Calcutta High Court in *Morshia Barayal* v. *Elahi Bux Khan* (2). On the other hand, the learned pleader for the appellant relied strongly upon a decision in *Bonomali Rai* v. *Prosunno Narain Chowdhury* (3), which laid down that when an order removing attachment is set aside afterwards there need be no further attachment and the attachment may be said to have been continued so as to effect the intermediate alienation. But this is a different question from what we have to consider in this appeal. All that we are concerned with here is whether the claimant whose claim has been dismissed is bound to get that order set aside even though the attachment has been removed subsequent to the order. Both upon authority and reason, we hold that that is not what is intended by O. 21, R. 63. The Full Bench decision in *Kovuri Basivireddi* v. *Nidumoori Ramayya* (4) has no bearing on the point.

The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

1. A I R 1915 Mad 57=26 I C 532.
2. (1905) 3 C L J 381.
3. (1896) 23 Cal 829.
4. (1917) 40 Mad 733=36 I C 445.

A. I. R. 1918 Madras 451

COUTTS-TROTTER AND SESHAGIRI AIYAR, JJ.

Devarapalli Ramalinga Reddi and *others*—Defendants—Appellants.

v.

Srigiriraju Kotayya and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 71 of 1916, Decided on 19th February 1917, against decree of Addl. Temporary Sub-Judge, Guntur, in Original Suit No. 42 of 1914.

(a) Evidence Act (1872), S. 35 — Village karnam or Reddi keeping register of deaths is public servant under S. 35.

A village karnam or Reddi keeping a register of deaths acts as a public servant in the discharge of his official duty within the meaning of S. 35. It is not necessary that a public servant should be compellable by legislative enactment to discharge such a duty. *Ratcliffe* v. *Ratcliffe and Anderson*, (1859) 1 *Sw. and Tr.* 467, *Foll.* [P 452 C 2]

(b) Evidence Act (1872), S. 35—Register of deaths kept by village Official is admissible—Entry is evidence of actual date of death.

Where death registers are kept under the directions of the Board of Revenue acting as agents of the Government, the entries therein are admissible in evidence under S. 35, Evidence Act. An entry in such register is proof of the actual date of death. 26 *Mad* 268; *Wintle, In re*, (1870) 9 *Eq.* 373, *Diss from. Goodrich, In re*, *Payne* v. *Bennett*, (1904) *P.* 138, *Foll.* [P 452 C 2]

T. V. Venkatarama Aiyar and *R. Rajagopala Aiyar*—for Appellants.

T. Prakasam—for Respondents.

Judgment.—This is an appeal from a decree in a suit brought by a reversioner to recover possession of the properties belonging to one Pelda Venktarayadu, the last male owner. His daughter, Venkamma, was in possession until she died. The first question argued before us related to the date of the death of this woman. The plaintiff's allegation was that she

died on 9th January 1902. Defendant 12, stated that Venkamma died in 1899 and that the suit was barred by limitation. The Subordinate Judge came to the conclusion that the plaintiffs' suit was in time. The main argument against this conclusion was that Ex. A, the public extract of the register of the death of Venkamma, was not receivable in evidence and that the judgment of the Subordinate Judge which is mainly based on that document should be reversed. The learned vakil for the appellants broadly contended that this document is not receivable in evidence under S. 35, Evidence Act. He argued that there is no legislative enactment making it compulsory upon village officers to maintain a register of this kind and that an extract from such a register is not covered by S. 35. There are two answers to this contention. In the first place, Madras Act 3 of 1899 provides for village officers beyond Municipal towns keeping a register of births and deaths. Under S. 5 the Collector may appoint any person either by name or by virtue of his office to be registrar of births and deaths in each village. There are provisions in the Act for such registers being sent up to the Taluk cutcherry.

Under S. 17, the extracts given in the Taluk office are required to be certified as provided in S. 76, Evidence Act. Such extracts may be produced in proof of the entries of which they purport to be copies. It is, therefore, clear that the records of death would be an entry made in a public register as required by the Evidence Act. It is true that under S. 2, the Local Government has to extend the operation of this Act to the Districts. On such a notification, S. 4 would enable the Collector to proclaim that registration shall be compulsory. As the point has been taken for the first time in appeal and as the appellant denied the existence of any legislative enactment on the subject the respondent has not been able to ascertain whether the Act has been extended to the District of Guntur and whether the registration has been made compulsory in that district. But even apart from this question, we see no reason for holding that the register would not be covered by the language of S. 35, Evidence Act. The entry spoken of in the first part of the section must either (a) be made by a public servant in the discharge of his official duty or (b) by any other person in the performance of a duty specially enjoined by the law of the country. The second part alone relates to legislative enactments; the first part is general in its terms. A reference to the Standing Order 101 of the Board of Revnue shows that the system of registering births and deaths was inaugurated in 1865; by the Board's proceedings dated 5th February 1874, the duty of keeping such registers was cast upon the village officials. It is clear, therefore, that a village Karnam or a Reddi keeping a register of deaths will be acting as a public servant in the discharge of his official duty. It is not necessary that a public servant should be compellable by legislative enactment to discharge such a duty. In *Ratcliffe* v. *Ratcliffe and Anderson* (1) it was pointed out that a register of births and deaths kept under the orders of the East India Company was a public document of the description mentioned in S. 35, Evidence Act. Lord Campbell in that judgment speaks of the register having been kept in obedience to directions given by the East India Company in its sovereign capacity. No legislation of the compony is referred to as having authorised the keeping of such a register. We are, therefore, of opinion that even apart from Act 3 of 1899 the registers which are being kept under the directions of the Board of Revenue since the year 1865 do come under S. 35, Evidence Act. It need hardly be stated that the Board of Revenue are the agents of the Executive Government of the Presidency [see *Secretary of State* v. *Kasturi Reddi* (2)]. One other argument of the learned vakil for the appellants was that the extract is not evidence of the actual date of the death mentioned in it.

Reliance was placed upon certain observations contained in In re *Wintle* (3). It is clear that these observations have not been accepted as good law in England. See *Goodrich*, In re, *Payne* v. *Bennett* (4). We are, therefore, of opinion that Ex. A was rightly admitted in evidence, and that it is evidence of the actual date of the death. Upon the facts, we have no hesitation in concurring with

1. (1859) 1 Sw & Tr 467.
2. (1903) 26 Mad 268.
3. (1870) 9 Eq 373=21 L T 781=18 W R 394.
4. (1904) P 123=73 L J P 33.

the conclusion of the Subordinate Judge that the plaintiff has proved that Venkamma died within twelve years of the date of suit. The evidence let in on behalf of the defendants is utterly worthless, having regard to the fact that defendant 12, who professes to have known the date of the death all along did not state it in the written statement filed by him. Another contention was that Chinna Venkatarayudu and Pedda Venkatarayudu were not divided; but the documentary evidence on the question is very clear. Exs. L, N, and Z of the year 1860 show that by that time the two brothers had become divided in status. Then it was suggested that the family compromise evidenced by Ex. D is binding upon the present plaintiffs. The contest in that case was between the widow of a coparcener who claimed maintenance from the family and defendant 12's father. Defendant 12's, father claimed that he was entitled to the whole of the property; he entered into a compromise. The present plaintiffs were not parties to the compromise and by no stretch of imagination can they be said to have been represented either by Bangaramma or by defendant 12's father. We hold that the compromise is not a family arrangement binding upon the plaintiffs. We must, therefore, for these reasons confirm the decree of the Subordinate Judge and dismiss the appeal with costs. We dismiss the memorandum of objections also with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 453

AYLING AND NAPIER, JJ.

Gangadharan Pattar and *others*—Defendants—Appellants.

v.

Patinhare Kovilakath Thazhathe Thavazhi Manavikraman and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 581 of 1916. Decided on 6th March 1917, against decree of Sub-Judge, South Malabar, in Appeal Suit No. 426 of 1915.

(a) Malabar Law — Verumpattam lease—Verumpattam being simple lease runs only for a year unless otherwise specified.

Verumpattam is a simple lease running only for a year unless otherwise specified, and the 12 years ordinarily presumed in the case for a kanom have no application to a verumpattam: 27 *Mad.* 202 and 36 *Mad.* 380, *Foll.* [P 454 C 1]

(b) Malabar Law — Verumpattam lease—Incidents stated.

Incidents of a verumpattam stated. [P 454 C 1]

(c) Malabar Law — Verumpattam lease—Notice—Lessee is only entitled to reasonable notice which depends on circumstances and local customs.

A verumpattam lessee is not entitled to a six months' notice. He is only entitled to reasonable notice, and what is reasonable notice is a question of fact in each case depending upon particular circumstances and the local customs as to harvesting of crops and letting of land: 9 *Cal.* 48 and 28 *I. C.* 915, *Foll.* [P 451 C 1, 2]

(d) Landlord and tenant—Date fixed for relinquishment is notice and date of termination of lease period—Both dates must synchronise for prevailing difficulty in apportionment.

The exact synchronising of the date fixed in the notice for relinquishment with the termination of the lease period is only of importance in so far as it prevents difficulty in apportionment. [P 454 C 2]

C. V. Anantakrishna Aiyar and *P. V. Parameswara Aiyar*—for Appellants.

T. R. Ramachandra Aiyar and *A. S. Venku Aiyar*—for Respondents.

Judgment.—This is a suit by a melcharatdar from the stani the 4th Rajah of Calicut, to recover possession of certain property held by the defendant under a lease from that stani, and also to recover the arrears of rent which had been assigned in the melcharath. The melcharathdar gave the defendant notice to quit, Ex C. The defendant set up that under his lease, he was entitled to a right of permanent occupancy or alternatively to hold for 12 years. The District Munsif, on the construction of the document and on the evidence of surrounding circumstances and on the evidence of P. W's. 3 and 4, one of whom was a clerk of the stani, upheld the contention that it was for a term of 12 years The Subordinate Judge on appeal has declined to act on the evidence of P. W's. 3 and 4 or to attach any special characteristics to verumpattam leases from the Rajahs of Calicut, and holding that this is an ordinary verumpattam lease negatived the claim for 12 years. The points urged before the District Munsif are pressed on us here and great stress is laid on the fact that this property has been held since 1870 and that there have been three renewals which, it is urged, prove the payment of a renewal fee. If the renewals had been at the end of periods of 12 years, there might have been some force in this argument, but the dates are 1870, 1881, 1888 and 1902. In our opinion those dates are against the contention of the appellant.

The document itself is silent as to the term, but contains a provision that the rent shall be paid in Makaram of every year. We agree with the Subordinate Judge that this is a verumpattam lease. The nature of such a lease has been explained many years ago in the proceedings of the Sadar Adawlat Court of 5th August 1856. These proceedings have been held in *Theyyan Nair* v. *Zamorin of Calicut* (1) and *Achutha Menon* v. *Sankaran Nair* (2) and by this Bench quite lately to be authoritative. The description is as follows: Verumpattam—simple lease.

"This lease runs only for a single year unless otherwise specified. At the end of the year, the landlord is at liberty either to renew the lease or let the land to another tenant, but he cannot under any circumstances disturb the tenant in his enjoyment until the year has expired. Where the lease is for a specified period, the tenant cannot be ejected during that period unless he endeavours to defraud the landlord or allows the rent to fall into arrears. In either case however an action of ejectment will lie against the tenant." (Proceedings of the Court of Sadar Adawlat No. 18, dated 5th August 1856).

It is clear, therefore, that the 12 years presumed in the case of a kanom has no application to a verumpattam. We must therefore treat this as a lease from year to year and accordingly the suit was not premature. The next question is as to the sufficiency of notice contained in Ex. C. This is dated 16th January 1913 and gives notice to quit on or before 26th February 1913. The Subordinate Judge has found that this is timely notice. It is urged that he has ignored the principle that notice must be for the end of term and must also allow six months. Admittedly, there is no statutory provision, but the English law is relied on and the principles enunciated in the Transfer of Property Act. The chief authority relied on in support of this contention is *Kishori Mohan Roy Chowdhry* v. *Nand Kumar Ghosal* (3). This case was treated as one not of general application in *Digambar Mahto* v. *Jhari Mahto* (4), in which the learned Judges have preferred to follow the rule laid down in a long series of cases, *Jagut Chunder Roy* v. *Rup Chand Chango* (5), *Radha Gobind Koer* v. *Rakhal Das Mukherji* (6), *Bidhumukhi Dabea Chowdhrain* v. *Kefyutullah* (7) and *Kali Kishen Tagore* v. *Golam Ali* (8). The true general principle is stated by Field, J., in the earliest of these cases thus:

"what is reasonable notice is a question of fact which must be decided in each case according to the particular circumstances and the local customs as to reaping of crops and letting land."

The same view has been adopted by this Court in a recent case reported as *Ramasami Chettiar* v. *Kathan Ambalagaran* (9) and in a still more recent case, *Second Appeal No.* 272 *of* 1915. We entirely agree that there is no right to a six months' notice. With regard to the date fixed in the notice for relinquishment, the exact synchronising of that with the termination of the lease period is only of importance in so far as it prevented difficulty in apportionment: vide *Kishori Mohan Roy Chowdhry* v. *Nand Kumar Ghosal* (3). In the present case the notice period expired on 26th February 1913. The renewal referred to in Ex. B was dated 9th March. The whole rent for the year was payable before the end of Makaram which is prior to 26th February, and both dates are admittedly after the end of the cultivation season. No difficulty as to apportoinment of rent could therefore possibily arise. There is therefore no legal objection to the finding of the lower appellate Court that the notice was timely. There remain two other points. The finding of the Subordinate Judge as to improvement is one of fact and cannot be contested here. As to the decree for three years' arrears of rent, it is true that the stani has already got a decree for that prior to this suit, but the plaintiff was not a party to that suit and is entitled to recover the rent on his assignment, notice of which had been given to the defendant. If he did not choose to plead the assignment as a defence to the Small Cause Court suit, he cannot rely on the decree in that suit against the plaintiff's claim. The appeal must therefore be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

1. (1904) 27 Mad 202.
2. (1913) 36 Mad 380=12 I C 1007.
3. (1897) 24 Cal 720.
4. (1899) 26 Cal 761.
5. (1883) 9 Cal 48.
6. (1886) 12 Cal 82.
7. (1886) 12 Cal 93.
8. (1886) 13 Cal 3
9. (1915) 28 I C 915

A. I. R. 1918 Madras 455 (1)

AYLING AND NAPIER, JJ.

Public Prosecutor—Appellant.

v.

Shamsudin Sahib and *others*—Accused—Respondents.

Criminal Appeals Nos. 490 to 500 of 1916, Decided on 13th March 1917, against order of Bench Magt. Erode in Bench Cases Nos. 227 to 237 of 1916.

Madras Towns Nuisances Act (3 of 1889), S. 3 (5)—Sanitary Inspector is competent to start prosecution—His filing of printed form duly filled in is complaint under S 190 (1) (a) and prosecution is not illegal when he is examined under S. 200—Criminal P. C. (1898), Ss. 190 (1) (a) and 200.

A Sanitary Inspector, not empowered to exercise the powers of a Police Officer, can initiate proceedings under the Madras Town Nuisances Act. [P 455 C 1]

He cannot put in a charge sheet or submit a police report to the Magistrate, but the mere use by him of a printed form appropriate to offences under the District Municipaiities Act for embodying the substauce of his complaint will not render the prosecution illegal when a document was treated as a complaint under S 190 (1) (a) Criminal P, C , and the complainants examined under S. 200. [P 455 C 1,2]

Public Prosecutor—for the Crown.

Judgment. — These are appeals by Government against acquittals of several accused persons who were charged before the Bench Magistrates of Erode with offences under the Towns Nuisances Act 3 of 1889, S. 3 (5). The ground of the acquittal is as stated in the order "that the Chief Sanitary Inspector is not competent to prosecute for offences under the Act." We think that what the Bench really meant was that the Sanitary Inspector had no power to put in a charge-sheet, that is, make a police report of the facts as provided in S. 190 (1), (b), Criminal P. C., and they seem to have held that the proceedings in these cases were initiated in that manner. They are in error in this matter, but their error has been induced by the user by the Sanitary Inspector of a printed form headed "charge-sheet of individuals prosecuted" which form is appropriate to offences under the District Municipalities Act in cases where the Governor-in-Council has under S. 282 (4) empowered a "servant of the Municipality" to "exercise the powers of a Police Officer."

Admittedly, the Sanitary Inspector is not so empowered. If the Magistrate who took the case on his file had accepted this document as a police report, the proceedings would have been contrary to law, but it is clear that he treated the document as a complaint under S. 190 (1) (a) and examined the complaint under S. 200, the substance of the complaint being reduced to writing and signed by the complainant as required by the same section. This appears on the document itself The Code does not require a complaint to be in any particular form and this document is an "allegation in writing to a Magistrate with a view to his taking action" within the definition of complaint in S. 4 (1) (h) of the Code. The proceedings were, therefore, properly instituted and we must reverse the acquittals and direct the Magistrates to take the cases on their file and dispose of them according to law.

S.N./R.K. *Appeals allowed.*

A. I. R. 1918 Madras 455 (2)

SESHAGIRI AIYAR AND BAKEWELL, JJ.

Ponnaloori Ellamandayya— Plaintiff—Appellant.

v.

Chilakapathi Lakshmayya and *others*—Defendants—Respondents.

Second Appeal No. 2018 of 1915, Decided on 20th April 1917, against decree of Temporary Sub-Judge, Guntur, in A. S. No. 25 of 1915.

(a) Evidence Act (1872), S. 108— Person not heard of for seven years— Presumption is of death and not of particular time when death occurred—Party alleging must prove time of death.

It is for the party who wants the Court to presume in a trial that a person was dead at a particular time to establish that fact affirmatively by evidence. [P 456 C 1]

(b) Evidence Act (1872), S. 108—Presumption that deceased left no heirs—No such presumption arises from presumption of death of individual.

There is no presumption arising from the presumption of the death of an individual that he left no heirs behind him. [P 456 C 2]

N. Rajagopalachariar for *P. Narayanamurthi*—for Appellant.

T. V. Venkatarama Aiyar and *R. Rajagopala Aiyar*—for Respondents.

Judgment.—This is a suit by a person alleging himself to be a reversioner for possession. The widow of the last male owner died in 1909. The suit was instituted in 1912. The defendants, among other pleas, stated that one Guruviah alias Gurunadhan, a nearer reversioner was alive when the widow died and that the plaintiff was excluded by him. In answer to this averment the

plaintiff stated that Guruviah was not heard of for thirty years and that the presumption therefore was that he was dead in 1909. The Courts below in our opinion rightly held that although Guruviah was not heard of for thirty years before suit there was no presumption that he was dead in 1909. Mr. Rajagopalachariar, who has argued this case with great insistence contested this proposition. He argued that the presumption must be raised with reference to the event which is the basis of the action and not with reference to the date of the suit. The language of S. 108, Evidence Act, in our opinion does not support this contention. The word question in that section has reference to the point raised in the suit. The law of evidence prescribes rules for the mode of proof in Courts and it is with reference to the matter that is in issue in the suit the rules are to be applied. The authority of Mookerjee, J. in *Srinath Das* v. *Probhat Chandra Das* (1), *Nurki* v. *Phekia* (2) and *Muhammad Sharif* v. *Bande Ali* (3), all support this proposition. *Band Veeramma* v. *Gangla Chinna Reddi* (4) approves of Calcutta and the Allahabad decisions. The learned vakil for the appellant has not convinced us that these decisions are wrong. He strongly relied on the decision of Karamat Husain, J., in *Akbari* v. *Bashir Ali* (5). The view of the learned Judge was expressly overruled by the Full Bench in *Muhammad Sharif* v. *Bande Ali* (3). Further it is clear that the learned Judge has misread the decision in *Phene's Trusts, In re* (6), upon which he based his conclusions. The statement of law by Giffard, L. J., at p. 151 of that volume leaves no room for doubt that it is for a party who wants the Court to presume in the trial that a person was dead at a particular time to establish that position.

Neville v. *Benjamin* (7) does not help the appellant. In that case it was found that the son of a testator was not heard of since 1892. The testator made a will and died in 1893. The administrators of the son's estate claimed the legacy made to the son in the will. It was held that they should prove that the son was alive in 1893 when the father died. This is also what S. 103 lays down. The prinicipie to be applied in such cases is clearly laid down by Sir G. M. Giffard, L. J., in *Phene's Trusts, In re* (6) in these terms:

"The true proposition is that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases but sufficient evidence there must be or the person asserting title will fail."

Applying this test we hold that the appellant has failed to prove that Guruviah was dead in 1909. Another contention of the learned vakil is that his client should have been allowed to amend the plaint by claiming title as the heir of Guruviah. We see no reason for interfering with the discretion of the lower appellate Court in this matter. Moreover there is no guarantee that the plaintiff is the sole heir of Guruviah because as was pointed out in *Jackson* v. *Ward* (8), there is no presumption arising from the presumption of the death of an individual that he left no heirs behind him. We hold that the Courts below are right and dismiss the second appeal with costs.

S.N /R.K. *Appeal dismissed.*

1. (1910) 6 I C 244.
2. (1910) 37 Cal 103=5 I C 70.
3. (1912) 34 All 36=11 I C 471.
4. A I R 1914 Mad 505=37 Mad 449=16 I C 43.
5. (1910) 8 I C 55.
6. (1870) 5 Ch App 139.
7. (1902) 1 Ch 723.
8. (1907) 2 Ch 354.

A. I. R. 1918 Madras 456

ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

(*Senakkayila*) *Virasami Naidu*—Defendant—Appellant.

v.

(*Bommadevara*) *Pichayya Naidu* and *others*—Plaintiffs and Defendants—Respondents.

Appeal Nos. 207 and 213 of 1915, Decided on 25th January 1917.

Hindu Law—Alienation—Widow—Gift of husband's entire property to daughters and their children is not valid—Dispositions in portions at different times does not validate gift.

Under the Hindu law, a widow is not entitled to divide the entire property of her husband among her daughters and their children, and such dispositions cannot be validated by the fact that portions of the estate are given away at different times: 17 *M. L. J.* 523; 35 *Mad* 623; 37 *Cal* 1 and 22 *Mad.* 113, Dist. [P 457 C 1, 2]

T. V. Venkatarama Aiyar—for Appellant.

P. Narayanamurthi — for Respondents.

Judgment.—*In A. S. No.* 207 *of* 1915. The first question argued before us in this appeal is whether the plaintiffs are the reversioners of the last male owner of the properties of one B. Perumallu, the son of defendant 2, who is the widow of one Naganna. We do not think that the matter admits of any reasonable doubt.

The next point that has been very strenuously argued before us is that the gift made to defendant 3 by the widow, defendant 2, of one-fourth of the family property is valid. We agree with the Subordinate Judge that the gift cannot be supported. What defendant 2 did was, she gave half the estate of her husband first of all to her daughter, defendant 4, and then one fourth of the estate to defendant 3 and the remainder to defendant 3's son, defendant 5. That is to say, she took it upon herself to divide the entire property among her daughters and the daughter's son. That is not a sort of disposition by a widow which can be sustained under the Hindu law, and we do not think that any of the cases which have been cited lends support to a claim of this nature. In the case of *Ramasami Ayyar* v. *Vengidusami Ayyar* (1) the gift was made on the occasion of marriage. Here the finding of the Subordinate Judge is that it was not proved that there was, as suggested, an oral gift at the time of the marriage supplemented by the execution of proper documents sometime afterwards. In the case of *Kudutamma* v. *Narasimha Charyulu* (2) the gift in favour of a daughter of the family was made by the manager. It was found that it was a reasonable gift, having regard to the circumstances of that case. The main circumstances as mentioned there were that the family owned very large family properties and that apparently a very small portion of the property was given to the daughter. Similarly in *Anivilla Sundararamayya* v. *Cherla Sitamma* (3) what was given was only 8 acres of land belonging to a very wealthy family, the possessions of which consisted of more than about 200 acres of land.

No doubt, the gift was made some years after the marriage, but the circumstances of that case were totally different from the circumstances of the present case. The next case which is relied upon is *Churaman Sahu* v. *Gopi Sahu* (4). In that case the gift appears to have been made on the occasion of the daughter's grihapravesam ceremony, a ceremony connected with marriage, and it was especially on that ground that the validity of the gift was upheld. We do not think that any of these cases can support the proposition that a widow is entitled to divide the entire property of her husband among her daughters and daughters' children or that, the fact that portions of the estate are given away at different times, can validate such a disposition. This appeal is dismissed with costs.

In A. S. No. 213 *of* 1915.

All that is stated in the plaint in the suit in which the appeal arises, is that the widow, defendant 2, has caused transfer of pattahs in the name of defendant 4 with respect to a portion of the land in dispute in this suit. There is no allegation that there had been an alienation by means of a conveyance and that alienation was to be set aside though, as a matter of fact, a deed of gift had been executed in favour of defendant 4. Nor was there any issue raised as regards the validity of the deed in favour of defendant 4. Issue 6 refers only to the transfer of pattahs. That being so, there is no reason to differ from the conclusions of the Subordinate Judge. Then, as regards items 20 to 22, the findings of the Subordinate Judge must be upheld. The appeal (No. 213 of 1915) will be dismissed with costs.

S N./R.K. *Appeals dismissed.*

1. (1899) 22 Mad 113.
2. (1907) 17 M L J 528.
3. (1910) 33 Mad 628=10 I C 56.
4. (1910) 37 Cal 1=1 I C 945.

A. I. R. 1918 Madras 457

SADASIVA AIYAR, J.

Public Prosecutor—Appellant.

v.

Attawar Rama Rao—Accused.

Criminal Appeal No. 680 of 1916, Decided on 2nd February 1917, against the order of Second Class Bench Magistrate, Mangalore, in Bench Case No. 133 of 1916.

Madras District Municipalities Act (4 of 1884), S. 222—Draining offensive liquid into public street devoid of side drains is offence.

An occupier of land within a Municipal area who lets offensive liquid to flow out of the land into a public street, is guilty of an offence under S. 222, Madras Dstrict Municipalities Act, even

where no side drains are provided for the street. 15 *Mad* 91 and 30 *Mad*. 121. *Foll*. [P 458 C 1]

K. P. Lakshmana Rao—for Accused.

Judgment.—The majority of the Bench have acquitted the accused (respondent in this appeal preferred by the Government), evidently on the view that where there are no side drains provided for a street, the occupier of a land in a Municipal area cannot be convicted under S. 222, District Municipalities Act, even if he lets offensive water or other liquid matter so as to flow out of the land into the street. Their above view is clearly erroneous. *Queen-Empress* v. *Sevudappayar* (1) and *Emperor* v. *Nagan Chetty* (2). The order of acquittal is reversed and the accused is directed to be re-tried, as no evidence has been let in on the side of the accused and no findings of fact seem to have been arrived at by the Bench before they disposed of the case on the above view.

S N /R.K. *Appeal allowed.*

1. (1892) 15 Mad 91
2. (1907) 30 Mad 221.

A. I. R. 1918 Madras 458

SPENCER AND KRISHNAN, JJ.

V. Ranga Rao—Plaintiff—Appellant.

v.

Kithori Ammal and *others*—Defendants—Respondents.

Second Appeal No 855 of 1916, Decided on 14th August 1917, against decree of Dist. Judge, Coimbatore, in A. S. No 176 of 1915.

(a) Evidence Act (1872), S. 92—Unconditional document—To introduce condition in document which is unconditional on its face amounts to varying its terms.

To introduce a condition into a document that is on its face an absolute and unconditional document is substantially to vary its terms within the meaning of S. 92, Evidence Act. [P 458 C 2]

(b) Deed — Construction—Gift deed providing that donee served donor and wished to continue services to her conveys to donee property to hold same unto donee as and from date of death of donor—Rendering service is motive and consideration for gift—Oral evidence is inadmissible to prove revocability if future services are not rendered—Donor's intention was to postpone enjoyment till her death but donee's right vested in property with execution of gift-deed.

A deed of gift after reciting that the donee had served the donor faithfully for the period of ten years and upwards and wished to continue his services to her, went on to provide that the donor gave, granted and conveyed to the donee certain property to hold the same unto the donee as and from the date of the death of the donor.

Held, (1) that the rendering of services was not the consideration but the motive of the grant and was immaterial:

(2) that oral evidence was inadmissible to prove that the gift was revocable by the donor if future services were not rendered; and

(3) that the intention of the donor was only to postpone the enjoyment of the property till her death and that the vesting of rights took place as soon as the deed was executed and registered and the gift was completed. [P 458 C 2]

(c) Deed—Construction—Expression of intention leading to making of document does not control clear dispositive words—Motive for making gift is no critertion to determine whether gift is absolute or otherwise.

Per *Krishnan, J.*—Any expression of the intention of the parties that leads to the making of a deed cannot be taken to control clear and unambiguous dispositive words in it. Statements of motives for making a gift are not relevant in considering whether a gift is absolute or conditional [P 459 C 1, 2]

C. Madhavan Nair—for Appellant.

R. N. Aiyangar, Renere, Tirumalai Pillai and *T. Arumainatham Pillai*—for Respondents.

Spencer, J.—As I understand Ex. 1, I feel no doubt that it is in terms an absolute gift deed of immovable property, the donee's possession of which is postponed till the happening of a certain future event, namely, the death of the donor. When the clause reserving to the donor power of revocation at her mere will which, if it had remained, would under S. 126, T. P. Act, have invalidated the gift, was struck out from the draft deed by consent of the parties, all that conditional character which the draft possessed was taken away from the deed as finally executed. The learned Judge was in error in thinking that because there is some ambiguity about the expression:

"whereas the donee has served the donor faithfully for the period of ten years and upward and wishes to continue his services to her,"

oral evidence could be let in to prove that future service was an essential condition of the contract. As in *Madhavrao Moreshwar* v. *Kashibai Dattubhai* (1), the rendering of the services was not the consideration but merely the motive of the grant, and the motive in this case is immaterial. I consider that to introduce a condition into a document that is on its face an absolute and unconditional document, is substantially to very its terms within the meaning of S. 92, Evidence Act Respondent's counsel has attempted to support the lower appellate Court's decision on the ground that the words "to hold the same unto the donee as and from the date of the death of the donor,"

1. (1910) 34 Bom 287=5 I C 599.

together with reference to future services, indicated that the parties intended that no interest should vest in the donee until the death of the donor, and, therefore, that the attaching of a condition as to service during the donor's lifetime could be proved as a condition precedent to the gift taking effect.

I am of opinion that the above words only implied that enjoyment was deferred. The words, "doth hereby give, grant and convey unto the donee", indicate that an immediate interest in the property was vested in the donee as soon as he accepted the gift and the deed was registered. To hold otherwise would be tantamount to holding that the deed partook of the nature of a testamentary disposition and this position has been abandoned as untenable from the beginning. I, therefore, consider that oral evidence was inadmissible to prove that defendant 1 was entitled to revoke her deed of gift. Accordingly the appeal is allowed and the District Judge will take back the appeal on his file for a decision on the issues other than issue 2. Respondent 1 to bear her own and appellant's costs in this Court. Costs in the lower appellate Court will be provided in the final decree.

Krishnan, J.—I agree that Ex. 1 is in terms an unconditional and absolute deed of gift. The operative words in it are not made subject to any conditions at all. The clauses beginning with "whereas" are merely recitals of motives which led up to the making of the gift, but they do not affect the nature of the gift itself. Any expression of the intention of the parties that led to the making of the deed could not be taken to control clear and unambiguous dispositive words in it: see the observations of the Privy Council in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (2). No doubt Ex. 1 provides that the property is to be "held unto the donee as and from the date of the death of the donor." Considerable argument was addressed to us on the meaning of this expression. The learned advocate for the respondent contended that it postponed the vesting of any right under Ex. 1 till after the death of the donor and not merely the enjoyment of the property. I am unable to agree with him. As the clause just previous " gives, grants and conveys" the property to the donee, consistently with that, I think, we must take it that the intention under the clause in question was only to postpone the enjoyment of the property and the vesting of rights took place as soon as the deed was executed and registered and the gift was completed. The point is of importance in considering whether oral evidence was admissible to show that the parties had agreed that the deed should fail if the donee did not serve the donor till her death.

If it is an agreement in defeasance of the gift, as it must necessarily be taken to be if the right to the property vested in the donee on execution of the deed and only the enjoyment was postponed, admittedly S. 92, Evidence Act, will prevent oral evidence of it being given. It was argued that the condition to serve till the donor's death was a condition precedent to the vesting of any right under Ex. 1 and so could be proved by oral evidence under S. 92, Cl. (3). I am unable to agree with this argument, as I think that the right in the property at once vested in the donee under Ex. 1 and it was only the possession and enjoyment of the property that was postponed. The deed of revocation executed by the donor shows that she herself understood that only possession was postponed. It was also urged that because Ex. 1 says that the donee was wishing to continue in the donor's service, oral evidence was admissible to prove that the deed was a conditional one. It is difficult to follow this argument. Under what proviso to S. 92 such evidence is admissible is not stated. There is nothing ambiguous in the gift itself under Ex. 1 that requires to be explained by oral evidence. I have already held that statements of motives for making a gift are not relevant in considering whether a gift is absolute or conditional. I hold that oral evidence was not admissible to show the deed was revocable by the donor if future services were not rendered by the donee; and therefore, the finding of the District Judge on that evidence fails. I find that the deed of gift is an absolute one. I, therefore, agree to the order proposed by my learned brother.

S.N./R.K. *Appeal allowed.*

2. (1897) 24 Cal 834=24 I A 76 (P C).

A. I. R. 1918 Madras 460 (1)

ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

Lingam Krishna Bhupathi and *others* —Defendants—Appellants.

v.

Kovvuri Basivireddi Garu and *others*—Paintiffs—Respondents.

Civil Appeal No. 177 of 1915, Decided on 24th January 1917, against decree of Temporary Sub-Judge, Vizagapatam, in Original Suit No. 5 of 1914.

Transfer of Property Act (4 of 1882), S. 101—Sale of mortgaged property to mortgagee—Mortgage whether extinguished or alive—Intention of parties determines.

Where a mortgaged property is sold to the mortgagee it is always a question of fact whether it was the intention of the parties to extinguish the mortgage or to keep it alive.

[P460 C 2]

A mortgagee bought the mortgaged property which was at the time of sale under attachment in execution of a money-decree against the mortgagor. The sale was held to be void:

Held: that the mortgage must be held to subsist, inasmuch as it could not possibly be presumed that even if the sale was found to be inoperative, the mortgagee intended to forgo the mortgage which he had on the property.

[P 460 C 1, 2]

B. Naraimha Rau—for Appellant.

D. Appa Rau, P. Narayanamurthi and *P. Somasundaram*—for Respondents.

Judgment.—The appellants were defendants 1 to 3 in the suit which was instituted in order to recover the money due on the mortgage executed in favour of the plaintiff of a half share in a village called "Tirigani" in the year 1896 subject to defendant 1's mortgage executed in 1877. The plaintiff afterwards bought that half share in 1906. Defendant 3 who had a money decree had, however, attached the property before the sale to the plaintiff. In the course of the litigation that followed in consequence of the sale to the plaintiff, it was held that the sale was void inasmuch as the property was under attachment at the time. The plaintiff's purchase, having thus failed, he now sues to recover the mortgage amount due to him under the mortgage of 1896. It is contended that since he obtained a sale of the half share, the mortgage in his favour became extinguished We do not think, that the contention is at all tenable. The sale has been found to be void. That being so, the mortgage must be held to subsist. We ought to have mentioned that the first defendant after the date of the sale being set aside in the previous Suit No. 198 of 1907, had purchased one-half share in the village from defendant 3 himself in 1913 and it is on the basis of this purchase that he resists plaintiff's suit. We do not think that S. 101, T. P. Act, applies at all in favour of the appellant. In cases of this character, all the decided cases treat the question as one of the intention of the purchaser, whether he intended to keep his mortgage alive or not. Here the plaintiff could not possibly have intended to forgo his mortgage if the sale was held to be bad. It could not possibly be presumed that even if the sale was found to be inoperative, still he intended to forgo the mortgage which he had on the property.

The next question which was argued before us was, that in the suit of 1907 as between the plaintiff and defendant 3 an issue had been raised in the lower Court as to whether the plaintiff, in case the sale was found to be void, was entitled to any relief on the basis of the mortgage. This apparently was not pressed and was never tried. And we do not think that it could have been tried having regard to the nature and the scope of that suit. The appeal fails and is dismissed with costs. The memorandum of objections is dismissed.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 460 (2)

ABDUR RAHIM, J.

Segu Baliah—Petitioner.

v.

N. Ramasamiah—Opposite Party.

Civil Revn. Petn. No 1214 of 1916, Decided on 13th March 1917, against order of Dist. Judge, Kurnool, D/- 20th September 1916.

(a) Provincial Insolvency Act (1907), S. 43—Permission can be granted to official receiver to prosecute insolvent on his report which is sufficient for prosecution though not for conviction — Penal Code (1860), Ss. 421 and 424.

It is open to a District Court to grant permission to the Official Receiver to prosecute an insolvent for an offence under Ss. 421 and 424, I. P. C. upon the strength of the Receiver's report, which is sufficient material for that purpose though it may not be evidence on which a conviction can be legally based: *A. I. R.* 1915 *All.* 308, *Dist.* [P 461 C 1]

(b) Criminal P. C. (1898), Ss. 195 and 476—Permission to prosecute insolvent is not sanction or order under S. 476.

Permission granted by District Court on report by Official Receiver to prosecute insolvent under Ss. 421 and 424, Penal Code, does not amount to

a sanction under S. 195 or to an order under S. 476, Criminal P. C. [P 461 C 1]

(c) General Clauses Act (1897), S. 26—Offence falling under Penal Code and Insolvency Act — Prosecution may be under either enactment.

Where a special enactment deals with an offence similar to an offence dealt with by a general enactment, it does not follow that the provisions of the general enactment are repealed to that extent. The prosecution in such a case may be under either of those enactments as provided by S. 26, General Clauses Act: 22 *Cal.* 131 *Dist.* [P 461 C 1,2]

A. Sundaram—for Petitioner.

Judgment.—This is not a case of an order either under S. 195 or S. 476, Criminal P. C. It is a permission granted to the Receiver, who is an officer of the District Court, to prosecute an insolvent who, within the knowledge of the Receiver or upon the information available to the Receiver, is alleged to have committed an offence under Ss. 421 and 424, I. P. C. The learned counsel for the petitioner contends that the report of the Receiver is not evidence and cites a ruling of the Allahabad High Court in *Nand Kishore* v. *Suraj Mal* (1), holding that a conviction based on such a report is not legal. But that has nothing to do with the present case. What the District Judge has done is only to grant permission to the Receiver to prosecute the insolvent, as it is alleged that he has committed an offence of the nature described.

Then it is argued that the prosecution ought to be under S. 43, Provincial Insolvency Act, and I am asked to hold that that section virtually repeals Ss. 421 and 424, I. P. C. Taking for instance S. 421, the offence with which it deals is not exactly the same as is covered by S. 43, Insolvency Act. But apart from that, S. 26, General Clauses Act is quite express on this point. It says:

"where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

The authority relied upon on behalf of the petitioner, i. e., the case reported as *Chandi Pershad* v. *Abdur Rahman* (2), was not one in which the prosecution was under Ss. 421 or 424, I. P. C. But I may observe that if this case is intended to support a general proposition that because a special enactment deals with an offence similar to the offence which is dealt with by the Indian Penal Code, therefore, the provisions of the Indian Penal Code should be taken to have been repealed to that extent, I am not prepared to accept that proposition. In the Calcutta case the provisions of S. 26, General Clauses Act, were not apparently brought to the notice of the learned Judges, and those provisions to my mind are too clear to be ignored. The petition is dismissed.

S.N./R.K. *Petition dismissed.*

1. A I R 1915 All 308=29 I C 998=37 All 429.
2. (1895) 22 Cal 131.

A. I. R. 1918 Madras 461

ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

Florina Marties—Appellant.

v.

M. L. Pinto and *another*—Respondents.

Second Appeal No. 404 of 1915, Decided on 22nd March 1917, against the decree of Dist. Judge, South Kanara, in Appeal Suit No. 344 of 1914.

(a) Contract — Construction — Provident Fund rules—Bonus can be given only to nominee—Testamentary disposition of bonus is ineffective against nominee — Provident Fund.

Under the rules of a Provident Fund, whose object was to provide for the family of the deceased members out of its funds, every member obtained a policy by which the society undertook to pay a bonus to his latest nominee. The nomination, however, could be superseded by a fresh nomination, in which case the member was to surrender the last nomination list to the society and the new nomination was to be sanctioned by them. *L.*, one of the members, nominated defendant 1 under the rules. Subsequently she made a will bequeathing the bonus to the plaintiff. In a claim by the plaintiff for the bonus:

Held: (1) that under the rules of the Fund, the latter contracted to pay the bonus only to the nominee and that, as between the estate of the nominator and the nominee, the latter was entitled to it; (2) that the will of L. did not operate as a nomination of the plaintiff and that defendant 1 was entitled to the bonus. 35 *Mad* 162; 37 *Bom* 471 and *A I R* 1915 *Cal* 9, *Dist.* [P 463 C 1]

Obiter. — The nominatton amounted to an assignment of the bonus and was intended to operate as such. [P 463 C 2]

(b) Provident Fund— Rules of — Nominee not party to contract — Legal personal representative of deceased member only can enforce contract and must hold money for benefit of nominee.

It may be that, if the nominee is not a party directly or indirectly to the contract between the member and the Fund, the only person who can enforce the contract is the legal personal representative of the deceased member, but, on recovering the money, the representative must hold it for the benefit of the person who, as against the estate of the deceased member, is entitled to it. [P 463 C 1]

B. Sitarama Rao—for Appellant.

C. V. Ananthakrishna Aiyar — for Respondents.

Srinivasa Aiyangar, J.— The question raised in this appeal is whether a sum of money paid into Court by defendant 2, the Roman Catholic Provident Fund. Mangalore, belongs to the plaintiff or defendant 1. The Roman Catholic Provident Fund is an unregistered voluntary association in the nature of a club managed by a committee. Its object is to make provision for the family of the deceased members out of the funds of the society in accordance with its rules, which are subject to alteration. One Lucia Fernandez joined the society as a member and, according to the rules of the society, obtained what is called a 'policy' by which the society undertook to pay a certain sum called 'bonus' to the person named in her latest nominee list and, in the absence of such a person, to those who are declared to be legal heirs by evidence approved of by the Directors. According to the rules of the society the policy was not assignable and a member can only nominate a member of his or her family —the family for this purpose is the wife or husband as the case may be and children—unless the Managing Committee expressly permits the nomination of any other person. The nomination list may be changed by a new nomination, but the change must be sanctioned by the committee before it becomes operative, and in any case the revoked nomination list, of which the member retains a duplicate, must in all cases be surrendered to the Fund and sent along with the new nominee list.

The duplicate nomination list is looked upon as something like a debenture. Lucia Fernandez first nominated her husband, and on his death in 1904 with the sanction of the committee nominated defendant 1 Florina Marties, the wife of her younger son. Defendant 1 says that the nomination was really an assignment to her of the bonus in consideration of the sum of Rs. 300 due to her from Lucia Fernandez. Whether Rs. 300 was owing to her or not, there can be no question that Lucia and defendant 1 agreed that the bonus should belong to the latter, for the policy and the duplicate of the new nomination list were delivered to defendant 1; thereafter she paid the subscriptions or calls due by her mother-in-law. The mother-in-law as between herself and defendant 1 ceased to have any interest in the bonus or any liability for the calls. In 1918 Lucia Fernandez apparently quarrelled with defendant 1 and attempted to revoke the nomination and substitute the plaintiff, her elder son, as beneficiary. She was unable to return the previous nomination list and the committee, after inquiry, declined to sanction the nomination as they were entitled to do. She did nothing thereafter to get the Fund to accept the plaintiff, as the nominee. But on 16th May 1910, a few days before her death, she purported to bequeath the bonus to the plaintiff. The plaintiff has also obtained Probate of the Will and is the representative of Lucia Fernandez. The question is to whom does the 'bonus' belong, the plaintiff or defendant 1. There is now no question of who is entitled to bring an action against the Fund to recover the amount due on the policy, for the money has been paid into Court; the question is as to the beneficial ownership of the money.

The first Court held that the policy amount was the property of the deceased Lucia Fernandez, that the nomination did not pass any interest whatsoever to the nominee and that the plaintiff as the legatee was entitled to it subject to the repayment of the subscriptions paid by defendant 1 to keep up the policy, and the sum of Rs. 300 due to her as debt. On appeal, the District Judge held that the plaintiff as legatee was not entitled to the amount but that he became the latest nominee of Lucia Fernandez though his nomination was not accepted or sanctioned by the Fund. This is obviously wrong; for the nomination can be changed only in conformity with the rules and they seem to have been framed with a view to prevent a fraudulent or improper change of nomination by insisting on the production of the previous nomination list and requiring the sanction of the committee. The object of the Fund requires that the members should not have an unrestricted right of disposal over the bonus and the rules, therefore, give only a limited power of appointment. It is not said that the committee were actuated by an improper motive in declining to accept the nomination and Lucia Fernandez herself apparently gave up the idea of nominating the plaintiff under rules. It has not been contended that the will itself operated as

a nomination of the plaintiff. In fact the learned pleader for the respondent practically conceded that the plaintiff cannot claim as a nominee. He supported the view taken by the trial Judges, viz., that the policy amount was the money of the testatrix and passed to her representative, and contended that if defendant 1 had any claim against the estate as a creditor or otherwise she must enforce it by other proceedings.

He strongly relied on the decision of this Court in *Oriental Government Security Life Assurance Co. Ltd.* v. *Vantedu Ammiraju* (1) and on *Shankar Vishvanath Wagh* v. *Umabai Sadashiv Wagle* (2) and *Ishani Dasi* v. *Gopal Chandra Dey* (3) in Bombay and Calcutta. It appears to me that these cases do not touch the present question. Whatever may be the meaning of the words 'for the benefit of wife and children' in an ordinary Life Insurance Policy taken out by a person without any understanding or agreement with them, he may even be unmarried, in a case like this where the nominee by agreement with the nominator was entitled to the money, there can be no question that, as between the estate of the nominator, and the nominee, the latter is entitled to it. The power of revocation and re-nomination which the member possesses under the rules, which are incorporated in the contract between the member and the Fund, may enable the Fund to discharge its liability under the contract by paying to the latest nominee without concerning itself with the rights of other persons to the bonus against the member or her nominee. It may also be that if the nominee is not a party directly or indirectly to the contract between the member and the Fund, the only person who can enforce the contract is the legal personal representative of the deceased member, but on recovering the money the representative must hold it for the benefit of the person who as against the estate of the deceased member is entitled to it. As said by Holmes, L. J.:

"There is no inconsistency between a right of action being under the complete control of a litigant and the fruits of the action being held by him for the benefit of a third party: *Kenney* v. *Employers' Liability Assurance Corporation* (4)."

1. (1912) 35 Mad 162=10 I C 263.
2. (1913) 37 Bom 471=19 I C 736.
3. A I R 1915 Cal 9=25 I C 236.
4. (1901) 1 Ir Rep 301.

In *Ashby* v. *Costin* (5), the rules of an unregistered Friendly Society provided for the payment of certain allowances to the relatives of a deceased member in such proportions as the Committee should determine unless the member bequeathed it by will. A member died leaving a sister, but without making a will. The Society paid the death allowance to the sister, and the plaintiff, the administrator of the deceased, brought the action to recover the money from the sister, on the ground that the stipulated allowance was a part of the assets of the deceased and the sister was not entitled to it. The action was dismissed, the Court holding, that the money was not the money of the deceased, but could have become his only by his exercising the power given to him by the rules by making a will, in which case it would become his assets. This decision was followed in *Davies, In re. Davies* v. *Davies* (6) and cited with approval in *Bennet* v. *Slater* (7), these being cases of registered societies, registered under the Friendly Society's Acts. That, I think, makes no difference for the present purpose, and in all these cases the principle adopted was that if under the contract between the member and the society, the society undertakes to pay a particular person, that person is entitled to the money, though the member may have the power to select any person he chooses and though the nomination may be ambulatory in character so as to enable the member at his entire discretion to change the nomination or even to make the Fund his own by merely observing the formalities prescribed by the rules. The present is a much stronger case, for, in my opinion, the nomination paper signed by Lucia amounts to an assignment of the bonus and was intended to operate as such. It is however unnecessary to go so far. Defendant 1, then, is entitled to the whole of the bonus paid by defendant 2. The plaintiff's suit must be dismissed with costs throughout and the money in Court should be paid to defendant 1.

Abdur Rahim, J.—I agree.

S.N./R.K. *Appeal allowed.*

5. (1888) 21 Q B D 401.
6. (1892) 3 Ch 63.
7. (1899) 1 Q B 45.

A. I. R. 1918 Madras 464

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Chidambaranatha Thambiran and *another*—Plaintiffs—Appellants.

v.

P. S. Nallasiva Mudaliar and *others*—Defendants—Respondents.

Appeal Suit No. 399 of 1915, Decided on 22nd March 1917, against decree of Sub-Judge, Tinnevelly, in Original Suit No. 36 of 1913.

(a) Civil P C. (1908), O 1, R. 8—Trust property—Tambirans of mutt representing worshippers can sue to set aside alineation of mutt property made by Mahant and for delivery of possession to succeeding Mahant.

Tambirans of a mutt representing all the worshippers can sue under O. 1, R. 8, Civil P. C., for a declaration that an alienation made by the mahant is not binding on the mutt and that possession should be banded over to the succeeding mahant. Such a suit stands in some respects on the same footing as an information filed by the Attorney-General in England on the information of relators to recover charitable property alienated by a trustee. [P 464 C 2]

(b) Trust—Beneficiary, rights of, mentioned—Trustee if estopped from suing for possession, beneficiary can move Court to deprive wrong-doer of possession and deliver it to trustee.

The general right of the beneficiaries of a trust is to see that there is no violation of the trust, and if the trustee does not discharge his duties properly, to appiy for his removal and for the appointment of a new trustee. But where a trustee is estopped from suing to recover possession and the beneficiaries do not desire his removal, the cestui que trustent should have the right to move the Court to deprive the wrong doer of his possession and to vest it in the trustee. [P 465 C 2]

(c) Trusts Act (1882), S 63 and Limitation Act (1908), S. 10—Beneficiary can take necessary steps to place trust property in hands of trustee.

Section 63, Trusts Act, if read along with S. 10, Lim. Act, clearly lays down that wherever trust property has gone into the hands of a stranger, the beneficiary can take all the necessary steps to place it in the hands of a person who can legally administer the trust. [P 466 C 2]

(d) Limitation Act (1908), Art. 144—Adverse possession against trustee becomes adverse also against beneficiary—Adverse possession.

A beneficiary derives his right to sue through his trustee. He is only the alias for him. Thus, what is adverse to the trustee is also adverse to the person who derives his right to sue through him. Art. 144, Sch. 1, Lim. Act, applies to a suit by a beneficiary to recover possession of the trust property. [P 468 C 1]

S. Srinivasa Aiyangar, *T. Narasimhi Aiyangar* and *V. Raghavachariar*—for Appellants.

T. Rangachariar, *A. Krishnaswami Aiyar*, *S. Aravamudha Aiyangar* and *C. Krishnamachariar*—for Respondents.

Wallis, C. J.—This is a suit brought by the two plaintiffs with leave under O. 1, R. 8, Civil P. C., 1908, as representing themselves and other tambirans and disciples of the suit mutt, to declare certain alienations made by the mahant invalid and have the property alienated handed over to the mahant, defendant 1. The mahant having died during the pendency of the suit and been succeeded by plaintiff 1, the plaint was amended accordingly and now prays for possession to be given to plaintiff 1. The Subordinate Judge has held that mutt properties as such are not trust properties and that consequently the suit is not barred under S. 92, Civil P. C., but he has also held that the plaintiffs are not entitled to sue for possession to be given to defendant 1 and that the suit must be treated as one for a declaration and is barred under Art. 120, Lim. Act. If the suit properties were held by the Pandara Sannadhi on trust, I think the Subordinate Judge was wrong in holding that the claim for possession was not maintainable and that the suit was barred under Art. 12, Lim. Act.

As regards the first point, it seems to me that the present suit, which is brought on behalf of all the beneficiaries, stands in some respect on the same footing as an information filed by the Attorney-General in England on the information of relators to recover charitable property improperly alienated by the trustees. This was the regular method of recovering charity property improperly alienated, and it has been explained that in such a proceeding the beneficiaries are the persons on whose behalf the information is brought and that the function of the Attorney General representing the Crown as parens patriae is simply to bring the case to the attention of the Court and ask it to provide for the due execution of the trust by securing for it the properties that belong to it. On such information the Court of Chancery recovered the property so alienated by cancelling the conveyance and directing possession to be given up to the trustees, who ex hypothesi did not formally occupy the position of plaintiffs in the suit, *St. Mary Magdalen, Oxford* v. *Attorney-General* (1); *Attorney General* v. *Flint* (2); and in the former case, it was held that the claim for relief was barred by limita-

1. (1857) 6 H L C 189.
2. (1844) 4 Hare 147.

tion in the same manner as if the beneficiaries on whose behalf the information was filed had themselves been plaintiffs.

The case was argued on the footing that the mahant was in the position of a trustee. If this be so, there is no reason why the plaintiffs should not be treated in this country as performing the same function as the Attorney-General on an information and asking the Court to undertake the execution of the trust, and to recover possession of the suit properties which have been improperly alienated, such possession being given to the trustee as the person entitled to it on behalf of the institution. But, even if the mahant be not in the position of a trustee, a question it is unnecessary to consider, I think that the plaintiffs, as held in *Arunachallam Chettiar* v. *Velappa Thambiran* (3), have sufficient interest in the institution to entitle them in India to sue under O. 1, R. 8, Civil P. C., in respect of an alleged wrongful alienation of mutt property, and that, if they are allowed to sue, there is no sufficient reason under our procedure for not granting them their full relief by ordering the property to be delivered to the prese t mahant or to a receiver.

As regards limitation, if the plaintiffs have a right to sue, it arose at the time of the alienation or later, and is not barred under Art. 144 or under Art. 134, if that is the Article applicable, and I think the possession of the alienee must be regarded as adverse to the institution and to the plaintiffs who claim on its behalf. I would therefore reverse the decree and remand the suit for disposal according to law.

Seshagiri Aiyar, J.—The properties in suit were purchased by a Pandara Sannadhi of the Dharmapuram Adheenam in the year 1869. Another Pandara Sannadhi sold them to the various contesting defendants in July 1901. The plaintiffs are the tambirans of the mutt. They obtained leave under O. 1, R. 8, Civil P. C., 1908, to institute a suit on behalf of all the persons interested in the mutt. Their case was that the properties belonged to the mutt, and that their alienation in 1901 was invalid. They prayed for a declaration that the alienation was not binding on the mutt and for possession being delivered to defendant 1 who was at the time of the suit the Pandara Sannadhi. Since then, defendant 1 has died and plaintiff 1 has succeeded him in the office. The plaint was thereafter amended to the effect that plaintiff 1 should be given possession on behalf of the mutt. There has been some dispute as to the scope of this amendment and of the undertaking given by the plaintiffs at the time. Although the language of the petition for amendment is not very clear it seems to me that all that was agreed upon was that the parties should proceed on the footing that the name of plaintiff 1 was to be substituted for that of the deceased defendant 1. The alienee defendants raised various pleas. The Subordinate Judge disposed of the case on the pleadings. His conclusions were that the plaintiffs were not entitled to sue for possession, that they were not competent to ask that possession should be given to defendant 1 and that the suit was barred by limitation. These findings were given on issues 1, 9 and 16 and the suit was dismissed. The plaintiffs have appealed.

The question which was debated with great ability at the Bar mainly related to the right of the plaintiffs to ask for possession in favour of defendant 1, the head of the mutt. The plaintiffs by obtaining the leave already referred to represent the whole body of the worshippers. They may be said to be the beneficiaries. There is no doubt that the legal owner of the properties is the Pandara Sannadhi. Ordinarily he alone could sue for their possession and for other reliefs in respect of them. The general right of the beneficiaries is to see that there is no violation of the trust, and, if the trustee does not discharge his duties properly, to apply for his removal and for the appointment of a new trustee.

These are the ordinary remedies but circumstances may arise which may estop the trustee from suing to recover possession and the beneficiaries may not desire that he should be removed from his office. In such cases, it is in the interests of the mutt that the cestui que trustent should have the right to move the Court to deprive the wrong doer of his possession and to vest it in the trustee. The authorities in England, as I shall show presently, have recognized this right. The principle upon which the English Courts have acted is that:

3. (1915) 28 I C 337.

"it is a rule in equity which admits of no exception that a Court of equity never wants a trustee."

Once the Court is apprised that there has been a violation of the trust, it acts on the maxim that a trust shall never fail for want of a trustee. It is obvious that such a resort to the extraordinary powers of the Court should be made under exceptional circumstances. The authorities have laid down the limitations under which alone the beneficiaries would be permitted to sue for possession but the rule stands good that under proper safeguards the cestui que trustent have the right to invoke the aid of the Court to deprive the trespasser of his wrongful possession and to vest possession in the trustee. Both the learned Advocate General and Mr. T. Rangachariar relied upon Ss. 59 and 63, Trusts Act. These provisions only relate to private trusts, but the underlying principles are applicable to public and charitable trusts as well. S. 59, Trusts Act, lays down that where:

"for any other reason the execution of a trust by a trustee is impracticable, the beneficiary may institute a suit for the execution of the trust."

An inadvertant ratification by the trustee in office of an alienation by his predecessor would be covered by clause "the execution of the trust by a trustee is impracticable." This would let in the beneficiary. No doubt, he can only claim that the trust should be executed. That is to say, he can ask that the trust be administered. It would be in the discretion of the Court when it is seized of the trust either to direct the existing trustee to carry out the terms, or to appoint a new trustee in that behalf, or to entrust the management to an interim receiver. By giving any of these directions, the Court would be executing the trust. There is no machinery in this country for the Court itself administering to its fullest extent the trust until the objects of the trust and the fund are exhausted. Consequently, the Court often appoints a receiver until the right to the trusteeship is settled. S. 63 is a very important provision. Mr. T. Rangachariar contended that this section expressly limits the right of the beneficiary to a bare declaration, and that consequently he is not entitled to ask for possession. I do not think that the word declaration should be given such a narrow interpretation. Even in a suit for possession, there must be an antecedent declaration. I am inclined to think that the Legislature did not intend to prevent a beneficiary from suing for possession in favour of the trustee. The beneficiary is only entitled to a declaration in his own right, but that would not prevent him from asking that the declaration be followed up by giving possession to the trustee. However that may be, S. 68 is not in terms applicable to charitable trusts and consequently its language is not conclusive of the rights of a public trustee. If this section is read along with S. 10, Limitation Act, it is clear that wherever trust property has gone into the hands of a stranger, the beneficiary can take all the necessary steps to place it in the hands of a person who can legally administer the trust.

As regards decided cases, the learned vakil for the appellant relied srtongly on *Sharpe* v. *Sen Paulo Railway Co.* (4). It was decided in 1873. The decision was that individual beneficiaries were not entitled to claim their share of a debt from the debtor. James L. J., pointed out that a bare allegation "that the trustee would not sue" cannot give a right of action to the beneficiary. Then the remedies open under such circumstances are pointed out. This is not a pronouucement that where a trustee could not sue (not would not sue) the beneficiaries are not entitled to claim that possession should be given to him. The same learned Lord Justice a few months later held that a beneficiary can sue for an injunction that a contract of the trustee should not be completed, *Dance* v. *Goldingham* (5). If a claim for an injunction is competent, I fail to see why a suit for possession should not lie. The decision in *Gandy* v. *Gandy* (6) is exactly in point. In that case, the trustees refused to be made co-plaintiffs with the beneficiaries. Cotton, L. J., negatived the contention that the only remedy possessed by the beneficiaries is to sue for the removal of the trustee and said

"that where a covenant is entered into with one person for the benefit of another, then, if the covenantee will not sue, the person beneficially interested may sue in equity."

Lindley, L J., and Bowen, L J., concurred in this view. *Yeatman* v. *Yeat-*

4. (1873) 8 Ch App 597=29 L T 9.
5. (1873) 8 Ch App 902=42 L J Ch 777.
6. (1885) 30 Ch D 57=54 L J Ch 1154.

man (7) and *Beningfield* v. *Baxter* (8) are to the same effect : see also observations of Lord Hobhouse in *Hiddingah* v. *DeOilliers Denyseen* (9). The latest case on the subject is *Meldrum* v. *Scorer* (10). Key, J., reviewed all the earlier authorities and said:

"Therefore, in this case, I have first to see whether there are real grounds for the trustee not suing. I have to ascertain whether there has been simply a refusal on his part or whether it is a case in which the circumstances are such as to render it an inconvenient or ineffectual course that he should sue."

It is clear from this dictum that it is a question in each case whether the beneficiary should be allowed to ask for the reliefs which prima facie should be claimed only by the trustee. The learned Advocate-General drew our attention to the nature of the relief claimed by the beneficiaries in *Consett* v. *Bell* (11), as showing that a claim that the trustee should be put in possession is within their rights. In none of the above cases was any decree passed giving the trustee possession at once. That is so, because the Chancery Court itself administered the estate and was not over-anxious to part with its control over the trust. The peculiar jurisdiction exercised by the Court of Chancery is thus stated by Wilmot, C. J., in *Attorney-General* v. *Lady Downing* (12):

"The person who creates a trust, means it should at all events be executed. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or being under disability to act or refusing to act, the constitution has provided a trustee . . . . Where no trustees are appointed at all, this Court assumes the office . . . . There is some personality in every choice of trustees . . . . . and if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium which the Constitution has substituted in its place."

The same conditions do not apply in India, although the Courts here have the same general right of supervision over trusts and trustees. In Perry on Trusts, after examining the English and the American authorities, the law is thus summarised:

"If a cestui que trust desires to bring a suit against a stranger, he should apply to the trustee to allow his name to be used as co-plaintiff, and the trustee is bound to comply, on being indemnified against the costs. If the trustee refuses improperly, he may be made a defendant."

This is exactly what has been done in the present case. As regards Indian decisions *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (13) is directly in point. In Madras, it was held in *Padmanabha Chettiar* v. *Williams* (14) that the proper procedure is to apply either for the removal of the trustee or to have a receiver appointed. It does not appear whether in that case possession was asked to be given to the trustee. The same remarks apply to *Kamaraju* v. *Asanali Sheriff* (15). There is an observation in this case that if a representative suit were brought, the result might be different. I do not think that these two cases have laid down anything more than that a few among the beneficiaries are not entitled to sue for possession being given to themselves on behalf of the trust. If they negative the right of the beneficiaries, under certain circumstances, to ask for possession being given to the trustee defendant, I respectfully decline to accept them as good law. The decision in *Ettisheri Edathil* v. *Pothera Kattoor* (16) does not affect the present case. To that case, the trustee was not a party nor did the plaintiffs ask that possession should be given to them. On the other hand *Subramania Aiyar* v. *Nagarathna Naicker* (17) is in point.

In a later case, *Subramanian Chettyar* v. *Rajah Rajeswara Dorai* (18), after full argument on the question, the right of the beneficiary to claim that possession should be given to the trustee was expressly upheld. When the case was taken before the Judicial Committee in *Subramanian Chettiar* v. *Rajeswara Dorai* (19), the eminent equity lawyer who appeared for the appellant apparently did not consider the question arguable. Although *Miyaji* v. *Sheik Ahmed Sahib* (20) proceeds on the construction of S. 14, Act 20 of 1863, the judgment shows that where a trustee is made a defendant, possession can be

7. (1878) 7 Ch D 210=47 L J Ch 6.
8. (1887) 12 A C 167=56 L J P C 13.
9. (1887) 12 A C 624.
10. (1887) 56 L T 471.
11. (1842) 1 Y & C C C 569.
12. (1767) Wilm. 1=97 E R 1.
13. (1897) 24 Cal 418.
14. (1900) 23 Mad 239.
15. (1900) 23 Mad 99.
16. (1915) 26 I C 946.
17. (1910) 5 I C 901.
18. (1909) 32 Mad 490=2 I C 963.
19. A. I. R 1915 P C 33=32 I C 258=39 Mad 115 (P.C.).
20. (1898) 21 Mad 212.

given to him in a case instituted by the beneficiaries. I am therefore of opinion that the Subordinate Judge is wrong in his view that under no circumstances can the beneficiaries sue that possession should be given to the lawful trustee.

On the question of limitation, Mr. Rangachariar contended that Art. 120, Lim. Act applies to the case. I am unable to agree. It may be that before Art. 134, Lim. Act is held applicable, more facts and more of the history of the institution of which the plaintiffs are the disciples may have to be ascertained. The allegations in the plaint state that the properties in suit appertain to the trust. The learned Advocate General argued that the words "bequeathed in trust" contemplate an original entrustment and that if the properties can be shown to have been acquired from the income of the trust property, the acquisitions would be included in it. There is great force in this contention. It is not necessary to decide this question at this stage of the case, nor the other question whether a Madathipathi is not a trustee. In my opinion Art. 144, Lim. Act, directly applies to this case. The suit is for possession of immovable property and consequently Col. 1 applies. The learned vakil for the appelant contended that Col. 3 is inapplicable, as the possession of the alienees is not adverse to the plaintiffs, the beneficiaries, but only to the trustee. Authorites were quoted to show that the beneficiaries have not the same character as the trustees. I do not think it necessary to pronounce any opinion on this question, as the word plaintiff in Col. 3 would include the beneficiary plaintiff according to tne definition of that expression in the Limitation Act.

The beneficiaries sue only in the right of the trustees. They are only the aliases for the trustees. Under the Common Law of England, the beneficiaries were compellable to use the name of the trustee as plaintiff. Consequently the beneficiaries derive the right to sue through the trustee. It is his action that they are prosecuting. In this view, what is adverse to the trustee is also adverse to the persons who derive their right to sue through him. Art. 144 therefore applies and there is no necessity for seeking the aid of the residuary Art. 120 in this case. The suit is not barred by limitation. Another aspect of the question of limitation relates to the character in which the trustee held the properties. The dictum of Miller, J., in *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* (21) that the alienrtion may be binding on the alienating trustee during his lifetime opens up a question which requires investigation. The learned Judge, as I understand him, did not lay down that such a proposition is applicable to all trust properties. It may be that his view may have to be reconsidered after the facts have been ascertained. At this stage, I do not think it advisable to say more on that question. For the above reasons, I would reverse the judgment of the Subordinate Judge and remand the case to him for disposal. Costs will abide the result.

S.N./R.K. *Appeal allowed.*

21. (1915) 38 Mad 356=19 I C. 694.

A. I. R. 1918 Madras 468

AYLING AND NAPIER, JJ.

Srinivasa Aiyangar and *others* — Plaintiffs—Appellants.

v.

(*Meddaikara*) *Abdur Rahim Sahib* and *another*—Defendants—Respondents.

Second Appeal No. 1448 of 1916, Decided on 13th March 1917, against decree of Dist Judge, North Arcot, in Appeal Suit No. 124 of 1915.

(a) Madras Estates Land Act (1908), S. 42 (2) — Increase in area discovered on resurvey—Suit for enhanced rent does not lie except on order under S. 42 (2).

No suit lies for enhanced rent for an increase in the area of a holding discovered on resurvey except on an order of the Collector under S. 42 (2). [P 469 C 1]

(b) Madras Estates Land Act (1908), Ss. 26 (3) and 56—Rent suit—Court cannot cancel patta—Until cancellation, it constitutes contract between parties.

Per *Napier, J.*—S. 26 (3) only gives the landlord the right to claim to revert to the old rate and compels the Collector, in a suit under S. 56, to decree it. It is not in the power of the Court in a rent suit to cancel an existing patta, and, until that is done, it constitutes the contract between the parties. [P 469 C 1]

M. Patanjali Sastri—for Appellants.

P. C. Desikachariar—for Respondents.

Ayling, J.—The suit out of which this second appeal arises is one for arrears of rent under S. 77 (1), Act 1 of 1908. The rent sued for is in excess of that paid in previous faslis, the difference being due to an increase in wet area discovered by resurvey. The District Judge has

disposed of the appeal on the short ground that the suit for excess rent will not lie, until the landlord has obtained an order of the Collector under S. 42 (2) sanctioning the enhancement. I think he is right. S. 42 declares that no alteration of rent in respect of an alteration in area shall be given effect to except under an order of the Collector passed on an application made to him for that purpose. Admittedly there has been no such application here. The raiyat is therefore not liable to pay the additional rent claimed. The question of whether a suit for enhanced rent (whatever be the cause of enhancement) can be brought without first enforcing the acceptance of a patta embodying the enhanced rent, on which a long argument was addressed to us, does not really arise in this case. I would dismiss the second appeal with costs.

Napier, J.—The lower appellate Court has dismissed the claim for excess rent, holding that it falls within the mischief of S. 42 (2), Act 1 of 1908. The appellant urges that he is protected by S. 26 (3), that the old paimash rate is the lawful rate and that the landholder who granted the lower rate being dead, he is entitled to sue for it without suing for a patta under S. 56. I am strongly inclined to think that whereas in this case there is in existence a patta and muchilika at the lower rate, these terms must be altered either by exchange or by a decree under S. 56 before the landlord is entitled to sue for the rent. It seems to me that the old patta remains in force, "fresh pattas neither having been accepted, exchanged or decreed." S. 26(3), I think, only gives him the right to claim to revert to the old rate and compels the Collector in a suit under S 56 to decree it. I 'do not think that it is in the power of the Court in a rent suit to cancel the old patta and until that is done, it constitutes the contract between the parties. Whether this be so or not, I do not see why we should not accept the footing on which the suit has been decided in both Courts, namely, that the claim is made in consequence of resurvey as the plaint does not allege the facts uecessary to bring the case within S. 26 (3). The fact of resurvey is admitted and the case therefore falls within S. 42 (2). I therefore agree that this second appeal be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

✻A. I. R. 1918 Madras 469
Full Bench

WALLIS, C. J. AND OLDFIELD AND KUMARASWAMI SASTRI, JJ.

Vaidyanatha Sastri — Plaintiff—Appellant.

v.

Savithri Ammal and *others* — Defendants—Respondents.

Second Appeal No. 275 of 1915, Decided on 26th July 1917, against decree of Sub-Judge, North Arcot, in Appeal Suit No. 41 of 1914, D/- 29th September 1914.

✻(a) Hindu Law—Alienation—Widow—Suit to set aside preadoption alienation during lifetime of widow—Adopted son can set aside alienation if not made for necessary purposes during widow's life-time.

An adopted son, who has been adopted by a widow acting under the authority of her husband, can during the widow's lifetime set aside the alienations made, not for necessary purposes, before he was adopted and recover the properey so alienated. [P 473 C 2]

(b) Limitation Act (1908), Art. 141—Right of adopted son is higher than that of reversioner—As adoption divests widow's estate it also divests estate of alienee from widow.

Per *Spencer, J.* (in the Order of Reference).—An adopted son's right is higher than that of a mere reversioner, whose right of action is limited by Art. 141, Lim. Act. If the adoption divests the widow's estate, as the adopted son derives his right to sue through his father, it cannot be said that it does not divest the estate of the alienees from the widow. [P 472 C 1]

T. R. Krishnaswami Aiyar—for Appellant.

K. S. Ganesa Aiyar—for Respondents.

Order of Reference

Sadasiva Aiyar, J.—I must confess that the strong inclination of my mind is to follow the decision of Sir Bhashyam Iyengar, J., in *Sreeramulu* v. *Kristamma* (1). I was a party to the decision in *Kottapalli Subbamma* v. *Jatavallabhulu Subrahmanyam* (2), and in my judgment in that case, I have mentioned a few further considerations which in my opinion ought to induce Courts to support the validity of alienations by a widow heir till at least the end of her life. The legal status of a Hindu widow and the legal status of a Hindu reversioner have been made so anomalous and complex by commentators and by the decisions of Courts that almost any decision in which such rights are discussed by even an eminent Judge like Sir Bhashyam Iyengar can be subjected to criticisms of

1. (1903) 26 Mad 143.
2. (1916) 39 Mad 1035=32 I C 813.

a plausible character. Of course, it follows that another decision coming to a diametrically opposite conclusion like that of Sir Chandavarkar, J., in *Ramakrishna* v. *Tripurabai* (3) can be made the subject of not less effective criticisms by lawyers of learning. I shall not therefore try to add to the confusions and anomalies existing on this subject by attempting an elaborate support of Sir Bhashyam Iyengar's views or an elaborate criticism of Sir Chandavarkar's views. I feel however bound to state (with reference to the argument of Mr. T. R. Krishnaswamy Aiyar contra) that I am not able to see any inconsistency between Sir Bhashyam Iyengar's views found in different portions of his judgment as to the starting point for the period of limitation as regards suits brought (a) during the lifetime of the widow, and (b) after the death of the widow, nor do I think it against the law to hold that the reversioner who succeeds by reason of a widow's surrender of the estate in her hands does not thereby enable the said reversioner to recover the properties which had been alienated by her before that surrender even during her lifetime.

As regards the case in *Bonomali Roy* v. *Jagat Chandra Bhowmick* (4) their Lordships of the Privy Council do not indicate the section of the Limitation Act of 1859 under which the suit was treated as barred or what the period of limitation (six years or twelve years) was by whose lapse, the suit became barred. That Act does not contain schedules of articles like the later Acts of 1877, 1882 and 1908 makes no such difference between suits brought during the lifetime of the widow and after the death of the widow as is made in Arts. 125 and 144, Sch. 1 of the present Lim. Act. It seems to contain only one general section (S. 12) corresponding to Art. 144 of the present Act giving a period of 12 years for possession of immovable property or of any interest therein. S. 16 of that Act gives six years for all suits not expressly provided for. A suit to set aside a lease improperly granted by a manager is not expressly provided for in that Act. An adopted son as distinguished from a contingent reversioner becomes entitled to a vested interest on the date of his adoption. in his adoptive father's estate. His right to bring a suit under the Act of 1859 for possession of his said vested interest in the immovable property (though physical possession might be postponed till the death of the widow alienee, his adoptive mother) might be made to arise under the Act of 1859 on the date of his adoption itself.

Further in that Privy Council case, the alienation by way of lease had been made, not by *B*. the widow and heir of the last male owner, but by *B's* mother-in-law (whom I shall call *A*) acting as manager for her son's widow *B*. The question in that case was as to when the cause of action for *C*, the son adopted by *B* (the daughter in law) to her husband, to sue *to set aside the lease granted by his adoptive grandmother* and to recover possession of the property, arose and not the question of his right to sue for bare possession of any property alienated by his adoptive mother directly. Now, the right to avoid the lease granted by *A* was in the widowed daughter-in-law *B* between 1837 (when the lease was granted) and 1846 (the date of the adoption of *C* by *B*) but as soon as the adoption was made, the right to avoid become vested in the adopted son *C* and it was that right that was held to be barred (if I understand the Privy Council decision aright) probably by S. 16 of the Act of 1859. It will be seen from the judgment of the High Court of Calcutta on pp. 672 to 674 that the setting aside of the lease of 1837 was held necessary before possession could be got from the lessee and that suit was held barred under the Act of 1859, at the latest 12 years after the adoption of *C*. The decision of the Privy Council in *Bonomali Roy* v. *Jagat Chandra Bhowmick* (4) has therefore in my opinion, no bearing on the question as to the applicability of Ss. 125. 141 and 144 of the present Lim. Act. or on the question as to whether an alienation by the widow herself (not by her alleged manager acting beyond the scope of the manager's authority as in the Privy Council case) is valid in the alienee's favour during the lifetime of the widow against the adopted son.

However, as my learned brother thinks that the question shonld be referred to a Full Bench, I do not think that I should object to this difficult question of law being so referred to a Full Bench on the mere ground that the principle of stare

3. (1909) 33 Bom 88=1 I C 647.
4. (1905) 32 Cal 669=32 I A 80 (P C).

decisis should not be lightly departed from.

Spencer, J.—The question which arises for our decision in this second appeal is whether an adopted son, who has been adopted by a widow under authority given by her husband, can during the widow's lifetime sue to recover possession of property alienated for purposes not binding upon the inheritance at a date prior to the adoption. This question has been answered in the negativein *Sreeramulu* v. *Kristamam* (1) by Bhashyam Iyengar J. He held that if any alienation was made not for a necessary purpose, the subject of it would fall into possession as a vested remainder only at the termination of the widowhood, and the adopted son must wait till that event to bring a suit to recover it. We have not been referred to any other decision of this Court directly on the point. But this decision was dissented from in *Ramakrishna* v. *Tripurabai* (3) by Chandavarkar and Heaton, JJ., and in *Sinnachaimi* v. *Ramasamy Chettiar* (5) the late Chief Justice expressed a doubt whether *Sreeramulu* v. *Kristamma* (1) had ceen correctly decided.

In Mayne's Hindu Law, Edn. 8, para. 197, the question is considered as to the date on which the right of the adopted son arises in the case of adoption by a widow after her husband's death; and the learned author quotes several authorities for his opinion that the son's rights date from the adoption He notices the decision of Bhashyam Iyengar, J., in *Sreeramulu* v. *Kristamma* (1) and observes that this decision proceeds upoh a view which, if correct cuts at the root of his reasoning. He says:

"when the case arises again it will be material to consider whether the widowhood, that is, the possession of a widow's estate, was not terminated by the act of adoption as much as by civil death."

The question has now arisen again for a decision by this Court. The Privy Council decision in *Bonomali Roy* v. *Jagat Chandra Bhowmick* (4) to some extent supports the view taken in *Ramakrishna* v. *Tripurabai* (3). In that case a widow adopted a son in 1846, who attained majority in 1856 and died in 1880 The widow, who prior to the adoption granted a lease of a portion of her husband's estate, died in 1894. It was held by their Lordships of the Privy Council that the right of action to set aside the lease as invalid, arose on the adoption and that time would begin to run from the date when the adopted son attained majority. This dictum cannot be explained away on the ground that the Act of Limitation in force when the cause of action arose was Act 14 of 1859, because even under that Act the possession of a widow would not become adverse to the right of a reversioner until the widow's death: see *Sambasiva* v. *Ragava* (6), and therefore the decision is only explainable on the suppositon that their Lordships placed the rights of an adopted son on a different footing from those of a reversioner. In *Sreeramulu* v. *Kristamma* (1) Bhashyam Iyengar, J., held that the starting point for the period of limitation in such suits was the date of adoption (see head-note). This conclusion would seem a little inconsistent with his conclusion on the other point that arose.

It was sufficient for the purpose of that case to hold that the suit was not barred by limitation, and the learned Judges' view upon this point must therefore be treated only as alternative to the view expressed as to the adopted son's right of suit At the bottom of p. 146 he ebserves that if the suit to recover property improperly alienated were maintainable during the widow's lifetime, the period of limitation should be computed from the date of adoption, the Article applicable being Art. 144; but at the top of p. 155 he observes that if the suit were brought after the widow's death, Article 141 would be applicable and the period of 12 years must be reckoned from the date of her death. It seems unreasonable to suppose that different Articles of limitation should be applied according to the circumstances of the particular case. Evidently the learned Judge felt the difficulty of applying the Articles of the Limitation Act to his conclusion upon the other point. The case of *Kottapalli Subbamma* v. *Jatavallabhulu Subrahmanyam* (2), to which one of us was a party, was a case of surrender by a widow in favour of a reversioner, and it was held that it merely had the effect of accelerating the succession. It seems anomalous that a reversioner who succeeds by reason of a widow's surrender of her life-interest should be at once enabled to recover the properties of the last male owner which have been improperly alienated by the widow, while

5. (1912) 13 I C 7.

6. (1890) 13 Mad 512.

an adopted son's remedy should be postponed till the widow's death. It is clear that an adopted san's right is higher than that of a mere reversioner, whose right of action is limited by Art. 141. If adoption divests the widow's estate as the adopted son derives his rights to sue through his father, can it be held that it does not divest the estate of alienees from the widow? I am not much impressed by considerations as to the inequity caused to purchasers from a widow, whose calculation as to their prospects of enjoyment during the widow's life are liable to be disturbed by a subsequent adoption. The length of a widow's life is in any case a matter of uncertainty and speculation and persons who take property from limited owners without proper consideration do not deserve much sympathy. The sooner that the validity of such alienation is challenged in a Court of Law, the better the position in which each side will find itself to adduce evidence as to the necessity for the transaction. Sufficient has been said in the full discussion in *Ramkrishna* v. *Tripurabai* (3) to show that the correctness of the Madras decision based upon the opinion of Bhashyam Iyengar, J., is open to question. I am of opinion that the Bombay decision represents the correct view of the law, and that a reference should be made to a Full Bench on the question whether an adopted son who has been adopted by a widow acting under the authority of her husband, can, during the widow's lifetime, set aside the alienations made, not for necessary purposes, before he was adopted and reover the property so alienated.

(This second appeal coming on for hearing in pursuance of the above Order of Reference, dated 23rd January 1917, on 18th and 19th April 1917, upon perusing the said Order of Reference and the record in the case and upon hearing the arguments of Mr. T. R. Ramachandra Aiyar and Mr T. R. Krishnaswami Aiyar, for the Appellant, and of Mr. K. S. Ganesh Aiyar, for Respondent 2 respondents 1, 3 to 5 and 7 to 11 not appearing in person or by pleader, respondent 6 having died and no legal representatives having been brought on record within the time allowed by law, and having stood over for consideration till this day, the Court expressed the following:)

Opinion

Wallis, C. J.—This reference which was argued before the long vacation raises a question of considerable difficulty which has given rise to much difference of opinion. On the one hand we have the judgment of Davies and Bhashyam Iyengar ,JJ., in *Sreeramulu* v. *Kristamma* (1), which is supported by Sadasiva Aiyar, J., in the Order of Reference. On the other hand we have the current of Bombay decisions ending with *Ramakrsihna* v. *Tripurabai* (3), with which Spencer, J., agrees. With reference to the decisions of the Privy Council which have been cited on either side, I may say at once that I do not consider *Bamundoss Mookerjea* v. *Mt. Tarinee* (7) and *Moniram Kolita* v. *Keri Kolitani* (8) as of any assistance, because the point now in question did not in any way arise for consideration by their Lordships and was not considered by them. As regards the first case it had been held by the Bengal Sudder Dewani Adawlat in *Ranee Kenishmunee* v. *Rajah Oodwant Singh* (9) that an alienation for necessary purposes made by a widow before adoption could not be questioned hy the adopted son. This was all that was decided and the head-note seems to go far beyond the decision. The judgment no doubt proceeded on the view that the alienation would not have been binding at all upon the adopted son if it had not been for a necessary purpose, but the point really did not arise. In the course of this case a Pundit expressed the somewhat extravagant opinion that a widow who had a power of adoption but had not yet exercised it was in the position of a femme enciente and more than twenty years later the right of such a widow to the possession and enjoyment of the estate left by her husband was questioned on the strength of this opinion in *Bamundoss Mookerjea* v. *Mt. Tarinee* (7). The Sudder Dewani in 1850 overruled this contention in an elaborate judgment which is set out at p. 177, etc., of Moore's Report, in which they pointed out that decision in *Ranee Kishenmunee* v. *Rajah Oodwunt Singh* (9) was not authority for such a proposition and observed, it seeme to me, obiter:

7. (1857-59) 7 M I A 169=1 Sar 61 (P. C.)
8. (1880) 5 Cal 776=7 I A 115. (P. C.)
9. (1823) 3 Sudder Dewany Ad Rep 228.

"In that case the son when adopted became the undoubted heir; and it was of course the correct doctrine that no sale made by a widow who possesses only a very restricted life-interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity."

Though their Lordships expressed their agreement with the principles laid down in the judgment of the Sudder Court and their entire concurrence in it, it seems to me to be going too far to regard them as having adopted as their own the obiter dictum of the Sudder Court on a question which did not arise. More weight attaches to the observation of their Lordships in the well-known case of *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (10), that

" the rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption, but this observation again was purely obiter."

On the other hand, I am unable to agree with Bhashyam Iyengar, J., in regarding the observation of their Lordships in *Moniram Kolita* v. *Kiri Kolitani* (8) as direct authority the other way. In considering the question whether the well-known texts about the widow keeping unsullied the bed of her lord required them to hold that her estate was forfeited by an act of unchastity committed after succession to the estate, their Lordships observed that if it were so held, a purchaser or mortgagee from her would lose his estate in consequence of an act of unchastity committed by her prior to the sale or mortgage. The implication that in such a state of the law mortgages and alienations made by the widow before the act of unchastity would remain unaffected appears somewhat far-fetched, even if it be assumed for the moment that the same considerations would be applicable in the case of adoption as in the case of unchastity. The more recent decision of their Lordships in *Boncmali Roy* v. *Jagat Chandra Bhowmick* (4) is however much more in point. The alienation in that case was said to have been made in 1837 by the widow's mother-in-law acting on her behalf. The widow subsequently in 1846 adopted a son who attained majority in 1856. The widow having died in 1894 the adopted son's representative sued for possession in 1897. The present contention that an alienation by a widow enures for her lifetime and is not divested by a subsequent adoption does not appear to have been raised for the plaintiff, the argument being that under the dispositions of the original owner the mother-in-law had the power to alienate the property for the terms of the widow's life. Their Lordships however appear to have held expressly that the adopted boy's cause of action for the recovery of the alienated property arose on the date of his adoption and that time began to run against him in 1856 on his attaining majority and that the suit became barred in 12 years under Regn. 2, 1803 and Act 14 of 1859.

This decision which is in accordance with the decisions of the Bombay Court and in accordance with their Lordships' dictum in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (10), is later than the decision of this Court in *Sreeramulu* v. *Kristamma* (1) and, so long as it stands unexplained, I feel bound to follow it. At the same time I feel considerable reluctance in differing from the judgment of Bashyam Iyengar, J., in *Sreeramulu* v. *Kristamma* (1), and the opinion of Sadasiva Aiyar, J., one of the referring Judges, because I think there is much to be said for the view taken by them that in the present state of the Hindu Law a Hindu widow, who, it is now well settled, has full powers of disposition over the income and accumulations of her widow's estate, should not be permitted, when in the exercise of such powers of disposition she has alienated for consideration her interest in whole or in part, to abridge the interest which she has parted with and derogate from her own grant by the subsequent exercise of a power of adoption which she is under no legal duty to exercise. It is well settled that a widow who has been authorised to adopt is at full liberty to adopt or not as she pleases and cannot be compelled by law to do so. Whether she is under a moral duty to adopt seems to me to be a matter for her own conscience especially in these days when it is certainly open to question whether the old views as to the religious necessity of adoption to a sonless man are so universally or so strongly held and whether the temporal inconveniences attending it are not more fully realised. Moreover to hold that the adopted son takes subject to the widow's prior alienations for the duration of her life would not interfere with the exercise of her

10. (1867-69) 12 M I A 397=1 B L R 1. (P.C.).

powers of adoption unless the alienations were so considerable as to deter the boy's parents from giving him in adoption, and this I think is a consideration which should be regarded by the widow at the time of the alienation. It has been held by this Court in *Kottapalli Subbamma* v. *Jatavallabhulu Subrahmanyam* (2) that a widow cannot by surrendering her interest in the estate to the next reversioner deprive prior alienees for consideration from her of their right to enjoy the alienated property during her lifetime, and I think there is much to be said for applying the same rule to adoptions. I do not pursue the question further, because in the present state of the authorities and especially in deference to the dictum in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (10) and the decision in *Bonomali Roy* v. *Jagat Chandra Bhowmick* (4), I feel bound to answer the reference in the affirmative.

Oldfield, J.—The question referred is whether a son adopted by a Hindu widow under her husband's authority can during her lifetime recover property alienated by her for no necessary purpose before adoption was made. In answering it in the affirmative I confine myself to what, with all respect, seems to me the only safe ground of decision in such cases, the current of judicial authority. For, of the other grounds relied on, it is not clear on which side the weight of the argument from inconvenience would preponderate if the uncertainty of the law authorised its consideration and it is useless to refer to the very general wording of ancient texts, which have been dealt with frequently by the Courts. It will facilitate the application of the authorities and define the issue before us, if the first citation is from the decision of this Court which has occasioned the reference and from which we are asked to dissent, *Sreeramulu* v. *Kristamma* (1). Its foundation as I understand it is the statement that:

> "a Hindu widow has an absolute right to the fullest beneficial interest in her husband's property for her life and that she has a personal interest therein which she can exercise at her will and pleasure by giving or transferring the estate to another for her own life or speaking more accurately, for the term of her widowhood,"

and no doubt this statement gives with sufficient accuracy the general effect of the nine cases and of Act 15 of 1856 which are referred to as supporting it. But it is useless, as justified by them for the present purpose because they relate only to cases of the widow's death or remarriage in which her widowhood and her estate ended together and the distinction between the duration of the one and the other would not have affected the determination of the estate she had conveyed. It is otherwise when the making of an adoption is in question. For there is no dispute but that it terminates the widow's estate although her widowhood continues. *Dhurm Das Pandey* v. *Mt. Shama Soondri Dibiah* (11). If therefore the distinction proposed is valid; if that is the widow's power is correctly defined as being to dispose only of a widow's estate subject to all its legal incidents not of an estate for the terms of her widowhood the authorities referred to are inconclusive and the statement of law founded on them must be rejected for the present purpose.

This distinction and the first of those views can, in my opinion be sufficiently supported by reference to the principle enunciated in general terms in *Dhurm Das Pandey* v. *Mt. Shama Soondri Dibiah* (11). For in view of those terms I cannot follow the suggestions that the widow can by unnecessary alienations diminish even temporarily the estate which the son inherits at once on his adoption and that the making of an adoption is to be excluded from the contingencies which like the widow's death or re-marriage, her alienee must face as determining his rights if necessity for the alienation cannot be proved. Before however turning to the arguments, by which those suggestions are supported [and they are in fact identical with those employed in *Sreeramulu* v. *Kristamma* (1)], I deal with the decisions, which favour the contrary conclusion.

It is not worth while to consider in detail those which deal with the widow's powers generally and without reference to the effect of an adoption on their exercise, because, although some of them refer explicitly to her alienations of a widow's estate, others refer to them as of an estate for her widowhood: and, as already observed, the maintenance of the distinction between these descriptions would have had no effect on the conclusion. There are however three cases in which an adoption was in question; and

11. (1841-46) 3 M I A 229=6 W R 43 (P C).

they are in my opinion decisive in favour of the adopted son's immediate right to recover from the alienee. In *Bamundoss Mookerjea* v. *Mt. Tarinee* (7) the Privy Council adopted comprehensively the judgment of the Sudder Dewani Adalat under appeal before it, endorsing the following reference to another case, *Ranee Kishenmunee* v. *Rajah Oodwunt Singh* (9) :

"The point . . . . . was whether a retrospective right could be claimed by a son, after he had been adopted, so as to bar a sale made by his adpotive mother previous to his adoption to the injury of his rights, at the time contingent and eventual, but which actually accrued to him upon his adoption In that case the son, when adopted, became the undoubted heir ; and it was of course, the correct doctrine that no sale made by a widow, who possesses only a very restricted life-interest . . . . could have been good against any ultimate heir, whether an adopted son or otherwise, unless . . . . . under circumstances of strict necessity."

This recognition of the adopted son's right was, though the fact is not expressly referred to in *Bamundoss Mookerjea* v. *Mt. Tarinee* (7), accorded, as reference to the Sadar Dewani Adalat Report shows, in a suit instituted during the lifetime of the widow. Next, there is a similar statement of the law in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (10), made explicitly in the judgment of the Privy Council, though no doubt merely obiter. These two authorities are, of course, only indirect, the first being important mainly as evidence of an early recognition of the principle it involves. But to the remaining case, *Bonomali Roy* v. *Jagat Chandra Bhowmick* (4), no such objection is available, since the question dealt with in the judgmeut of the Privy Council was whether the suit brought by a person claiming under the adopted son was in time and it was held that, if the latter had a cause of action, it arose on the date of his adoption. The fact that the law of limitation then in force was Act 14 of 1859 is no ground of distinction from the present case since the question was of the starting point for, not the period of, limitation; and since a reversioner's cause of action arose under the earlier Act, as it does now, on the widow's death, the distinction in favour of the adopted son is marked clearly. *Sambasiva* v. *Ragava* (6), and in review, *Streenivasa Raghavachariar* v. *Sambasiva Pillai* (12). These decisions of the Privy Council are accordingly irreconcilable with *Sreeramulu* v. *Kristamma* (1). It must be added that the last mentioned case has been dissented from by the only other High Court which has considered it: *Ramakrishna* v. *Tripurabai* (3).

It remains to deal shortly with the other considerations, by which the decision in *Sreeramulu* v. *Kristamma* (1) has been supported. They include first an argument from the explanation given in *Lakshmana Rau* v. *Lakshmi Ammal* (13) of the decision in *Bamundoss Mookerjea* v. *Mt. Tarinee* (7) already referred to, in which it seems to me (with all respect) that the connexion in which that explanation was given is overlooked. The Court was dealing with a point very similar to the main point dealt with in the earlier case, the effect on the widow's power of alienation of her possession of an authority to adopt ; and it therefore had no occasion, especially as it held that the alienation in question before it was made for a necessary purpose, to define an adopted son's rights, to decide the date from which he could assert them or to consider the portion of the judgment extracted above, in which *Ranee Kishenmunee* v. *Rajah Oodwant Singh* (9) is referred to. The reference, which follows in *Sreeramulu* v. *Kristamma* (1). to the decision in *Ganapati Ayyan* v. *Savithri Ammal* (14) appears to disregard the fact that no alienation by the widow was in question in the latter case, her action, as the Court found, consisting only in the creation of documentary evidence of the oral devise by her husband under which the alienee claimed; and therefore nothing at present material was decided. Next an extract from the judgment in *Moniram Kolita* v. *Keri Kolitani* (8) is relied on as showing that the validity of a widow's alienation can be affected only by her conduct prior to it and not it is to be inferred, by her subsequently making an adoption but the dictum in question, which no doubt actually mentions only prior conduct, is not statedly applicable to it alone and occurs in the course of a hypothetical argument from inconvenience, in connection with which any conclusion ex silentio would be unsafe· Lastly it is argued that Art. 125. Sch. 1, Lim. Act, 1908, impliedly post

12. (1891) 1 M L J 392.

13, (1882) 4 Mad 160.
14. (1898) 21 Mad 10.

pones the right to recover possession from a widow's alienee until after her death or re-marriage. The answer is firstly, that substantive rights under Hindu law cannot be regarded as curtailed by mere implication from a provision relating to procedure; and secondly, that an adopted son is not and has not been shown to be on the same footing as a reversioner and that his suit for possession will be covered by Art. 144. The argument by which the conclusion in *Sreeramulu* v. *Kristamma* (1) is supported failing. I would dissent from the decision in that case and answer the question referred in the affirmative.

Kumaraswami Sastri, J.—The question referred to us for decision is whether an adopted son who has been adopted by a widow acting under the authority of her husband, can during the widow's lifetime set aside alienations made, not for necessary purposes, before he was adopted and recover the property so alienated. It has now been well settled that an adopted son has all the rights of a natural son in his adoptive father's estate. He acquires by right of adoption an interest in his adoptive father's ancestral property and the same right to question his alienations as the aurasa son. He succeeds to collaterals of his adoptive father and holds the same position as the natural son unless his right has been specially curtailed by express texts. When a widow adopts a son under authority from her husband the son so adopted succeeds to the estate of his adoptive father by right of inheritance just in the same way as the natural born (aurasa) son. The estate which the widow had between the date of her husband's death and the date of the adoption is at once divested and becomes vested in him, not as succeeding to the widow making the adoption, but to the deceased person in pursuance of whose authority the adoption was made. Though his rights arise only from the date of his adoption, they are paramgont to those of the widow who is at once relegated to position of a female member of the family entitled only to maintenance and residence in the family house. The position of such an adopted son is clearly and accurataly set out by Farran, J., in *Moro Narayan Joshi* v. *Balaji Raghunath* (15), where he observes as follows:

"Now an adopted son claims from and through his adoptive father. His adoption, however does not relate back to the death of his adoptive father: *Bamundoss Mookerjea* v. *Musammat Tarinee* (7). He comes in bound by such acts of the widow as would bind the natural heirs of the husband after her and entitled to set aside (in the absence at all events of stipulations to the contrary) such unauthorised alienations of the widow as they succeeding upon her death would be entitled to set aside. . . . The only difference between him and other full heirs of the husband for the purpose I am considering seems to be that his rights spring into existence the moment of his adoption and displace the rights of the widow, while the rights of other reversioners awsit the determination of the widow's estate by her death."

In *Ranee Kishenmunee* v. *Rajah Oodwunt Singh* (9) it was held that a sale made by a widow to the prejudice of her late husband's property, before the adoption made by her under authority given by her husband, will not be valid as against the adopted son unless made under circumstances of necessity and that he was entitled to possession. This case was referred to by the Calcutta Sudder Court in *Bamun Das Mookerjee* v. *Mt. Tarinee* (16), which was affirmed by the Privy Council, *Bamundoss Mookerjea* v. *Mt. Tarinee* (7). Referring to *Ranee Kishenmunee's* case (9), the Judges of the Sudder Court observed as follows:

"The point in that suit was whether a retrospective right could be claimed by son after he had been adopted so as to bar sale made by his adoptive mother previous to his adoption to the injury of the rights, at that time contingent and eventual, but which actually accrued to him upon his adoption. In that case the son when adopted became an undoubted heir, and it was of course, the correct doctrine that no sale made by a widow, who possesses only a very restricted life-interest in an estate, would have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity."

Their Lordships of the Privy Council simply confirmed the judgment of the Sudder Court with the remark that they entirely agreed in the principles laid down in the judgment, which was in their opinion most able and elaborate [*Bamundoss Mookerjea* v. *Mt. Tarinee* (7)]. In *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (10) their Lordships distinctly lay down that the rights of an adopted son are not prejudiced by any unauthorised alienation by the widow which precedes the adoption. In *Lakshmana Rau* v. *Lakshmi Ammal* (13) the decision of the Privy Council above referred to was considered and it was held the decision established that during the

15. (1895) 19 Bom 809.

16. 6 S D A R 533.

period of her husband's death and the adoption, only such acts as are authorised and would be effective against reversioners would bind the sons taken in adoption and that acts in excess of her powers under Hindu law may be challenged by the adopted son. The decision of the Privy Council [*Bamundoss Mookerjea* v. *Mt. Tarinee* (7)] was also considered by the Bombay High Court in *Nathaji Krishnaji* v. *Hari Jagoji* (17), where relying on the authority of the case, the Court upheld the right of the adopted son to set aside unauthorised alienations made by a Hindu widow between the date of her husband's death and the adoption made in pursuance of authority given by him. So far as the Bombay High Court is concerned, a series of well considered decisions clearly establish the adopted son's right to recover immediate possession. I need only refer to *Lakhman Rhau Khopkar* v. *Radhabai* (18) *Moro Narayan Joshi* v. *Balaji Ragunath* (15) and *Ramkrishna* v. *Triporabai* (3). Though the rights of the adopted son commence only from the date of his adoption, it is undoubted law that he divests the estate of the widow making the adoption and her co-widows and the interest (wholly or partially) of all persons in possession of the property of his adoptive father to whom he would have a preferential title if he had been in existence as adopted son at his adoptive father's death. In *Dhurm Das Pandey* v. *Mt. Shama Soondri Dibiah* (11) Their Lordships of the Privy Council observe (p. 242,:

"An objection has been made that pending the suit an act of an adoption was executed by the respondent, whereby the whole property was divested from the mother and vested in her adopted son. Now upon the authorities there can be no doubt that that is the result of an act of an adoption, because the property is in the widow from the death of the husband till the power of adoption is exercised. Then that adoption divest it from the widow and vests it in the adopted son."

The authorities in my opinion clearly establish the view that an adoption puts an end to the widow's estate as fully and effectually as her death. Such being the rights of an adopted son who on adoption claims under a title paramount to that of the widow and divests her of the estate she held, the question is whether the widow who alienates properties without any legal necessity and the alienee from such widow have any rights or equities which would entitle the alienee to possession as against the adopted son. I find it difficult to see how the purchaser from a Hindu widow who has only limited powers of alienation and who alienates property without any necessity or justifying circumstances such as would bind the reversioners after her death or re-marriage can invoke any principles of Hindu law or any equity to prevent the adopted son (whose adoption has put an end to the widow's estate just as effectively as her death or re-marriage) from claiming possession of properties which were alienated. I can see very little equity in postponing the adopted son to a purchaser from the widow who, contrary to the principles of Hindu law and the directions of Smrithi writers alienates the estate for no necessity. Whatever may be the nature of the estate taken by a Hindu widow succeeding to her sonless husband it is clear that her powers of alienation are restricted. As pointed out by the Privy Council in *Collector of Masulipatam* v. *Cavaly Vencata Naraianapah* (19), the estate she takes is a qualified proprietorship with powers of alienation for purely worldly or escular purposesonly where there is justifying necesity and the restrictions to the powers of alienation are inseparable from her estate.

So far as the texts and Smrithis go they do not countenance the view that a widow can make a valid alienation of any kind or to any extent without justifying necessity and no distinction is drawn as to alienations purporting to be for her lifetime only. The text of Katyayana is specific and enjoins her to keep the bed of her Lord unsullied to enjoy with moderation his estate and pass it on to his heirs. Brihaspathi observes that she has not got property therein to the extent of gift, mortgage or sale except for spiritual or religious purposes. The restraints on powers of alienation by a Hindu widow are based as pointed out by their Lordships of the Privy Council in *Collector of Masuliptam* v. *Cavaly Vencata Naraianapah* (19), not merely for the protection of the material interests of her husband's relations but by reason of the opinion of all the Smrithi

17. (1871) 8 Bom H C R A J C 67.
18. (1887) 11 Bom 609.
19. (1859-61) 8 M I A 529=2 W R 61 (P C).

writers as to the necessity of a Hindu widow being under the advice and protection of her husband's elderly relations. I can find nothing in any of the Smrithis or commentaries to warrant the view that they empower a Hindu widow to do what she likes with her limited estate. On the contrary the limitations imposed and the reasons given for the imposition thereof show to my mind clearly that such an idea was repugnant to the minds of the Smrithi writers. So far as judicial decisions go all that they decide is that a Hindu widow may deal with her interest in the property inherited at her pleasure so long as such dealing enures for the term she is entitled to the estate as widow succeeding to her sonless husband and no prejudice to the reversion is caused thereby: see *Muthu Naicken* v. *Srinivasa Aiyangar* (20). This is chiefiy due to the fact that there is in existence ne person who can demand present possession of the estate (the reversionary heirs having only a spes successionis) and the widow is estopped from contesting the validity of her own grant. The title of the alienee is therefore incapable of being defeated by any superior title arising during the widow's life.

That the estate of the widow is not an indefeasible life-estate but only an estate durante viduitate is clear. It is not disputed that the adopted son would divest the widow of all the properties which remain unalienated at the time of the adoption and it is well settled law that her re-marriage will have the same effect so far as the reversioners of her husband are concerned. It is difficult to see how the widow can under these circumstances be said to have an absolute indefeasible estate in the property inherited by her from her husband during the term of her natural life. If she has not got such an estate it is still more difficult to see how any alienation by her can last a moment longer than the cessation of the widow's estate either by death, remarriage or an adoption which certainly divests her as completely as if her husband had left male issue. To speak of any portion of the estate which has been alienated by her without any legal necessity as having been "lawfully severed" for the period of her natural lifes, with all respect, unsupported by any texts of the Hindu law or any principle of Hindu Jurisprudence. It has not been suggested by anybody that a gift of the whole or any part of the estate would, if made prior to the adoption, disentitle the son to claim possession from the donor. As pointed by Chandavarkar, J., in *Ramakrishna* v. *Tripurabai* (3), the doctrine enunciated in *Sreeramulu* v. *Kristamma* (1) would be equally applicable if the widow alienated the whole of the properties before adopting a son, and yet it can hardly be contended that such a result was ever contemplated by Smrithi writers. There seems to me to be no real analogy between the position of a father to whom a son is born after an alienation and a Hindu widow who adopts under authority of her husband after making an unauthorised alienation. Though the fiction of constructive pregnancy through permission to adopt has been exploded by a series of decisions, the adopted son on his adoption becomes the son and heir of his father and the adoption has retrospective effect, in so far as it divests wholly or partially the estate of all persons whom he would have either excluded from the inheritance or shared with. The estate held by a sonless father and a Hindu widow with authority to adopt are essentially different in nature and extent and the difference has been pointed out by Chandavarkar, J., in *Ramakrishna* v. *Tripurabai* (3) and by Collins, C. J., and Handley, J., in *Jagannadha* v. *Papamma* (21).

So far as reversioners are concerned, their position is quite different from that of an adopted son. Till the death of the widow or the termination of her estate, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband, as the property under Hindu law descends to those who would have been heirs to the husband if he had lived up to and died at the moment of her death. When, however the widow makes a valid adoption, a son is by fiction of law born to her husband the moment she adopts and he by virtue of his sonship succeeds immediately to his father's property as effectually as if he was a posthumous son. The decision of the Privy Council in *Bonomali Roy* v. *Jogat Chandra Bhoumick* (4) supports the view that the adopted son is entitled to immediate possession of pro-

20. (1910) 8 I C 269.

21. (1893) 16 Mad 400.

perty wrongfully alienated by a widow before his adoption. The facts of the case are fully set out at pp. 669 to 671 of the report and the judgment of the High Court appears on pp. 672 to 674 of the report.

It will be seen that the adopted son sued to set aside a perpetual lease granted between the date of the death of his adoptive father and his adoption and recover possession. Various contentions were put forward which are fully dealt with in the judgment of the High Court. One of them was that the lease was executed by the mother-in-law of the widow acting as her guardian and that as the lease was not repudiated by her, it must be taken to be the act of the widow and consequently limitation began to run as against the adopted son only from the death of the widow. If the view taken in *Sreeramulu* v. *Kristamma* (1), namely, that the cause of action for possession arose only on the widow's death were correct, it is clear that the suit would not have become barred at the date of its institution, assuming that the lease was one executed by the widow's guardian on her behalf and ratified by her. The following passage in the judgment of their Lordships of the Privy Council shows that they were of opinion that the right to possession arose immediately on adoption:

"On the most favourable view for the appellant she (Hemlate, the mother-in-law of the widow making the adoption) granted the putni as manager of the estate for Brajeswari (the widow who adopted the plaintiff), the then legal owner. If the putni was void, the period of limitation ran from the date on which it was granted under Regn. 2 of 1803 as amended by Regn. 2 of 1805, which was then in force. But if it was voidable only by Brajeswari's successor, the right of action arose on the adoption of Banwari Lall and time would begin to run against him from the date when he attained his majority in 1856. Under either Regn. 2 of 1803 or Act 14 of 1859 time ran from the date when the cause of action arose."

It was contended by Mr. Ganesa Aiyer in the course of his able argument that the question as to the right of the adopted son to set aside the alienation of his adoptive mother did not arise for determination, as the Courts were only concerned with the lease granted by her mother-in-law acting under an annumati patra granted by adopting widow's father-in-law. A reference to the judgment of the High Court, which deals with every possible alternative case or contention, and the judgment of the Privy Council, which deals with the point of view most favourable to the plaintiff and treats the lease as one by the widow making the adoption, shows that the aspect of the case now before us was considered. It is no doubt true that the decision in *Sreeramulu* v. *Kristamma* (1) was not cited at the Bar or considered by their Lordships, but this is hardly a ground for overlooking what is in my opinion the plain result of the decision of their Lordships. In *Sinnachami* v. v. *Ramasamy Chettiar* (5) Sir Arnold White, C. J., observed that the decision in *Sreeramulu* v. *Kristamma* (1) does not seem to be reconcilable with the decision of the Privy Council and Spencer, J., is of the same opinion in the order of reference.

In *Amrita Lal Bagchi* v. *Jatindra Nath Chowdhry* (22), which was a suit to set aside an alienation by a widow who subsequently made an adoption, it was held, following *Lakshman Bhau Khopkar* v. *Radhabhai* (18), *Nathaji Krishnaji* v. *Hari Jogiji* (17), *Moro Narayan Joshi* v. *Balaji Raghunath* (15) and *Bijoy Gopal Mukerji* v *Nil Ratan Mukerji* (23), that the cause of action, which an adopted son has to set aside an alienation accrued as soon as he is adopted and that as he was barred, those who came after him were likewise barred, even though the suit was within 12 years from the date of the widow making the alienation. The view taken was that as adopted son divests the estate of the widow and becomes entitled to possession immediately he is adopted and not on her death, Art. 141, Limitation Act, has no application as it only provides for cases when the person suing is entitled to possession on the death of the female. In *Kancharla Venkataratnam* v. *Koganti Venkataramiah* (24), Wallis, C. J., and Seshagiri Aiyar, J., following *Moro Narayan Joshi* v. *Balaji Raghunath* (15), *Hari Vithal Parulkar* v. *Waman Hari Deshpande* (25), *Hare Chand Babu* v. *Bejoy Chand Mahtab* (26) and the view taken in *Sreeramulu* v. *Kristamma* (1) as to the Article of the Limitation Act applicable, held that the adopted son

22. (1905) 32 Cal 165.
23. (1903) 30 Cal 990.
24. A I R 1915 Mad 539=25 I C 692.
25. (1900) 2 Bom L R 411.
26. (1905) 9 C W N 795.

is governed by Art. 144 and has 12 years from the date of his adoption. The facts as appear on the judgment show that the widow before adopting the plaintiff entered into a partition with her mother-in-law, which the learned Judges agree in holding was not binding on the adopted son. If the learned Judges intended to adopt the view of Bhashyam Iyengar, J., in *Sreeramulu* v. *Kristamma* (1). on the other question and to hold with him that the adopted son had no right to recover possession of property alienated by the widow prior to the adoption till the death of the widow, it is difficult to see why Art. 141, Sch. 2, Limitation Act, would not apply and exclude Art. 144 which is only a residuary article, as quoad the property alienated the adopted son would be in the same position as any other Hindu entitled to the possession of immovable property on the death of a Hindu female. Seshagiri Aiyar, J., in dealing with *Runchordas Vandravandas* v. *Parvatibai* (27), observes:

"The principle of the decision is that until the plaintiff's right to immediate possession accrues his right to possession is not barred. In the case of a reversioner the cause of action will accrue on the death of the widow; in the case of an adopted son, on his adoption,"

and the observations suggest that he was not in agreement with the view of Bhashyam Iyengar, J., that the right to possession in case of alienation prior to the adoption accrues only on the death of the widow.

Reference has been made to cases where it has been held that a reversioner to whom the widow surrenders the estate (and thereby accelerates the succession) cannot sue to set aside the alienation made by her till she dies. These cases have, in my opinion, no bearing or application to cases of adoption by the widow. The whole doctrine of surrender and consequent acceleration of the estate of the reversioners has no basis in Hindu Smiritis, but has been evolved by Courts of Justice on general principles of jurisprudence. An anticipation of interest involved by the theory of relinquishment or the defeasance of an ulterior interest by the intermediate acts on the part of the widow are hardly contemplated by the Hindu lawgivers. It is clear that the surrender by the widow and the acceptance of the estate by the reversioner are purely matters of contract. The widow is not bound to surrender the estate, nor is the reversioner bound to accept it except on terms which would apply to any other transfer of immovable property so far as prior alienees are concerned and conditions which Courts will impose on considerations of justice, equity and good conscience. To a voluntary relinquishment by the widow based on no considerations of duty to her husband or his spiritual benefit Courts have very properly refused to annex the right to defeat alienations made by her which would enure longer but for her voluntry act. As between the widow, the prior alienee, and the reversioners claiming title under a subsequent surrender the alienee has a clear equity to retain possession and the fruits of his purchase till at least the widow dies. But what equity is there in favour of a person who purchases property from a Hindu widow, knowing that there is absolutely no necessity for the sale and that she has authority to adopt which she could exercise at any time? It is his clear duty to inquire as to whether she has authority to adopt, just as it is the duty of a person dealing with a qualified owner to inquire into the existence of necessity for the alienation.

It is no doubt true that the power to adopt has no legal effect till it is actually exercised, but the adoption made in pursuance does not put the adopted son in the same position as a volunteer. Having regard to the spiritual importance attached by Hindu lawgivers to sonship and the care and anxiety displayed by them to provide for a substitute in case a son is not born, there can be little doubt that a Hindu widow, who has been solemnly enjoined by her husband to perform (what was in his eyes at least) the sacred duty of adopting a son, so as to continue his name and lineage and to enjoy and transmit the property to his descendants, is under a strong moral obligation sanctioned by the dictates of duty and the pieties of human life to carry out his wishes. It is true she cannot be compelled to adopt, but this is due not to the unimportance of the duty but to the absence of any legal machinery by which she can be compelled to perform so personal an act. Self-interest often deters her from performing a duty, which according to all Hindu lawgivers and the views and sentiment of the great majo-

27. (1899) 23 Bom 725=26 I A 71 (P C).

rity of Hindus is of paramount importance to the spiritual needs of her husband and his ancestors but the duty if performed is far from a purely voluntary act on her part but on the contrary one which she was bound to perform by all the dictates of duty and morality as understood by Hindu law and sentiment. It has been argued that it would be a hardship on the widow to terminate the alienation made by her, as it would place a difficulty in the way of her dealing with the estate.

I have already shown that the theory that she could do what she pleases with the estate during her lifetime finds no sanction in Hindu law. From the point of view of the widow's interest I should think that any check on her power of squandering her husband's estate or alienating it without any necessity is for her benefit, having regard to the ignorance of the vast majority of Hindu females. In an age when legislation has been directed towards and is being called for to protect ignorant people against their own imprudent acts, I think we can well preserve the rules of Hindu sages and lawgivers who, recognizing the limitation of Hindu females and the temptations afforded by poverty, have secured to them protection against their own improvidence. It is difficult to see why a purchaser, who purchases without any necessity for the sale and who knows that death or remarriage would put an end to her rights, should be encouraged in any "reasonable expectation" that the widow would violate a clear moral duty for her benefit. Cases relating to agreements between the widow and the father or guardian of the adopted son or the adopted son himself if he is of age, whereby the rights of the adopted son are postponed or put an end to, have also no bearing on the question. Where an adopted son is a minor, the arrangement is supported on the ground that it was for his benefit and that but for the arrangement he would not have been adopted and so worse off. I doubt very much if Courts would uphold an agreement which is distinctly disadvantageous to the minor.

In cases where the adopted son is a major, he is competent to contract so as to divest himself of rights which accrue to him under Hindu law. As observed by Mayne in his work on Hindu Law, it would be cutting at the root of all well-recognized principles as to the status of an adopted son and the consequences of an adoption to hold that alienations without necessity would bind the adopted son during the widow's lifetime. I feel little hesitation in following *Ramakrishna* v. *Tripurabai* (3), and answering the question referred to us in the affirmative.

S.N./R.K. *Reference answered in the affirmative.*

A. I. R. 1918 Madras 481

ABDUR RAHIM AND NAPIER, JJ.

Venkataranga Josiar—Petitioner, In re.

Criminal Revn. No. 836 of 1916 and Criminal Revn. Petn. No. 680 of 1916, Decided on 12th April 1917, against decision of Sub-Divl. First Class Magistrate, Madura in Calendar Case No. 30 of 1916.

Criminal P. C. (5 of 1898), S. 403—Acquittal under S. 406, Penal Code, by 2nd Class Magistrate is no bar for fresh trial on same facts under S. 409 by First Class Magistrate—Penal Code (45 of 1860), Ss. 406 and 409.

The accused was charged under S. 406, I. P. C., and was tried and acquitted by a Magistrate with second class powers He was subsequently charged on the same facts under S. 409 and was brought before a Magistrate with first class powers to take his trial:

Held: that the subsequent charge being with relation to an offence which the first Magistrate could not try, vide S. 403 (4), Criminal P. C., the previous order of acquittal with respect to the minor offence for which the accused had already been tried was no bar to the subsequent proceedings. [P 482 C 1]

P. N. Krishnaswami Aiyar for *P. R. Narayanaswami Aiyar*—for Petitioner.

Public Prosecutor—for the Crown.

Order.—In this case the first point for consideration is whether the charge under S. 409, I. P. C., against the accused Venkataranga Josiar can be proceeded with inasmuch as he had been previously tried by a Magistrate with second class powers upon the same facts for an offence unde S. 406, I. P. C., and acquitted. We think S. 403, sub-S. 4, Criminal P. C., applies; it states that if a person has either been acquitted or convicted of an offence but the same facts disclose an offence which could not be tried by the first Magistrate, then the previous acquittal or conviction is no bar to further proceedings for a more serious offence. The words of the sub-section are:

"A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for any other offence constituted by the same acts which he may have committed if the Court by which he was first

tried, was not competent to try the offences with which he is subsequently charged."

Then Illus. (f) and (g) make it perfectly clear that if the subsequent charge is with relation to an offence which the first Magistrate could not try, then the previous order of acquittal or conviction with respect to the minor offence for which the accused has already been tried, is no bar to subsequent proceedings. In the exercise of our powers of revision and for other reasons we quash the proceedings.

S.N./R.K. *Petition allowed.*

A. I. R. 1918 Madras 482

AYLING AND SESHAGIRI, AIYAR JJ.

Ramanadhan Chetty —Plaintiff—Appellant.

v,

Katha Velan and *another*—Defendants—Respondents.

Letters Petent Appeals Nos. 35 and 36 of 1916, Decided on 11th September 1917, against judgment of Coutts-Trotter, J., D/- 20th December 1915, in Civil Revn. Petins Nos. 131 and 132 of 1915.

Negotiable Instruments Act (1881), S. 51—Promissory note executed in favour of trustee—Succeeding trustee can sue on note without assignment.

Section 57, Negotiable Instruments Act, contemplates that the legal representatives of a deceased person can negotiate a promissory note executed in favour of the latter. The Act does not abrogate rules of devolution of rights to the properties of a deceased person. [P 483 C 1]

A trustee can sue on a promissory note executed in favour of his predecessor-in-office without any assignment or devolution of the note. [P 483 C 2]

T. V. Gopalaswami Mudaliar—for Appellant.

S. R. Muthuswami Aiyar—for Respondents.

Order.—We must call for a finding as to whether at the time of the suit the right to collect moneys due to the trust had devolved solely on the plaintiff. Fresh evidence may be adduced, if desired. The finding will be submitted within two months from this date, and the parties will be at liberty to file objections to the said finding within seven days after notice of the return of the same shall have been posted up in this Court.

Finding.—By an order made in Letters Patent Appeals Nos. 35 and 36 of 1916, I was directed to take further evidence and remit a finding on the following question: Whether at the time of the suit the right to collect moneys due to the trust had devolved solely on the plaintiff. The plaintiff has examined three witnesses in this connection and on the other side defendant 1 has been examined. The oral evidence on behalf of the plaintiff is to the effect that sometime in 1913, defendant 2 handed over the management of the trust properties to the plaintiff. There is no positive evidence to contradict this nor do I see any reason to disbelieve the witnesses. I am also of opinion that the probabilities of the case favour this position. Ex. B is an award which decides that each trustee was to be in management for a period of five years. Exs. F 1 and G 1 are two promissory notes executed in favour of plaintiff in June 1914 in renewal of promissory notes executed previously in favour of defendant 2. There is also no explanation as to how the documents Ex. A in the present suit and Exs. F, G, H came into the possession of plaintiff, if the statement of the plaintiff's witness that it was on account of his succeeding the defendant 2 as managing trustee is to be rejected. On a consideration of the evidence in the case I find that at the date of these suits, the right to collect moneys due to the trust had devolved on the plaintiff.

Judgment.—We must accept the finding that the promissory note sued on was executed to Ulagappa Chettiar as trustee of the charity. The question whether the said payee could alone have maintained the suit without joining his co-trustees was not raised in the Court below. It would depend in each case upon the powers and duties of the managing trustee whether such a person is competent to represent the trust solely. That question has not been put in issue and we are not prepared to allow it to be debated now. Another question which was argued at some length need not be discussed now, namely, whether if there is as assignment of the note by the act of parties, it should not be only in the mode prescribed by the Negotiable Instruments Act. There is a considerable conflict of opinion on this question and it can only by settled by a reference to a Full Bench. The possibility of transfer of right in the note by operation of law has not been the subject of judicial pronouncements to any considerable extent. In this Presidency, apart from certain observations of

Miller, J., in *Sowcar Lodd Govinda Doss* v. *Lepali Muneppa Naidu* (1), the matter is res integra. The Negotiable Instruments Act only deals with transfers by negotiation. Under the English Bills of Exchange Act the Common law of the land is expressly saved (see S. 97). It is a pity that there is no such saving clause in the Indian Enactment. S. 57 of the Act, by implication, seems to contemplate that the legal representatives of a deceased person can negotiate promissory note. The practice of allowing legal representatives in this country to sue on notes executed to their predecessors is apparently founded on the principle that the Act does not abrogate rules of devolution of rights in the properties of the deceased. If a son, as legal representative, can sue on a note executed to his father, there could be no impediment in principle to other heirs or successors having a similar right. The case of trustees is, in some respects, stronger than that of other heirs. In the case of private trusts, S. 75, Act 2 of 1882 enacts that the property standing in the name of the predecessor shall vest in the successor. It is not necessary to obtain a transfer by an instrument or by endorsement. We fail to see why this principle should not be extended to public trusts. In Byles on Bills it is stated:

"The executor of a deceased party to a bill or note has, in general, the same rights and libilities as his testator." The executors of every person,"

says Lord Macclesfield,

"are implied in himslf and bound without naming" . , . On the death of the holder of a bill or note, his executors or administrators may endorse; and an endorsement by the executors or administrators is for ali purposes as effecutal as an endorsement by the deceased."

The cases quoted by the author in support of the above propositions show that the English Bills of Exchange Act does not affect the Common law right of devolution by operation of law. The same considerations are applieable to the construction of the Indian Enactment. In *Catherwood* v. *Chabaud* (2) it was held that a note given to an administrator as such can be sued on without assignment by an administiator de bonis non to the original estate. Bayley, J., points out that "the money recovered is applicable to the right fund, as assets of the first intestate." The case of a trustee replacing another stands on the same footing. Broadly speaking, trustees exercise rights and obligations as agents of the trust. The trust being the owner, succeeding trustees derive their rights and office by relation to the trust and not as the heirs of the last holder of that office. All of them form a chain of representatives in respect of the trust, as was once said by the Judicial Committee. In this view, each trustee by virtue of his appointment takes up the management of the trust properties at the place left by the previous trustee. It is not necessary that the authority or consent of such a person should be given to the successor. As pointed out by Miller, J., in *Sowcer Lodd Govinda Doss* v. *Lepati Muneppa Naidu* (1), the predecessor, being functus officio, would have no power to endorse the note given to him in a capacity which he was divested of. Consequently the present plaintiff who has replaced Ulagappa Chetty is entitled to sue on the note without any assignment or endorsement. We are therefore of opinion that the decision of the learned Judge must be reversed and that of the Court below must be restored. Appellant will get his costs from defendant 2 in this Court.

S.N./R.K. *Appeal allowed.*

1. (1908) 31 Mad 534.
2. (1823) 1 B & C 150.

A. I. R. 1918 Madras 483

WALLIS, C. J.

Bagiammal and *another*—Plaintiffs—Petitioners, In re.

Civil Misc. Petn. No. 334 of 1917, Decided on 7th Februry 1917.

Civil P. C. (1898), S. 24—Madras City Civil Court not competent to try Small Cause Suit—Chief Justice of High Court has power to transfer Small Cause Suit to City Civil Court not under S. 24 but only under Madras City Civil Court (1892), Ss. 3, 5.

Section 24 only authorises transfer to a Court competent to try the case. The Madras City Civil Court is not a Court competent to try a Small Cause Suit (vide S. 3, Madras City Civil Court Act) and S 24 (4), Civil P. C, does not make it so. It can become so only by an authorisation of the Chief Justice of the High Court under S. 5 (2), City Civil Court Act. [P 483 C 2]

N. Swaminatha Aiyar — for Petitioners.

Order.—Section 24, Civil P. C, only authorises transfer to a Court competent to try the case. The City Civil Court is not such a Court, S. 3, City Civil Court Act: and I do not think S. 24, Civil P. C., makes it so. It can only become so by the Chief Justice of the High Court authorising the City Civil Court Judge to try the case in his capacity of Small

Cause Court Judge under S. 5 (2), City Civil Court Act,

I so direct him.

S.N./R.K. *Suit set aside.*

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* A. I. R. 1918 Madras 484
Full Bench

WALLIS, C. J. AND AYLING AND KUMARASWAMI SASTRI, JJ.

Doraisami Aiyar and *others*—Plaintiffs—Appellants.

v.

T. Subramania Aiyar and *others*—Defendants—Respondents.

Second Appeal No. 100 of 1916, Decided on 26th October 1917, against decree of Temporary Sub-Judge, Tanjore, in A. S. No. 680 of 1914.

*** (a) Civil P. C. (1908), S. 11—Decree for past mesne profits does not bar suit for future mesne profits**—15 *M. L. J.* 462, *Overruled.*

By the Full Bench (Ayling, J., dissenting).—Where, in a suit for possession of property and mesne profits, past and future, a decree is passed for possession and past profits without the claim for future profits being decided, a second suit for recovery of mesne profits from the institution of the first suit till delivery of possession is not barred. 15 *M.L.J.* 462, **Overruled.** [P 486 C 1,2]

(b) Civil P. C. (1908), O. 20, R. 12—Claim for future mesne profits—Alteration in new code is not material—Civil P. C. (1882) Ss. 214 and 212.

Order 20, R. 12, does not make any material alteration in the nature of the claim as to future mesne profits from what was contained in Ss. 211 and 212 of the old Code of 1882. Under the new Code, as under the old, it is still a claim in respect of a cause of action that has not accrued at the date of suit and the plaintiff's omission to ask for that relief in his plaint will not bar a second suit for the same. [P 486 C 2]

(c) Civil P. C. (1908), S. 11, Expln. 5—Relief—Meaning of, stated.

Per *Wallis, C. J.*—The word 'relief' in Explanation 5, S. 11, means relief arising out of a cause of action which had accrued at the date of suit and on which the suit was bronght and does not include relief, such as mesne profits, accruing after the date of suit as to which no cause of action had then arisen. [P 486 C 1]

(d) Civil P. C., (1908), O. 20, R. 12—Change introduced in—Effect of, stated—Civil P. C. (1882), Ss. 211 and 212.

The change introduced by O. 20, R. 12, is that the award of mesne profits is to be in all cases by a preliminary decree, and that when ascertained, they are to be embodied in a final decree, whereas under Ss. 211 and 212 of the old Code of 1882, they were to be ascertained in execution. This change does not affect the construction of Expln. 5, S. 11, nor is it affected by the omission in S. 47 of the new Code of the proviso to the corresponding S. 244 of the old Code [P 486 C 1]

(e) Civil P. C. (1908), O. 20, R. 12 (c)—'May' should be construed as "shall."

Per *Kumaraswami Sastri, J.*—The words 'may pass a decree' in O. 20, R. 12 (c), show that the power of the Court is discretionary, though the word 'may' in the previous sub-Cls. (a) and (b) should be construed as meaning 'shall.' [P 487 C 1]

Wheh different claims are dealt with in one rule under one of the subsections, the fact that the word 'may' should be construed as 'shall' in one of the sub-Ss. owing to the nature of the claim which it deals with, does not necessarily mean that the word cannot be construed in its ordinary sense as regards otber clauses. [P 487 C 1]

C. V. Ananthakrishna Aiyar—for Appellants.

S. T. Srinivasagopalachari—for Respondents.

Order of Reference.

Sadasiva Aiyar and Spencer, JJ.—This is a suit for mesne profits. The plaintiffs brought a previous suit (Original Suit No. 288 of 1909) for partition of family property, including a prayer for mesne profits. They obtained a decree directing a division to be made into five equal shares and awarding Rs. 108 for past mesne profits. The judgment was silent on the subject of future mesne profits. In the present suit the District Munsif gave the plaintiffs a decree for the recovery of Rs. 254-8 0 mesne profits accruing after the institution of Original Suit No. 288 of 1908, but on appeal the Subordinate Judge dismissed the suit with the remark that although his decision might seem hard, he was bound by the ruling in *Ramasami Iyer* v. *Srirangaraja Iyengar* (1) to hold that no separate suit could be brougha for mesne profits claimed in a previous suit, as the matter was res judicata by reason of the former decision.

Under the Code of 1882 it well settled by a Full Bench decision of this Court, *Kuppusawmy Aiyar* v. *Venkatarmaier* (2), that such a suit would lie. The same principle was upheld in Calcutta in *Mon Mohun Sirkar* v. *Secy. of State* (3): see the observations of Ameer Ali, J., at pp. 970 and 971 on the discretionary form of S. 211 Civil P. C., (1882). It was also decided by another Full Bench that claims for possession and claims for mesne profits form separate causes of action under the old Code and under the new Code: vide *Ponnammal* v. *Ramamirda Aiyar* (4).

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1. (1915) 26 I C 622.
2. (1905) 15 M L J 462.
3. (1890) 17 Cal. 968.
4. (1915) 38 Mad 829=27 I C 679.

The learned Judges who decided *Ramasami Iyer* v. *Srirangaraja Aiyengar* (1) base their opinion on the change of language in the Code of 1908. They say that in this Code, S. 211 of the Code of 1882 disappears altogether, and as O. 20, R. 12, now reads, it is made equally a matter of discretion with Courts to direct an inquiry into future mesne profits as it is to pass a decree for possession or for future mesne profits. With due respect to those learned Judges, we are unable to see that there has been any substautial change of language. S. 211 has not disappeared, but combined with S. 212 it has been recast in O. 20, R. 12. S. 211 declared "the Court may provide in the decree" for the payment of future mesne profits. O. 20, R. 12 (1) (c), declares that "the Court may pass a decree . . . . . directing an inquiry as to rent or" future mesne profits. S. 212 permitted the Court either to determine the amount of past mesne profits by the decree itself or to pass a decree for the property and direct an inquiry into the amount of mesne profits. O. 20, R. 12 (a) and (b), is to the same effect. The only essential in procedure is that under the new Code mesne profits are not left to be to be determined in execution. A more important change, and one to which the judgment in *Ramasami Iyer* v. *Srirangaraja Iyengar* (1) contains no allusion, is the omission of the proviso to S. 244 from S. 47 of the new Code. This ran as follows:

"Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between tne institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree."

It may be that these words were omitted because they were considered superfluous. Similarly a provision that a claim for the recovery of land and a claim for mesne profits from such land should be deemed to be distinct causes of action, found place in the Code of 1859 but dropped out of the Code of 1882 for the reason that it became superfluous, as explained in *Ponnamal* v. *Ramamirda Aiyar* (4), but this did not prevent the Court from arriving at a conclusion that such claims constitute separate causes of action in the present state of the law. The use of the word 'may' in O. 20, R, 12, like the same word in the old S. 211, seems to indicate that it is discretionary with the Court to award future mesne profits. The plaintiff could not insist on them being granted to him, because at the date of the first suit the cause of action for mesne profits is not completed. In this connexion the use of the word 'shall' in O. 20, R. 16, which deals with suits for accounts may be compared with the use of the word 'may' in O. 20, R. 12. As regards the question of res judicata, S. 11, Expl. 5, declares that any relief claimed in the plaiut, which is not expressly granted by the decree, shall be for the purposes of this section, deemed to have been refused. But if mesne profits were claimed in the first suit and through mistake or oversight they were neither granted nor refused, the section will not prevent a second suit being instituted for their recovery, when the relief claimed in the plaint is a relief which the Court was not bound to grant if the defence failed. This is made clear in *Kuppusawmy Aiyar* v. *Venkataramier* (2). The case in *Ramasami Iyer* v. *Srirangaraja Iyengar* (1) has since been followed in Civil Revn. Petn. No. 858 of 1913 (unreported), but one of the two learned Judges who decided it was a party 1 1/2 months later to *Thavasi* v. *Arumugam* (5), which followed *Kuppusawmy Aiyar* v. *Venkataramier* (2) without referring to the more recent decision under the Code of 1908. The other learned Judge was a party to the Full Bench in *Ponnammal* v. *Ramamirda Aiyar* (4), which proceeds on considerations not easily reconcilable with those upon which *Ramasami Iyer* v. *Srirangaraja Iyengar* (1) was decided.

We are inclined to the opinion that *Ramasami Iyer* v. *Srirangaraja Iyengar* (1) was wrongly decided and requires reconsideration and as the question involved is of considerable importance and of frequent occurrence, we refer to the decision of a Full Bench the question whether, after a suit for possession of lands and mesne profits, past and future, has been brought and decided and a decree has been obtained for possession and past mesne profits, without the claim to future mesne profits being decided, a second suit will lie to recover mesne profits from the institution of the first suit till delivery of possession.

This second appeal coming on for hearing before this Full Bench on 10th October 1917, in pursuance of the above Order

5. (1915) 28 I C 1.

of Reference, upon perusing the said Order of Reference and the records in the case and upon hearing the arguments of counsel on both sides and having stood over for consideration till this day, the Court expressed the following

Opinion

Wallis, C. J.—I agree with the refering Judges. Expln. 5, S. 11 of the present Civil P. C., is in exactly the same terms as the corresponding Expln. 3, S. 13, in the Code of 1882. Under the Code of 1882 it was held by a Full Bench of this Court, in *Kuppusawmy Aiyar* v. *Venkataramier* (2), in conformity with the decisions of other High Courts, that the word "relief" in the explanation means relief arising out of the cause of action which had accrued at the date of suit and on which the suit was brought, and did not include relief such as mesne profits accruing after the date of suit as to which no cause of action had then arisen, but which the Court was nevertheless expressly empowered to grant. Tha explanation having been reproduced in exactly the same words, tht presumption is that it was intended to have precisely the same effect. I do not find any sufficient indication to rebut this presumption in the fact that Ss. 211 and 212 of the old Code were amalgamated to form O. 20, R. 12. The change introduced by the new rule is that the award of mesne profits in all cases is to be by preliminary decree, and that when ascertained they are to be embodied in final decree, whereas under Ss. 211 and 212 they were to be ascertained in execution. This change does not appear to me to affect the construction of Expln. 5, S. 11, nor do I think it is affected by the omission in S. 47 of the new Code of the proviso to the corresponding S. 244 of the old Code. I answer the question in the affirmative.

Ayling, J.—I agree that I am unable to concur. The point referred is identical with that considered by Hannay, J., and myself in *Ramasami Iyer* v. *Srirangaraja Iyengar* (1) and with all respect after hearing it re-argued I remain of the same opinion. I would answer the question in the negative.

Kumaraswami Sastri, J.—The question referred to us for decision is

"whether, after a suit for possession for lands and mesne profits, past and future, has been brought and decided and a decree has been obtained for possession and past mesne profits, without the claim to future mesne profits being decided, a second suit will lie to recover mesne profits from the institution of the first suit till delivery of possession."

I agree with the Chief Justice, whose judgment I have had the advantage of perusing, and with Sadasiva Aiyar and Spencer, JJ., the referring Judges, that the question should be answered in the affirmative, As there has been no adjudication as to future mesne profits, the second suit can only be barred if it can be brought under Expln. 5, S. 11, Civil P.C., 1908. It is now well settled that the word "relief" in Expln. 5 means a relief which the plaintiff can claim as a matter of right in respect of a cause of action which has accrued to him at the date of suit and that relief in respect of future mesne profits is not claimable as a matter of right, no cause of action accruing to the plaintiff at the date of suit in respect of the future injury he might suffer if the defendant continues to be in wrongful possession in spite of the suit, and that Expln. 3, S. 13 of the Code of 1882 which is the same as Expln 5, S. 11 of the Code of 1908 will not bar a second suit. *Man Mohun Sirkar* v. *Secy. of State* (3), *Jiban Das Oswal* v. *Durga Pershad Adhikari* (6), *Bhivrav* v. *Sitaram* (7), *Ram Dayal* v. *Madan Mohan Lal* (8), *Kuppusawmy Aiyar* v. *Venkatramier* (2). There is nothing in the present Code that alters the nature of the claim for future mesne profits. It is still a claim in respect of a cause of action that has not accrued to the plaintiff at the date of suit and it cannot be contended after the recent decision of the Full Bench in *Ponnammal* v. *Ramamirda Aiyar* (4) that if the plaintiff had omitted to ask for th e reiief in his plaint, a separate suit would be barred. The main contention for the respondents is that O. 20, R. 12, has now rendered it obligatory on the Court to pass a decree as to mesne profits from date of suit to date of delivery of possession if the plaintiff makes out a claim for such relief and that consequently the decisions under the Code of 1882 have no application.

I do not think that the Code of 1908 which enacts as O. 20 ,R. 12, what was contained in Ss. 211 and 212 of the Code of 1882, has made any material alteration in the nature of the claim as to future mesne profits. R. 12 provides that the

6. (1894) 21 Cal 252.
7. (1895) 19 Bom 532.
8. (1899) 21 All 425.

Court may pass (1) a decree for possession of the property, (2) a decree for rent or mesne profits up to suit or direct an inquiry as to the same and may (3) direct an inquiry as to future mesne profits. It provides for a final decree being passed after the inquiry directed is made and the liability ascertained. So far as Cl. (c), R. 12 is concerned, the power of the Court is still discretionary, as all the order does is to provide that the Court may pass a decree directing an inquiry as to rent or mesne profits from the institution of the suit till the period provided for by Cls. (i), (ii) and (iii). It has been argued that even as regards Cls. (a) and (b) the word used is "may" and not "shall," though the Court is bound to pass a decree in terms of Cls (a) and (b) if plaintiff's claim is established S. 212 of the old Code provides that the Court may either determine the amount by the decree itself or may pass a decree for the property and direct an inquiry into mesne profits and dispose of the same on further orders, and the legislature in including in one section what was embodied in two by using the word "may," which occurred in both the sections, cannot be said to have introduced any new principle as regards future mesne profits. When different claims are dealt with in one rule under various sub-sections the fact that the word "may" should be construed as "shall" in respect of one of the subsections owing to the nature of the claim which it deals with does not necessarily mean that the word cannot be construed in its ordinary sense as regards other clauses. With all respect I am unable to agree with the decision in *Ramasami Iyer* v. *Srirangaraja Iyengar* (1) that the grouping in one section of past and future mesne profits affect the nature of future mesne profits so as to attract to it the provisions of Expln. 5, S. 11. The omission of the proviso to S. 244 in S. 47 of the Code of 1908 is due to the fact that under the Code of 1908 the determination of questions as to mesne profits was to be in the suit itself and not subsequent to decree in execution proceedings. Under the scheme of the present Code there is no necessity for any such proviso to S. 47, which corresponds to S. 244 of the old Code.

There being, in my opinion, no material difference between S. 211 of the old Code and R. 12, Cl. (c), O. 20 of the present Code, there is no reason for departing from the decisions of this and the other High Courts as to the second suit not being barred by Expln. 5, S. 11 of the Code.

S.N./R.K. *Reference answered in the affirmative.*

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SPENCER AND KRISHNAN, JJ.

(*Manugarra*) *Satyalakshmi Narayana* and *another*—Plaintiffs—Appellants.

v.

(*Manugarra*) *Jagannadham* and *others*—Defendants—Respondents.

Second Appeal No. 2169 of 1915, Decided on 4th September 1917, against decree of Temporary Sub-Judge, Bezwada, in A. S. No. 94 of 1910.

(a) Hindu Law — Widow — Surrender—Scope of transaction stated.

A surrender of her life-estate by a Hindu widow in favour of a reversioner of her husband is not a conveyance of any rights by the widow but only an extinguishment of her rights, so that the rights of the reversioner under Hindu law vest at once on surrender. The reversioner's rights arise by the operation of the Hindu law, the surrender by the widow being tantamount to her civil death. [P 489 C 1]

(b) Hindu Law—Widow—Surrender—Conditions of validity stated.

The surrender, to be valid, must be of the entire interest of the female holder who surrenders and must be to the next reversioner and with the consent of the intervening life-holders, if any. [P 488 C 2]

The rule that the widow should surrender the whole estate means that she should surrender all her rights at the time of the surrender, reserving nothing for herself. [P 488 C 2]

(c) Registration Act (1908), S. 17 (b)—Surrender by widow need not be in writing but if in writing must be registered.

There is no rule of law requiring a registered instrument for the extinction of a widow's rights, though if there is an instrument in writing, it must be registered: 34 *I. C.* 748 *Dist.* [P 489 C 1]

(d) Limitation Act (9 of 1908), Art. 44—Suit to set aside alienation by releasee's guardian is governed by Art. 44.

A suit to set aside an alienation of the properties surrendered by the releasee's guardian is governed by Art. 44. [P 489 C 1, 2]

K. V. L. Narasimham and *K. P. Shunmughum Pillai*—for Appellants.

B. Narasimha Rao, T. Prakasam and *G. Venkataramiah*—for Respondents.

Krishnan, J.—Plaintiffs-appellants sued to recover 9 items of property as the reversionary heirs of their maternal grandfather, one Avadhanulu, the original owner, on the death of the last life-estate holder Venkamma in September 1902. Avadhanulu died long ago leaving a widow

and two daughters Buchamma, plaintiff's mother, and Venkamma, her sister. The widow who had the first life-estate died in 1887. The properties had all been alienated after the death of the widow and during the life-time of the daughters by defendant 1, the father of the plaintiffs, who acted as their guardian in doing so. Plaintiffs claimed that as these alienations were made before the properties had become theirs and were without necessity and authority, they were not binding on them. Defendants other than the first pleaded that the widow had with the consent of her two daughters surrendered the whole of her estate in favour of plaintiff 1 and that the alienations by the father subsequently were partly for necessary purposes and partly for the benefit of the minors and were binding on them and that their suit was barred by limitation under Art. 44, Sch. 1, Limitation Act. One of the alienations was a gift, and the donee pleaded that the property had already been gifted to her by Avadhanulu himself and that the deed of gift executed by defendant 1 as guardian was only in recognition of the previous gift. The lower Courts found all the allegations of these defendants proved except that the Subordinate Judge has not given a finding on the previous gift alleged: and they dismissed the suit.

Plaintiffs appealed to us and contended first that the finding in favour of the surrender was not correct, because there was no surrender in fact and if there was, it was not valid in law. The surrender of the widow with the consent of the daughters is found as a fact by the lower Court on the evidence in the case and we must accept it in second appeal. Though it is true that there is no direct proof of any act of the widow from which the surrender could be inferred, there is other evidence for it and it is not possible to say that the finding is based on no legal evidence. The validity of the surrender is attacked on two grounds, viz., (1) that the surrender was not of the whole estate and was not in favour of the nearest reversioner and (2) that it could only be made by a registered instrument and there was no such instrument in the present case. The conditions required for a valid surrender have been stated recently by this Court on a consideration of the various authorities on this point in the case of *Mulugu Kotayya* v. *Mudigonda Chandramowli Sastri* (1). According to that case the surrender must be of the entire interest of the female holder, who surrenders, and must be to the next reversioner, but it recognizes that with the consent of the intervening life-estate holder, if any, the surrender may be to the next reversioner. The surrender may then be looked upon as a joint surrender by the widow and the other females. In this case the finding is that the daughters consented to the surrender. There is no reason therefore to invalidate the surrender to plaintiff 1 on the ground that her mother and her sister had a right to a life-estate after the widow's death and before her reversion fell in.

In 1879 the widow had executed a deed of gift Ex. 2 (a), by which she gave two items from her husband's estate to her daughter Venkamma to be enjoyed by her for her life-time in consideration of her past and future protection of her mother. It was argued that as the widow had parted with a fraction of her inheritance before the surrender, the surrender not being of the whole estate was invalid. The rule that the widow should surrender the whole estate means that she should reserve nothing for herself. She should surrender all her rights at the time of the surrender and that was done in this case. It is not necessary to consider the effect of the surrender on Ex. 2 (a); it may cease to have effect as a gift any longer. But suppose the widow had made a sale of a part of the estate for a purpose binding on the reversioners, that will not be a reason why she should not validly surrender the whole of the remaining estate. In the case of *Ram Naresh Lal* v. *Sadhu Saram Lal* (2) a portion of the estate was given to certain parties and the balance was surrendered by the widow to the next reversioners and that surrender was upheld. The surrender in the present case therefore cannot be invalidated on this ground either.

The last objection taken was that the surrender required a registered instrument to effect it, as it was a transfer of immovable property, viz., the widow's life-estate and that in the present case it was of a value of over Rs. 100. Reliance

1. (1916) 36 I C 407.
2. (1915) 28 I C 585.

was placed for this argument on the case of *Betireddi Somireddi* v. *Betireddi Tatayya* (3). The appellants' argument is that the surrender was in effect a sale of property under S. 54, T. P. Act or a gift under S. 122. It seems to me that this argument ignores the nature of surrender altogether. A surrender is not a conveyance of any rights by the widow to a reversioner but only an extinguishment of her rights so that the rights of the reversioner under the Hindu Law vest at once. The position is well explained in the judgment of Srinivasa Aiyangar, J., in the case already quoted as *Mulugu Kotayya* v. *Mudigonda Chandramowli Sastri* (1). The reversioner gets the estate in his own right and not because anything is conveyed to him by the widow, her surrender being tantamount to her civil death. His rights arise by the operation of the Hindu Law. No rule of law is pointed out which requires a registered instrument for the extinction of the widow's rights. If there is a written instrument, it will no doubt require to be registered under S. 17, Cl. (b), Registration Act. But where there is none, the surrender does not seem to become invalid thereby. In the case cited as *Betireddi Somireddi* v. *Betireddi Tatayya* (3) their Lordships found that the transaction there amounted to a transfer of the widow's estate for a price paid of over Rs. 100, and obviously that required a registered instrument as for a sale. The present is not a case of that nature.but one of pure surrender or extinguishment of rights.

The surrender being upheld it followed that, when defendant 1 as guardian of plaintiffs purported to alienate the properties in suit, they belonged to plaintiff 1. Defendant 1 as the father of the plaintiffs was their proper guardian during their minority. The plaintiffs are, therefore, not entitled to succeed without setting aside the alienations by him and following the ruling of this Court in *Ranga Reddi* v. *Narayana Reddi* (4) and *Madugula Latchiah* v. *Pally Mukkalinga* (5), their suit must be held to be barred under Art. 44, Limitation Act. Plaintiffs' suit also fails on the ground that the sales were for necessary purposes and for their benefit. This finding has not been contested before us. As regards the alienation under Ex. 4 it was found by the Munsif that it was only a recognition of the gift by Avadhanulu himself and that it was not open to plaintiffs to dispute it. It is true the Subordinate Judge has not given a finding on this point, but it is unnecessary to call for one as the suit fails on the ground of limitation as well. A somewhat different question was argued before us that even if the surrender was not established and in consequence plaintiffs had no title to the properties at the time of their alienation, nevertheless the sales would take effect when the reversion fell in and the plaintiffs got title, on the principle embodied in S. 43, T. P. Act. There seems to be considerable difficulty in applying that principle to the case by reason of the prohibition contained in S. 6 (A) of that Act against the transfer of mere expectencies, but in the view taken above it is unnecessary to decide the point. The second appeal fails and is dismissed with costs.

Spencer, J.—I concur.

S.N./R.K. *Appeal dismissed.*

3. (1916) 34 I C 748.
4. (1905) 28 Mad 423.
5. (1907) 30 Mad 393.

A. I. R. 1918 Madras 489

WHITE, C. J AND SANKARAN NAIR, J.

K. Hajee Abdul Lateef and *another*—Plaintiffs—Appellants.

v.

Official Assignee of Madras—Defendant—Respondent.

Original Side Appeal No. 4 of 1912, Decided on 15th November 1912, from judgment of Wallis, J., in Civil Suit No. 206 of 1911.

Presidency Towns Insolvency Act (1909), S. 7—Order under S. 7—Appeal lies—Suit is barred.

No suit lies to set aside an order passed under S. 7. The proper remedy for the party aggrieved is to appeal against the order. [P 490 C 1]

A. Krishnasami Ayyar for *C. P. Ramasami Aiyar*—for Appellants.

M. D. Devadoss and *M. K. Ramasami Ayyar*—for Respondent.

Judgment.—The appellants made an application in the insolvency of A. S. Mahomad Oosman Sahib and Co. and asked for a declaration that certain goods which had been seized by the Official Assignee after adjudication were their property and not the property of the insolvents. This application was dismissed on the merits. The appellant then brought a suit against the Official Assignee for the

declaration which he had asked for in his application in the insolvency. No authority has been cited in support of the contention that such a suit will lie. In our opinion it will not.

We see no reason for interfering with Wallis, J.'s order refusing leave to amend the plaint. The appeal is dismissed with taxed costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 490

ABDUR RAHIM AND PHILLIPS, JJ.

T. P. Govindan Nair—Plaintiff—Appellant.

v.

K. Cheruvanna and *others*—Defendants—Respondents.

Second Appeal No. 543 of 1916, Decided on 5th October 1917.

Transfer of Property Act (1882), Ss. 83 and 84—Deposit and notice together constitute valid tender—Deposit of mortgage money by melcharth holder—He is entitled to benefit of Ss. 83 and 84.

Under Ss. 83 and 84 a martgagor depositing money in Court is entitled to cessation of interest from the date of notice of the deposit to the mortgagee. The deposit and notice together constitute a valid tender in law. [P 490 C 2]

A melcharth holder is entitled to the benefit of the sections on his depositing the money due to the kanomdar in Court. [P 490 C 2]

C. V. Ananthakrishna Aiyar — for Appellant.

K. P. M. Menon—for Respondents.

Judgment.—The appellant had a melcharth executed to him in 1914 and on the basis of that melcharth he was entitled to redeem a mortgage in favour of the defendants. It appears that he paid the amount due, viz., Rs. 1,000 into Court and notice was sent to the respondents that the money was available to to them in satisfaction of their mortgage. The defendants refused to accept the money and the money remained in deposit in Court. Then the plaintiff had to institute a suit to recover possession of the property. The defendants defended the suit; which was dismissed by the First Court but in appeal the decree of the District Munsif was set aside. The question we have got to decide in the second appeal is, whether interest on the amount in lieu of which the respondents were entitled to enjoy the usufruct of the property ceased to run from the date the money was deposited and notice sent to the mortgagees. In the recent Full Bench decision of this Court in *Thevaraya Reddy* v. *Venkatachala Pandithan* (1) is has been held that a deposit, in order to be effective within the meaning of S. 84, T. P. Act, must continue to be in Court in order that the requirement of the section, that the mortgagor in depositing the money should do all that is necessary to enable the mortgagee to withdraw the money, may be satisfied. In that case, the Full Bench had to consider the decision of a Division Bench of this Court in *Krishnaswami Chettiyar* v. *Thippa Ramaswami Chettyar* (2). Though the ruling in the latter case was upheld so far as it laid down the general proposition that the deposit, in order to be effective within the meaning of the law, must continue to be in Court for such time as is necessary to enable the mortgagee to withdraw the money, on the question however, whether on the facts of the case in *Krishnaswami Chettyar* v. *Thippa Ramaswami Chettyar* (2) there was a valid tender within the meaning of S. 84, T. P. Act, my learned brother expressed the opinion that there would be a valid tender within the meaning of the law.

I also made a suggestion to the same effect. However that may be, we have to see upon the facts of this particular case, apart from any question of deposit, whether there was not a valid tender which the respondents refused. Notice was given to the respondents, and the mere fact that notice was given by Court and that deposit had been made, could not make it any the less a valid tender. It might be something more than a tender; but it was a tender nonetheless. There was no question here of any difficulty as to the title of the mortgagees, and the tender was therefore made to the right persons. That being so, we think the terms of S. 84 were satisfied. We reverse the judgment of the Subordinate Judge on this point. The decree will have to be modified by awarding mesne profits from April 1914 till the respondents surrender possession of the property. Both parties are agreed that mesne profits should be calculated at 130 paras of paddy a year, which is the rate admitted by the respondents. Six months' time will be allowed for redemption of the property. The parties will pay and receive proportionate costs.

S.N./R.K. *Decree modified.*

1. (1917) 40 Mad 804=37 I C 444.
2. (1912) 35 Mad 44=8 I C 763.

* A. I. R. 1918 Madras 491

SESHAGIRI AIYAR AND NAPIER, JJ.

Paramasiva Udayan — Plaintiff — Appellant.

v.

Krishna Padayachi and *another*—Defendants—Respondents.

Second Appeal No 262 of 1916, Decided on 21st November 1917, against decree of Dist. Judge, Trichinopoly, in Appeal Suit No. 101 of 1915.

*** Transfer of property Act (4 of 1882), S. 59—Mortgage-deed—Scribe can be attesting witness—Attestation, explained.**

A scribe of a mortgage-deed can also be an attesting witness and can be called to prove its execution if he wituessed it.

It is a question for the trial Court in each case whether a scribe was intended to witness the execution of a document. The mere fact that he signs the document as its writer is not proof that he was not an attesting witness as well. The essence of attestation is that the person must have seen the document executed. The question is one of qualification and not of the use of any set phraseology. 5 *C. W. N.* 454, *Dist* [P 491 C 2]

T. V. Muthukrishna Aiyar—for Appellant.

M. D. Devadoss—for Respondents.

Judgment.—In this case the deed of mortgage sued on was attested by two witnesses and was signed by the scribe as the writer thereof. One of the attesting witnesses is dead and the plaintiff has not taken steps to examine the other witness who is said to be still alive. He has however examined the writer of the document who deposed that he saw it executed. The Courts below have held that this proof is not sufficient and dismissed the suit. We are unable to agree with them. The fact that a person calls himself a scribe is not proof that he was not an attesting witness as well. It may be that the writer left the place immediately after he had written the document and before it was signed by the executant. In such a case, he cannot be regarded as an attesting witness. The essence of attestation is that the person must have seen the document executed. The question is one of qualification, but not of the use of any set phraseology. There is plenty of authority for the proposition that a scribe can also be an attesting witness. *Veerappudayan* v. *Muthu Karuppa Thevan* (1) was relied on by the appellant. That decision lays down that the fact that a scribe wrote the endorsement after the document was executed and attested, was some evidence in favour of regarding him as an attesting witness. This was followed by a Bench in which one of us sat in *Ayyasami Iyengar* v. *Kylasam Pillai* (2). It would greatly depend upon the facts of each case whether a scribe is also an attesting witness. As pointed out in *Ranu* v. *Laxmanrao* (3), the time and place of the scribe's endorsement may show that he did not witness the execution.

Under such circumstances, to examine him as an attesting witness may give some room to purjured evidence being let in. As regards *Radri Prasad* v. *Abdul Karim* (4) relied on by the learned vakil for the respondent, there can be no doubt that the decision was right on the facts found. The scribe signed his memorandum before the document was executed. If that decision lays down that under no circumstances can a scribe be an attesting witness, we are unable to agree with it. Chamier J., who was a party to this judgment, took part in the decision reported as *Ram Bahadur Singh* v. *Ajodhya Singh* (5) Chief Justice of the Patna High Court. In this case the learned Judge expresses himself more uncompromisingly than in the Allahabad judgment. Jwala Prasad J. while concurring with the Chief Justice on the facts of the case, points out that a scribe is not necessarily debarred from being an attestator. In *Raj Narain Ghosh* v. *Abdur Rahim* (6) the same view was taken of the position of a scribe. We do not think *Shamu Patter Abdul Kadir Rowthan* (7) is opposed to this view. In this country less attention should be paid to the name by which a person chooses to style himself than to the character he fills. It will be a question in each case, whether a scribe was intended to witness the execution of a document. That is a matter for the trial Court. We must, therefore, hold that the a fortiori conclusion come to by the Courts below that because a person called himself a scribe he was incapable of being regarded as an attesting witness, is not a proposition which we can accept. We must, therefore, reverse the decrees of the Courts below and remand the case for trial to the Court of first instance in

1. (1913) 19 I C 589.
2. (1915) 26 I C 409.
3. (1909) 33 Bom 44=1 I C 464.
4. (1913) 35 All 254=19 I C 451.
5. (1916) 34 I C 370.
6. (1901) 5 C W N 454.
7. (1912) 35 Mad 607=16 I C 250=39 I A 218 (P C).

the light of the above observations. Further evidence may be taken. Costs will abide the result.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 492

AYLING AND NAPIER, JJ.

Sathula Venkanna—Defendant — Appellant.

v.

Namuduri Venkatakrishnayya and *another*—Plaintiffs—Respondents.

Second Appeal No. 842 of 1915, Decided on 6th February 1917, against decree of Sub-Judge., Cocanada, in A. S. No. 82 of 1914.

(a) **Limitation Act (9 of 1908), Art. 113—Right to enforce specific performance of contract vesting in third party—Doctrine of certum est quod certum reddi potest does not apply.**

In cases where a right to enforce specific performance vests in a third party to whom the ascertainment of the date on which performance becomes due need not necessarily be known, the doctrine certum est quod certum reddi potest has no application. [P 493 C 2]

(b) **Limitation Act (9 of 1908),—Interpretation—Act should be liberally construed in favour of person whose right is sought to be barred.**

The Limitation Act operates as a bar to legally enforceable claims and it should, therefore, be construed as much as possible in favour of the person whose right is sought to be barred. [P 493 C 2]

(c) **Limitation Act (9 of 1908), Art. 113—Suit for specific performance of contract to transfer decree on payment of decretal amount—Limitation commences from date of refusal.**

A agreed with *B* to transfer to *C* a certain decree in *A*'s favour, on condition that *B* paid to *A* the amount due under the decree within six months. *B* paid the sum three days after the lapse of six months. In a suit by *C* against *A* to enforce specific performance of the contract to transfer the decree instituted beyond three years from the date fixed for payment of the amount by *C* but within three years from the date when performance was refused:

Held: that the case fell within the second clause of Art. 113, Sch. 1, Lim. Act and having been brought within three years from the date of refusal of specific performance, it was not barred by time. [P 494 C 1]

G. Venkataramiah for *V. Ramesam*—for Appellant.

M. Patanjali Sastri for *P. Narayanamurthi*—for Respondents.

Judgment.—This appeal arises out of a suit instituted by the plaintiff to compel defendant 1 to execute a duly registered transfer in respect of a decree in a suit, Original Suit No. 364 of 1904. Defendant 1 was the holder of this decree and he had by an agreement, Ex. F, made with one Jayanti Venkayya, (defendant 2) agreed that on Jayanti Venkayya paying to him the amount of that decree he would transfer the decree to the plaintiff. The particular clauses of that agreement which are important are to the following effect: (1) the amount was to be paid within six months; (2) the transfer in favour of the present plaintiff was to be made as soon as the amount in respect of the razinamah was paid.

It is to enforce this latter clause that the suit is brought. No point has been taken that it was not open to the plaintiff, not a party to the contract, to bring a suit for specific performance; so we must deal with it as if that right did vest in him. The lower appellate Court has held that the suit is primarily barred under Art. 113, Lim. Act, but that the circumstances under which defendant 1 received the money from defendant 2 constituted him a trustee for the plaintiff within the meaning of S. 10, Lim. Act, and it, therefore, held that the suit was not barred. Before us this contention was not relied on by the respondent and we think rightly, for it would be quite impossible to bring this case within the language of that section. But it has been urged by the respondent that the contract does not contain the date fixed for the performance and that the second clause "when the plaintiff has notice that performance is refused" is the starting point for limitation and that, therefore, the suit is not barred. For the appellant it is contended that the date is fixed for the performance and the suit is out of time. Admittedly of course no specific date was fixed; and the question that remains is whether it is possible in these circumstances to apply the doctrine certum est quod certum reddi potest, so as to bring the case within the Article. A very careful argument has been addressed to us by both sides. We have been strongly pressed with the decisions of the Privy Council in *Juggomohun Ghose* v. *Manickchund* (1) and of the Court of Queen's Bench in *Merchant Shipping Co.* v. *Armitage* (2) and *London Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (3). These decisions turned on the construction of the Interest Act which is as follows:

1. (1857-59) 7 M I A 263=4 W R 8 (P C).
2. (1874) 9 Q B 99=43 L J Q B 24.
3. (1893) A C 429=63 L J Ch 93.

"that upon all debts or sums certain payable at a certain time the jury on the trial of any issue may allow interest."

There is no doubt that the Privy Council in dealing with this clause has given a very restricted meaning to it, and their Lordships gave their reasons for so deciding at great length. They point out that the sum may never be due and that even if due, it is uncertain in amount at the time of the contract and it necessarily follows of course that the amount which will be payable for interest will be equally uncertain. They also point out that this provision is an alteration of the Common law and is in its nature penal and for these reasons, they construed the Act strictly.

The case of *Merchant Shipping Co.* v. *Armitage* (2) was argued before the Exchequer Chamber and the decision that there was no principal sum payable at a time certain on which interest could run was given by the Court after the decision on the main question in respect of which the case is really reported. No reasons are given by the learned Judges for that decision. It appears that about the same time the opposite view was taken by the Court of Queen's Bench in a case reported as *Duncomle* v. *Brighton Club and Norfolk Hotel Co.* (4). Their Lordships did not consider the policy of the Act but confined themselves to applying the doctrine of certum est in its entirety. They quote and follow the language of Lord Kenyon in an old case which language is reproduced as being a correct exposition of the doctrine in Broom's Legal Maxims vide p, 479. That language certainly is in the widest terms, for it applies the maxim whether the time can be ascertained by any process of computation at the time the contract is made or whether it cannot. I will quote a few words:

"That certainty need not be ascertained at the time; for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. As, if a lease be granted for 21 years, after three lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty and in certum est quod certum reddi potest."

We have, therefore, a clear conflict on the language of the Interest Act. Now we have not to decide this question on the construction of that Act, and we must bear in mind the essential difference between the Interest Act and the Limitation Act. As pointed out in the Privy Council case, the Interest Act is penal and imposes a higher liability than was known to common law. It should, therefore, be construed strictly. On the other hand, the Limitation Act is one which operates as a bar to a claim which is legally enforceable, and it should, therefore, be construed as much as possible in favour of the person whose right is sought to be barred. There are indications that the Courts of this country have been inclined to give a liberal application to the language in Art. 113. The case in *Muhi-un-din Ahmad Khan* v. *Majlis Rai* (5) is one case. The decision of Boddam J. in *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabhadrudu* (6) is another. We do not think it necessary, however, to express a final opinion on this point because in this case there is an element which seems to us to render the doctrine inapplicable. It may be that it is right to apply the doctrine fully between the actual parties to the contract who would get the benefit and be subject to the liabilities under the contract and to whom, therefore, the payment of the meney would be on a certain date, some time or other to their knowledge.

But in cases where a person is entitled to bring a suit on the contract who may not and need not, and very likely may not be aware of the date becoming fixed, we cannot think that the doctrine will apply. Taking this case for instance, defendant 2 was bound to pay the amount within six months to defendant 1, and on the date of that payment defendant 1 was bound to transfer the property to the plaintiff. He might have paid it within two days; and the plaintiff need not have known anything about it. He might have paid it, as in fact he did, three days after the due date and the plaintiff might not have known anything about it. He might not have paid it till years after the due date and defendant 1 might have accepted payment and the plaintiff might not have known anything about it. It seems to us, therefore, that in cases where a right to enforce specific performance vests in a third party to whom the ascertainment of the date need not necessarily be known, the doctrine certum est quod certum reddi potest can have no application. We therefore, on

4. (1875) 10 Q B 371=44 L J Q B 216.

5. (1884) 6 All 231.
6. (1907) 30 Mad 486.

this narrow ground alone, hold that the suit is not barred by reason of the first part of Art. 113 and that as he is within time under the second part of the Article, the claim is not barred. It is admitted that there is no defence on the merits. The appeal will, therefore, be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 494

SADASIVA AIYAR, J.

Malayil Kottayil Koyassan Kutty—Complainant—Petitioner, In re.

Criminal Revn. No. 626 of 1916 and Criminal Revn. Petn. No. 511 of 1916, Decided on 30th January 1917, from order of Sub-Divl. Magistrate, Malappuram, D/- 8th June 1916.

(a) Criminal P. C. (5 of 1898), Ss. 403 and 494 — Discharge of accused — Second complaint is not barred — Very strong ground is necessary to start proceedings.

There is nothing in law against the entertainment of a second complaint on the same facts on which a person has already been discharged, inasmuch as a discharge is not equilvalent to an acquittal. But unless very strong grounds are shown, e. g, new facts are discovered which were not within the knowledge of the prosecution when the first charge was brought, a person who has once been discharged ought not to be harassed again on the same charge. [P 495 C 1]

(b) Criminal P. C. (5 of 1898), S. 439 —High Court—Discretion is unfettered.

A High Court has an unfettered discretion under S. 439 to pass whatever orders seem to it to be required in the interests of justice. [P 495 C 1]

(c) Penal Code (45 of 1860), S. 141—Unlawful assembly—Crown alone can prosecute— High Court will not interfere with magistrate's refusal to take cognizance of complaint — Criminal P. C. (5 of 1898), S 439.

A complaint for rioting or for being a member of an unlawful assembly discloses a non compoundable offence for which the Crown alone in the interests of public peace and security has a right to prosecute, and a complainant has no independent right to have the guilty persons punished. [P 495 C 1]

A High Court in the exercise of its powers of revision is not bound to recognize and respect such alleged rights of a complainant by setting aside a Magistrate's refusal to take cognizance of a complaint. [P 495 C 1]

K. R. Subramaniya Sastri—for Petitioner.

P. R. Narayanaswami Iyer for Public Prosecutor—for the Crown.

Order.—The complaintant is the petitioner in revision. The complaint was preferred against 56 accused on 7th June 1916, charging them with the offence of forming an unlawful assembly on 15th March 1916 with the intention by use of force to obstruct the complainant's party from hoisting a flag in connexion with a festival to be celebrated in a mosque. A similar complaint had been made by the Police on 15th March 1916 itself, but as the accused's party afterwards allowed the flag to be hoisted and the festival to be conducted, the District Magistrate asked the Police Superintendent to instruct his Circle Inspector, who was in charge of the prosecution, to withdraw the case. Accordingly the Police Superintendent instructed the Circle Police Inspector to withdraw that case and that Inspector on 29th May 1916 reported to the Joint Magistrate that he withdrew the case. Then on 4th June 1916, the Subdivisional Magistrate passed the following order:

"As it has been intimated to me by the Inspector of Police, C Circle, that Calendar Case No. 22 of 1916 is withdrawn, I hereby under S. 494, Criminal P. C., discharge the accused in that case."

Three days afterwards on 7th June, the complainant filed this complaint before the same Subdivisional Magistrate. The order of the Subdivisional Magistrate on this complaint dated 8th June 1916 is as follows:

"The accused in the petition presented today by Koyassan Kutty have already been discharged by me under S. 494, Criminal P. C., the Police having withdrawn an identical case against them. To entertain this complaint means setting aside that discharge.

"The question is a difficult one, but I think I have power to revive the case and also that to revive or refuse to revive it is within my discretion, there being no order under S. 437, Criminal P. C The matter in question is one of public rather than of private concern. In the absence of an order under S, 437, Criminal P. C., I refuse to revive the case."

Mr. K. R Subramania Sastri has argued the case before me for the petitioner in revision, namely, the complainant. His contentions are:

"(1) The withdrawal by the police of the former case instituted by them was illegal and irregular, as the police officer had no power to withdraw it and as it does not appear that the Court gave its consent to such withdrawal (see grounds 8 and 9 In the criminal revision petitions); (2) The lower Court was bound in law to entertain the complaint and dispose of it in one of the ways provided by the Code such as dismissal, discharge, acquittal or conviction. (3) The question is wholly one of private interest as the obstruction complained of was to the performance by the tangal" (whose kariasthan was the complainant) 'of the celebration of a festival in the mosque under the control of the tangal."

As regards ground 3, I think that a complaint for rioting or of being a member of an unlawful assembly discloses a non-compoundable offence which the Crown alone in the interest of public peace and security has a right to conduct, and I cannot allow the contention that the complainant has an independent right to have the guilty persons punished, nor can I agree that the Court, in the exercise of its powers of revision, is bound to recognize and respect such alleged independant rights of the complainant by setting aside the Magistrate's refusal to take cognizance of the complaint. I think I have an unfettered discretion to pass whatever orders seem to me to be required in the interests of justice (see S. 439, Criminal P. C). Coming to the other two grounds, it must be admitted that on the record as it stands there is nothing to show that the Inspector of Police who withdrew the prior case charge-sheeted by the Police was a Public Prosecutor appointed under S. 494; or that he was an Officer of Police who was "not below the rank" prescribed by the Local Government (see S. 495, Cl. 1); or that he was permitted by the Magistrate to conduct the prosecution under that same S. 495 (Cl. 1).

Having regard to the maxim that all acts of Courts of Justice should be presumed to have been regularly performed, I think that it might be taken that the withdrawal of the first case was properly made and followed under S. 494 read with S. 495, Cl. 2. Taking it then that the discharge was proper and legal, there is no doubt nothing in law against the entertainment of a second complaint on the same facts as a discharge is not equivalent to an acquittal, but I think that unless very strong grounds are shown, a person who has been charged once and discharged ought not to be harassed again on the same charge. It is not alleged that new facts have been discovered which the police did not know when they brought the first charge. The only new contention is that the complainant has got an independent right of his own to have the accused punished criminally for his (the complainant's) own advantage, namely, the establishment of his master's (the thangal's) legal rights to the undisturbed celebration of a festival in the mosque. I think that when the District Magistrate and the Police Superintendent, who are in direct charge of the peace of the district, have considered that the interests of the public peace do not require the prosecution of the accused further and have therefore withdrawn the prosecution, it is not advisable for this Court to interfere at the instance of a private party with the order of the Magistrate refusing to take cognizance of a second complaint on the same facts. I, therefore, dismiss this revision petition.

S.N./R.K. *Petition dismissed.*

A. I. R. 1918 Madras 495

ABDUR RAHIM AND KUMARASWAMI SASTRI JJ.

Aiya Ramalinga Mudali and *another* —Defendants—Appellants.

v.

Arumuga Mudali— Plaintiff--Respondent.

Cival Misc. Appeal No. 41 of 1917, Decided on 19th July 1917, against order of Sub-Judge, North Arcot, in A. S. No. 148 of 1916.

Hindu Law—Alienation— Widow — Withdrawal of suit by nearest reversioner—Succeeding reversioner can challenge alienation by another suit—Civil P. C. (1908), O. 23, R. 1.

The dismissal for default or non-prosecution of a suit by one reversioner does not bar the institution of another suit by another presumptive reversioner. The withdrawal of a suit by the nearest reversioner without obtaining permission to institute another suit does not bind the succeeding reversioner so as to deprive him of the right to challenge the alienation by another suit. *A. I. R.* 1915 *P. C.* 124 (*P. C.*), *Expl.*

S. Varadachariar—for Appellants.

K. Bhashyam Aiyangar— for Respondent.

Judgment.—The question for decision before us in this appeal is whether the withdrawal of suit instituted by the nearest reversioner, a daughter, without obtaining permission to institute another suit is binding on the succeeding reversioner, the daughter's son, so as to deprive him of the right to challenge the alienation by another suit. The learned pleader who appeared for the appellants has entirely relied on certain general language used by their Lordships of the Privy Council in *Venkatnarayana Pillay* v. *Subbammal* (1) and also *Janaki Ammal* v. *Narayanasami Aiyar* (2). In the first case, their Lordships had to consider the question whether when the nearest reversioner who

1. A I R 1915 P C 124=38 Mad 406=42 I A 125=29 I C 298 (P C).
2. A I R 1916 P C 117=39 Mad 634=37 I C 161 (P C).

instituted the suit died, that suit could be continued by the next reversioner and they held that it could be. In giving their reasons for the decision, they treated the next reversioner as legal representative for the purpose of reviving the action. It is contended that it logically follows that if a suit which is instituted by one reversioner is withdrawn or dismissed for default of prosecution, all the other reversioners will be barred and prevented from questioning the alienation by a separate suit. We do not think that their Lordships of the Privy Council ever contemplated such a result when they held that when a reversioner who instituted a suit dies, that suit can be revived by another presumptive reversioner. The scope of the decision is to enable one reversioner who instituted the suit to carry on the same action for the protection of the estate. It would be a violent conclusion to draw from such a decision to say that if a suit instituted by one reversioner has been dismissed for default or without ever being tried on the merits, a suit by another reversioner, challenging the improper alienation is barred. In the other case in *Janaki Ammal* v. *Narayanasami Aiyar* (2) there is only some general observation to the same effect as in *Venkatanarayana Pillay* v. *Subbammal* (1), and no other authority has been cited before us which covers the present case laying down that the dismissal for default or non-prosecution of a suit by one reversioner bars the institution of another suit by another presumptive reversioner. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A I. R. 1918 Madras 496

ABDUR RAHIM AND NAPIER, JJ.

Mongalu Aorodhono Hathi — Accused, In re.

Criminal Revn. No. 63 of 1917, and Referred Case No. 6 of 1917, Decided on 2nd May 1917, made by Sess. Judge, Ganjam, D/- 20th January 1917.

Criminal P. C. (1898), S. 238—Appellate Court acquitting persons charged with rioting under S. 147 but convicting under Ss. 448 and 328, Penal Code—Conviction held not legal.

An Appellate Magistrate cannot, when once he acquits persons charged with rioting and being members of an unlawful assembly of that offence, convict them of the minor offences of house tres, pass and hurt under Ss. 448 and 323 I. P. C. [P 496 C 2; P 497 C1]

Eleven persons were charged with rioting and being members of an unlawful assembly before a Second Class Magistrate. They were convicted of offences under S. 147, I. P. C. On appeal the appellate Magistrate acquitted seven of them and convicted the remaining four of offences under Ss. 448 and 323, I. P. C.

Held: that the conviction was illegal and must be set aside. 23 *W R Cr* 59 and 34 *Cal* 325, *Foll.* [P 497 C 1]

P. R. Narayanaswamy Iyer—for the Crown.

Abdur Rahim, J.—The accused were tried on a charge under S. 147, I. P. C., for being

"members of an unlawful assembly and having in prosecution of the common object of such assembly viz, to enforce a right or supposed right to the barber's land in Sorobogedo Pubodo in Pattupur committed the offence of rioting at Pattupur"

and were convicted of that offence by the Sub Magistrate. On appeal the appellate Magistrate held that the charge under S. 147 could not be sustained as he was unable to find that more than four persons were concerned in the occurrence but found the accused guilty of offences under Ss. 447 and 323 instead of the offence of rioting as found by the Trial Magistrate, and reduced the sentence from three months' to one months' rigorous imprisonment in the case of each accused. The learned Sessions Judge has referred the case to us for revision being of opinion that the appellate Magistrate had no power to convict the accused under Ss. 447 and 323, offences with which they were not charged and for which they were never tried. I may mention that no appeal has been preferred by the Government against the acquittal of the accused with respect to the charge of rioting. The point for consideration arises whether the convictions under Ss. 447 and 323, I. P. C. by an appellate Court can be sustained by virtue of S. 238, Criminal P. C. I am of opinion that they cannot. The common object of rioting as charged in the case was neither criminal trespass nor hurt nor any of the latter offence, a necessary ingredient of an offence under S. 147, I. P. C., so that it could not be said that the accused were charged with an offence

"consisting of several particulars, a combination of some only of which constitutes a complete minor offence or that being so charged, facts have been proved which reduce it to a minor offence."

The illustrations to S. 238 show the class of cases comprehended by that section, and to convict the accused under

Ss. 447 and 323, I. P. C., in this case would be to convict them of charges which they were never called upon to meet. The case of *Queen* v. *Salamut Ali* (1) is authority for the proposition that a man charged with rioting cannot be convicted of house trespass. Similarly in *Dasarath Mandal* v. *Emperor* (2) it was ruled that when certain accused persons were charged under Ss. 304 and 325, I. P. C. read with S. 147, I. P. C., that is with offences of culpable homicide and grievous hurt as being members of an unlawful assembly in the prosecution of a common object of which those offences were committed, and the offence of unlawful assembly was not proved, they could not be convicted of an offence under S. 323, I. P. C., with which they were not charged. The conviction and sentence under Ss. 447 and 323, I. P. C., must, therefore, be set aside. There is, however, evidence which, if believed, would support these charges against the accused if they were properly tried. This order will not, therefore, prevent the Magistrate taking cognizance of a complaint or charge under Ss. 447 and 323, I. P. C.

Napier, J.—This case arises out of a disturbance that took place in a barber's main land in Pattupur village on 27th June 1916 It arose out of a dispute as to the ownership of the land. The Karji reported to the police that two parties had gone to the land intending to fight there. Undoubtedly, the fight took place. Eleven persons who are charged in the present case were arrested by the police on the spot and the persons belonging to the other party who are charged in the counter-case were likewise arrested at the same time. Thirteen sticks and two khodnas were seized from the accused party at the time. Seven persons received injuries and were sent to the medical officer one of the persons soinjured receiving twenty contused wounds and abrasions. Both parties were charged and convicted of rioting by the Second Class Magistrate of Aska town in Calendar Cases Nos. 47 and 48 of 1916. On appeal before the Deputy Lagistrate, the accused in C. C No. 48 of 1916 were acquitted on the ground that they exercised the right of self defence, the appellate Court being of opinion that the land was in their possession and the Magistrate obviously thinking that this finding was sufficient to dispose of the charge against them. Whether that view is correct or not, need not be considered here as there is no appeal by Government before us. With regard to the accused in Calendar Case No. 47 of 1916 the Magistrate, without giving any reason for disbelieving the evidence of the police Officer who says he arrested them on the spot, states that it is hard to say whether the accused other than Nos. 1, 2, 10 and 11 were really present or took any part in the affair, and so only convicts accused 1, 2, 10 and 11 who received injuries. He accordingly altered the conviction from one under S. 147, I. P. C., to one under Ss. 447 and 323, I. P. C.

The Sessions Judge has now referred the case on the ground that the accused were not charged under those sections, and they having been acquitted of rioting, he is of opinion that the conviction should be set aside. There is undoubtedly, authority for this position. But speaking for myself, I am not quite satisfied that the case does not fall within S. 238, Criminal P. C. and that hurt is not a minor offence, the hurt being clearly proved in this case. As my learned brother takes a different view following the authorities, I will not press my doubts, and I agree with my learned brother in the order proposed by him under which the matter can be further enquired into if thought necessary.

S.N./R.K. *Petition allowed.*

1. (1875) 23 W R Cr 59.
2. (1907) 34 Cal 325=5 Cr L J 424.

A. I. R. 1918 Madras 497

PHILLIPS, J.

L. A. L. Alagappa Cheettar—Petitioner.

v.

Nagaratna Mudaliar and *others*—Opposite Party.

Civil Revn. Petns. Nos. 797 and 798, of 1916, Decided on 31st July 1917, to revise the order of Dist. Judge, Tanjore, in Civil Misc. Appeals Nos. 89 and 90 of 1915.

Provincial Insolvency Act (1907), S. 22—"person aggrieved" is person who has sufficient legal grievance—Person's claim to property for sale as that of insolvent rejected—He is person aggrieved.

A person aggrieved within S. 22 is a person who has suffered a legal grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something which he

had a right to demand, or wrongfully affected his title to something.' [P 498 C 2]

A person whose claim to property proclaimed for sale as belonging to the insolvent is rejected by the Official Receiver is a "person aggrieved" within the meaning of S. 22, Provincial Insolvency Act. [P 499 C 1]

T. Narasimha Aiyangar—for Petitioner.

K. Bhashyam Aiyangar for *N. Kunjitapatham Iyer*—for Opposite Party.

Judgment.—Petitioner is a creditor of respondent, 3 an insovent. Respondent 1 in Civil Revision Petition No 798 of 1916 is a son of the insolvent and claimed the properties in dispute under a will of his grand-father, between whom and the insolvent there was a partition in 1908. Respondent 1 in Civil Revision Petition No. 797 of 1916(called hereafter respondent 1) is an alienee from the minor. The properties left by will to the minor were sought to be sold by the creditors and at the request of the petitioner, the Official Receiver on 10th April 1915 ordered the sale of half the properties. Respondent 1 in 797 of 1916 then put in a petition asking that the properties should not be sold as they did not belong to the insolvent. On 21st April 1915 the Official Receiver passed the following order:

"I have no jurisdiction to decide whether the insolvent has a saleable interest. That is a matter which should be decided by a Court having jurisdiction in a regular suit between the future purchaser and the applicant. Of course this claim will be notified at the time of the sale and the purchaser wlll purchase with knowledge of the claim. I have no reason to stop the sale. Petition rejected."

On 23rd April 1915 respondent 1 put in a petition under S. 22, Provincial Insolvency Act. The District Munsif held that the petition did not lie under S. 22, but held that the Court had inherent power to review the conduct of its servant, the Official Receiver, and allowed the petition. The District Judge did not go into the question of jurisdiction but dismissed the appeal on the merits. It is now contended on behalf of the petitioner (1) that the petition did not lie under S. 22 (2) that if it did lie it was out of time, (3) that the Court has no inherent power to deal with such a petition. The second point can briefly be disposed of, for the order of the Official Receiver complained of was passed on 21st April 1915, and the petition was filed two days later, and was well within the time allowed. As regards the first point, the question for decision is whether the petitioner in Original Petition No. 545 of 1915 was aggrieved by the decision of the Receiver within the meaning of S. 22, Provincial Insolvency Act. In *Ex parte Sidebotham In re Sidebotham* (1), James, L. J., held that

" a 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wronfully refused him something or wrongfully affected his title to something."

This definition was considered in *Ex parte Official Receiver*; *In re Reed* (2) and Lord Esher, M. R., interpreted it at pp. 177 and 178 as including

" a man against whom a decision has been pronnonced which has wrongfully . . . . . refused him something . . . . which he had a right to demand."

while Lopes, L. J., remarked at p. 181:

"I am not at all prepared to say that a man, who has asked something which he is authorised and entitled to ask under the Act, has not, when his application is refused, 'suffered a legal grievance.' "

This case was referred to and approved in *In re Lamb, Ex parte Board of Trade* (3), where Kay, L. J., remarked:

'When two persons are in the position of litigants before the High Court and the decision of the Court goes against one of them, how can it be said that he is not a person aggrieved by the decision?"

In *Mujuluri Sivaramayya* v. *Singumahanti Bhujango Rao* (4) a Bench of this Court held that the decision must be such as to affect the right claimed, and not merely to impede the person concerned in his assertion of it, and that is the view taken in *Hanseswar Ghosh* v. *Rakhal Das Ghose* (5), but in neither of these cases was any reference made to *Ex parte Official Receiver*; *In re Reed* (2), or to *In re Lamb*; *Ex parte Board of Trade* (3), whereas in *Thriuvenkatachariar* v. *Thangayi Ammal* (6) these two cases were followed and a creditor was held to be aggrieved by the failure to publish an order which was likely to depreciate the value of the insolvent's property which was to be sold under that order. This act did not actually deprive the creditor of anything to which he was legally entitled, but it tended to render the task of recovering his dues more difficult, and as such he was held to be aggrieved. In the

1. (1880) 14 Ch D 458.
2. (1887) 19 Q B D 174.
3. (1894) 2 Q B 805.
4. (1917) 37 I C 773.
5. A I R 1914 Cal 885=20 I C 683.
6. (1916) 39 Mad 479=29 I C. 291.

present case the order of the Receiver had no effect whatever on the legal rights of respondent, 1 but it was likely to involve him in difficulties in asserting his title to the property which. as has now been found, was really his. "Aggrieved" is a somewhat wider term than injured. and if we adopt Lord Esher's definition that a person is aggrieved if a decision has been pronounced which has wrongfully refused him something which he had a right to demand, respondent 1 is clearly aggrieved by the decision of the Receiver for he had a right to demand that his own property should not be sold by an officer of the Court as belonging to someone else.

In this view it is unnecessary to decide whether a Court has inherent power to review all acts of an Official Receiver, for the petitions come within S. 22, Provincial Insolvency Act. The petitions are accordingly dismissed with costs.

S.N./R.K. *Petitions dismissed.*

A. I. R. 1918 Madras 499

ABDUR RAHIM, J.

Jagathambal—Defendant--Petitioner.

v.

Kannusami Pillai and *another*—Opposite Parties.

Civil Revn. Petn. Nos. 19 and 306 of 1917, Decided on 4th October 1917, to revise order of Dist. Munsif, Negapatam, in I. A. Nos. 1895 and 1896 of 1916, in Original Suit No. 453 of 1916.

(a) Civil P. C. (1908), O. 23, R. 1—"Sufficient ground" must be interpreted ejusdem generis.

The expression "sufficient ground" in R. 1 (2) (b), O. 23, must be interpreted as ejusdem generis with the formal defect referred to in R. 1 (2) (a): *A. I. R.* 1915 *Mad.* 480, *Foll.* [P 499 C 2]

(b) Civil P. C. (1908), O. 23, R. 1—Incorrect valuation of subject matter is not formal defect — Withdrawal with liberty to bring fresh suit should not be permitted.

The incorrect valuation of the subject-matter of a suit, which on inquiry by Court, is found to be less than the actual value is not a formal defect within the meaning of R. 1 (2) (a), O. 23 and a plaintiff should not on that ground, be permitted to withdraw his suit with liberty to bring a fresh suit. [P 500 C 1]

T. V. Muthu Krishna Aiyar—for Petitioner.

G. S. Ramachandra Aiyar—for Opposite Parties.

Civil Revn. Petn. No. 19 *of* 1917.

Judgment.—Plaintiff 2 is the natural son of plaintiff 1 and the defendant is the widow of plaintiff 2's adoptive father, who was a nephew of plaintiff 1. The suit is brought to recover certain properties from the possession of the defendant on the allegation that plaintiff 2 is the adopted son of the defendant's husband. Of the items of properties which the plaintiffs sought to recover from the defendant, one is item 76, a house which originally was valued at Rs. 200, but which has been found on proper inquiry being made on the objection of the defendant to be worth more than Rs. 6,000. When the proper value of item 76 was ascertained, the plaintiffs applied for leave to withdraw their claim with respect to this item with liberty to file a fresh suit afterwards. The District Munsif acceded to this application and it is against that order that the present petition has been filed. The argument in support of the petition is that the plaintiffs should not have been allowed to withdraw the suit with respect to item 76 with liberty to file a fresh suit, inasmuch as this is not a case within the purview of O. 23, R. 1, Civil P. C. The reason that is given by the plaintiffs in support of the application is that in any case the defendant will be entitled to residence and that they do not, therefore, want to eject her from this house. They are in fact willing that she should reside there by virtue of her right as widow of the adoptive father of plaintiff 2. R. 1 (2), O. 23 says:

"Where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of claim, it may . . . . grant the plaintiff permission to withdraw from such suit, etc."

It has been held by a Bench of this Court in *Aiya Gounden* v. *Jayan Mandalatipathi Gopanna Mauradiyar* (1) that the "sufficient ground" mentioned in R. 1 (2) (b), O. 23, Civil P. C, must be interpreted as being ejusdem generis with the formal defect referred to in R. 1 (2) (a). That being so, can it be said that there was a defect of that character in this suit? If it were a mere question of general discretion I should be prepared to hold that this discretion was rightly exercised by the first Court. But I am bound by the ruling of the Division Bench of this Court above referred to. Therefore, unless it could be said that there was a defect in the suit of a character akin to a formal defect the order of the District

1. A I R 1915 Mad 480=26 I C 57.

Munsif must be held to be unauthorised by law. It is perfectly true that if the plaintiffs are content to allow the defendant to remain in possession of the house in lieu of her right of residence, they should not be compelled to sue to eject her and if they should not be compelled to eject her from the house at present, I see nothing improper in their conduct in asking for leave to withdraw the suit with respect to this house. But having regard to the interpretation that has been placed on O. 23, R. 1, by which I am bound, I cannot say that this was a case in which leave to withdraw was properly granted. I must, therefore, allow the petition and set aside the order of the District Munsif. The case will be remanded to the District Munsif for disposal in the light of the above observations. The petitioner is entitled to the costs of this petition.

Civil. Revn. Petn. No. 306 *of* 1917.

This petition follows Civil Revision Petition No. 19 of 1917 and for the reason contained in the above judgment therein the order of the lower Court is set aside and the case remanded to the District Munsif for disposal. The petitioner is entitled to the costs of this petition.

S.N./R.K. *Cases remanded.*

A. I. R. 1918 Madras 500

AYLING AND SADASIVA AIYAR, JJ.

Venkatasubba Sastrial and *others*—Plaintiffs—Appellants.

v.

V. Subramania Aiyar and *others*—Defendants—Respondents.

Appeals Suits Nos. 3 and 4 of 1916, Decided on 20th March 1917, against decrees of Sub-Judge, Tinnevelly, in original Suits Nos 10 and 29 of 1913.

Evidence Act (1872), S. 92—Sale-deed-Oral evidence showing deed was intended to be mortgage is inadmissible.

Oral evidence is inadmissible to prove that a document was intended to have some other mode of operation than that which the executants stated and which the parties intended that it should state. 38 *Mad.* 226 and 22 *All* 149, *Rel. on.* [P 501 C 1]

Where an ostensible vendee pays out of his pocket sums towards amount due by the vendor and which he had undertaken to pay, the burden lies very heavily upon the vendor to prove that the transaction was intended to be a sham and colourable one. 29 *I. C.* 970, *Rel on.* [P 501 C 2]

In a suit to recover possession of the properties conveyed under a sale-deed oral evidence was adduced to show that the parties to the document intended to give simple mortgage rights to the alleged purchaser for the sums which he had promised to pay to the creditors of the alleged vendor:

Held: that the evidence was inadmissible to prove that a different mode of operation was intended from the one which the executants stated and which they intended that the document should state. 38 *Mad.* 226, *Foll.* [P 501 C 1]

T. R. Ramachandra Aiyar, *T. R. Krishnaswami Aiyar*, and *G. R. Sivaramakrishna Aiyar*—for Appellants.

T. Rangachariar, *M. D. Devadoss* and *S. Ramaswami Aiyar*—for Respondents.

Sadasiva Aiyar, J.—These are appeals from two connected suits brought in the Subordinate Judge's Court of Tinnevelly. Appeal No. 3 is against the decision in Original Suit No. 10 of 1913 brought by the plaintiffs on behalf of themselves and of defendant 9 for a declaration that a sale-deed of 4th July 1901 executed by the members of the plaintiffs' family was not bona fide sale-dead, nominal and inoperative, and for recovery of possession of the agricultural lands sold under it, the plaintiffs having themselves continued in possession of the house and house sites sold under the deed. The connected suit (Original Suit No. 29 of 1913) was brought by defendant 1 to recover possession of the house and house sites against the plaintiffs in Original Suit No. 10 of 1913. I shall call the plaintiffs in Original Suit No 10 of 1913 plaintiffs hereafter. Though the plaint in paras. 4 and 5 uses the words 'benami,' 'colourable,' 'nominal' and so on and the claim is based upon the allegation that no interest whatever in the properties was intended to be conveyed under the sale-deed Ex. 35 (Ex A is a copy of Ex. 35), the evidence let in by the plaintiffs at the trial (see especially the evidence of P. Ws. 1 and 12) was to the effect that the parties intended to give simple mortgage rights to defendant 1 over the properties for the sums which defendant 1 promised to pay to the plaintiffs' numerous creditors (mortgage-simple and decree creditors). The word "malaranai" in Madura and Tinnevelly seems to be used in a very loose manner to indicate not only transactions and documents which are wholly colourable but also to indicate documents which were intended to have some other legal effect than the effect which the language of the document in its plain and natural construction imports.

The sale-deed (Ex. 35) thus is not a sham nominal or colourable transaction according to the evidence of the plaintiffs

themselves but it is a transaction which was intended to have a legal effect of far-reaching character and to transfer large interests and rights in the properties mentioned therein in favour of defendant 1. The executants deliberately stated in the document that it was executed in order to convey the absolute proprietary interest in the properties mentioned in it to defendant 1. There was no mistake existing in the mind when making the statements and they intended to state in the document that it should operate as a conveyance, but the plaintiffs' case as developed in the trial was that both parties secretly intended that it should operate as a mortgage though they intended to state and did state differently. Is it allowable to parties to adduce evidence to show that what they intended to state and what they stated in a document was not what they intended should be the operation of the document but it was to have some other legal effect ? I think we are bound by the decision in *Mottayappan* v. *Palani Goundan* (1), following the decision in *Balkishen Das* v. *W. F. Legge* (2), to hold that oral evidence is inadmissible to prove that it was intended to have some other mode of operation than that which the executants stated and which the parties intended that it should state.

It is clear from the evidence in this case that the parties intended that defendant 1 should advance moneys of his own to discharge the mortgage debts, simple money debts and decree debts mentioned in Ex. A and due by the plaintiffs. It is also clear that a few days even before the execution of the document defendant 1 (vendee) borrowed Rs. 2,000 in order to discharge the plaintiffs' decree debts. He afterwards paid Rs. 3,000 odd to discharge the prior mortgage debts Exs. N and N 1, though he had agreed under Ex. A to pay only Rs. 2,000 on that account. He had also to pay Rs 3,700 odd to a usufructuary mortgagee whose debts were not mentioned at all in Ex. A. It is, therefore, impossible to contend that no interest whatever was intended to be transferred to defendant 1 under Ex. A and as decided by the Chief Justice and Seshagiri Aiyar, J., in *Vaithinatha Aiyar* v. *Vaithinathasawmy Aiyar* (3), where an ostensible vendee has paid out of his pocket sums towards the amounts due by the vendor and which he (the vendee) has undertaken to pay, the burden lies very heavily upon the vendor to prove that the transaction was intended to be a sham and colourable one. It no doubt appears from the evidence that the amounts mentioned in Ex. A as payable by defendant 1 to discharge the plaintiffs' debts do not correspond in many cases exactly with the actual sums due to the said creditors. It further appears that defendant 1 in November 1902 sent the account Ex. B to the managing member of the plaintiffs' family (Gopalakrishna Aiyar), showing the amounts which he (defendant 1) had paid or the amounts for which he had made himself liable to the creditors of the plaintiffs' family.

This indicates one of three alternatives (1), that at the very time of the sale deed there was a contemporaneous oral agreement to re-convey on re payment of defendant 1's expenses, (2) that there was a secret understanding that the sale deed was to be really a mortgage-deed for the sums payable to defendant 1, or (3) that there was a subsequent oral agreement to re-convey. The Subordinate Judge finds for the second of the three alternatives and I am inclined to agree with him. But as I said, evidence cannot be adduced to prove such an intention varying the terms of the registered document. As regards the alternatives 1 and 3, neither is put forward as the basis of the claim as in the plaint or developed at the trial. The result is that the sale deed Ex. 35 ought to be given its legal effect as conveying title to defendant 1 as owner as regards the plaint lands. Defendant 1's subsequent conduct in trying to get what he thought would be a stronger or safer title through bringing the properties to sale by means of a suit instituted on the mortgages, Exs. N and N-1, in the name of his benamidar (whom he made to get an assignment of these deeds from the original mortgagee) has no relevancy on the question of the legal effect of Ex. A or 35 in creating a perfect title in defendant 1 according to its own unaided strength.

In the result I would dismiss the appeal with costs. The other appeal follows. Defendants 1, 2 and 4 will get separate costs on the value of the pro-

1. (1915) 33 Mad 226=20 I C 924.
2. (1900) 22 All 149=27 I A 53 (P C).
3. (1915) 29 I C 970.

perties in which they are respectively interested.

Ayling, J.—I agree.

S N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 502 (1)

SADASIVA AIYAR AND BAKEWELL, JJ.

M. Azminuddin Sahib and *others*—Plaintiffs—Appellants.

v.

S. E. S. Kadirsa Rowther and *others*—Defendants—Respondents.

Appeal No. 134 of 1916, Decided on 9th October 1917, against order of Sub-Judge, Trichinopoly, in Original Suit No. 90 of 1914.

(a) Court-fees Act (7 of 1870), S. 7 (4)—Injunction.

A relief claimed by way of injunction can be valued arbitrarily and such valuation is conclusive. 18 *I. C.* 363, *Foll.* [P 502 C 1]

(b) Court-fees Act (7 of 1870), S. 7 (4)—Suit for declaration and injunction as consequential relief—Valuation of injunction alone is sufficient.

In a suit for declaration and for injunction as a consequential relief, the plaintiff is entitled to value the injunction alone for purposes of jurisdiction and court-fees. [P 502 C 1, 2]

(c) Court-fees Act (7 of 1870), S. 7 (4)—Wrong valuation—Plaint should be returned for amendment.

Where the declaration and the injunction are separately valued, and the sum of the two values is given in the plaint as the value for purposes of jurisdiction and court-fees, the plaint should be returned for amendment subject to the rule laid down in S 7 (4). [P 502 C 1]

T. R. Ramachandra Ayyar and *K. S. Ganesa Ayyar*—for Appellants.

K. V. Krishnaswami Ayyar—for Respondents.

Judgment. — Following *Chelasami Ramiah* v. *Chelasami Ramasami* (1) we hold that the plaintiff was entitled to value the injunction relief, arbitrarily and such valuation is conclusive. The decision in *Krishna Mallar* v. *Secy. of State* (2) is authority for the view that in cases where the plaintiff has wrongly valued the declaration and the consequential relief of injunction separately, and given the sum of the two values as the value for purposes of jurisdiction and court-fees, the proper course is to return the plaint to the plaintiff for amendment in order to give the value of the consequential relief of injunction alone under the last sentence of S. 7, Cl. 4, Court-fees Act, and to mention that value in that plaint as the value for purposes of jurisdiction and court-fees. If along with the injunction relief, additional consequential relief or reliefs are prayed for, they should, of course, be also valued according to law. In this case the additional relief of damages to the extent of Rs 600 is prayed for, though the body of the plaint mentions only "about Rs. 500" as the damages incurred by plaintiff. We direct the plaintiff to amend the figures as to values found in his plaint as advised, but subject to the whole being consistent in all its parts and subject also to the amendment being in accordance with the rule laid down in S. 7, Cl. 4, Court-fees Act, as pointed above. Time allowed is two weeks.

If, on the amendment, the value of the consequential relief (or the total value of the consequential reliefs) is less than Rs. 2,500, the plaint will be returned to be presented for presentation to the proper Court, plaintiff paying all costs thrown away up to the present. If it is over Rs. 2,500 the order of the lower Court will be set aside and the case will be remanded to the lower Court for fresh disposal plaintiff, however paying the defendant's costs in this Court. Costs in the lower Court will abide.

S N./R.K. *Order accordingly.*

1. (1913) 18 I C 363.
2. A I R 1915 Mad 386=25 I C 375.

A. I. R. 1918 Madras 502 (2)

BENSON AND SUNDARA AIYAR, JJ.

Alaudin Saheb and *another*—Plaintiffs—Appellants.

v.

Secy. of State and *others*—Defendants—Respondents.

Second Appeal No. 390 of 1911, Decided on 19th March 1913, against decree of Dist. Judge, North Arcot, in Appeal Suit No. 107 of 1909.

Madras Land Encroachment Act (1905), S. 3—Public pathway over private land—Obstruction—No penal assessment can be levied.

Government have no right under Madras Act 3 of 1905 to levy penal assessment where an owner of land obstructs a pathway over the land to which the public have acquired a right of user.

G. C. Adam—for Appellant.

C. F. Napier—for the Crown.

Judgment.—This suit was for a declaration of the plaintiffs' absolute right to the right of a pathway, free from any public right of way, to recover the penal assessment levied by Government on the footing that the pathway belonged to it and not to the plaintiff, and for an injunction to restrain Government from in-

terfering with the plaintiffs' enjoyment of the pathway as their absolute property. Both the lower Courts have found that the public have been walking along the way as a matter of right and not with the plaintiffs' license as urged by them, and that the public have a right of way. The plaintiffs did not contend that the right of way was abandoned by the public and we cannot, therefore, allow the contention to be raised at this stage. It is then argued that the ownership of the pathway is in the plaintiffs, though the public may have a right of way, and that therefore, Government had no right to levy penal assessment under Madras Act 3 of 1905. The District Judge's view, that even in such a case penal assessment could be lawfully levied, is not sound, as Act 3 of 1905 allows penal assessment only where Government property is encroached on.

Butthe plaintiffs did not contend in the first Court that they were the owners of the pathway even if the public had a right of way. The question presented to the Munsif by the parties was whether the pathway belonged to the plaintiffs and the public walked along it only with their license, or whether the public did so because the pathway belonged to Government. A right of way in the public was taken to carry with it the right of ownership in the pathway on the part of Government. The point that the public might have a right of way as an easement, should have been raised in the first Court, as it was one on which the parties would be entitled to adduce evidence. The Munsif, moreover, found that the plaintiffs failed to establish their ownership. The fact that the site is not marked in the survey plan as poramboke be regarded as not conclusive. On the other hand, the Union metalled the pathway and built culverts so early as 1894 without any assertion of their ownership by the plaintiffs. We see no reason for not accepting the Munsif's finding that the plaintiffs' ownership of the site was not proved. We dismiss the second appeal with the costs of respondent 1.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 503

SADASIVA AIYAR, J.

Sreenivasa Ayyangar—Petitioner.

v.

Ranganatham Chettiar — Opposite Party.

Criminal Revn. Nos. 617 and 618 of 1916, and Criminal Revn. Petns. Nos. 503 and 504 of 1916, Decided on 11th January 1917, from order of Subdivl. Magistrate, Devakotta. in D. Dis. No. 156 Mgl. of 1916.

Criminal P. C. (1898), Ss. 144 and 145—Order not specifying section—Irregularity is material.

An order purporting to be under Ch. 12, Criminal P. C., should specify the section under which it is passed and it should not be left for speculation by the Court of appeal or Revision as to whether it was under S. 144 or S. 145.

[P 503 C 2]

S. T. Srinivasagopalachari—for Petitioner.

Public Prosecutor—for the Crown.

C. V. Rajagopalchariar and *S. Desikachariar*—for Opposite Party.

Order.—The Sub divisional Magistrate has acted most irregularly. He has not indicated under what section of the Code of Criminal Procedure he passed his proceedings. The District Magistrate on appeal thought they were passed under S. 145 and there is something to support what I might call his speculation, as the Sub-Divisionl Magistrate says:

"I declare Ranganathan Chettiar who is in possession and management of the temple to be in possession",

a declaration which follows the words of Cl. (3), S. 145, Criminal P. C. But seeing that the proceedings cannot for one moment be supported if passed under S. 145, Criminal P. C., both Mr. P. R. Narayanasamy Iyer (who appeared for the Public Prosecutor) and Mr. Rajagopalachariar (who appeared for Ranganathan Chettiar) said that the proceedings were passed under S. 144, Cl. 2, Criminal P. C. I am not prepared to indulge in speculations in this case in order to see if an order passed hastly and irregularly can be supported somehow. I set aside the whole proceedings as irregular.

S.N./R.K. *Petitions allowed.*

A. I. R. 1918 Madras 504 (1)
Full Bench

WALLIS, C. J , AND AYLING KUMARASWAMI SASTRI, JJ.

Tenjerla Suryanarayana—Appellant.

v.

Prabhala Subbayya—Respondent.

Letters Patent Appeal No. 36 of 1917, Decided on 16th October 1917, against judgment of Oldfield, Judge, in L. P. A. No. 167 of 1916.

Contract Act (1872), S. 23—Agreement by litigant for paying remuneration to vakil's clerk is against public policy and is void.

An agreement by which a litigant binds himself to pay remuneration to his vakil's clerk for giving special attention to a case entrusted by him to his vakil is void and unenforceable as being contrary to public policy. [P 504 C 2]

P. Nagabhushanam—for Appellant.

V. Ramadoss—for Respondents.

Wallis, C. J.—The agreement in question is one by which a litigant binds himself to pay his vakil's clerk Rs. 20 for giving special attention to legal business which the vakil was bound to see to in consideration of his fee. The revised translation makes it clear that this is the scope of the agreement. The law has never allowed legal practitioners of any kind to enforce contracts with clients irrespectively of the consideration whether they conformed to public policy or not. Barristers cannot sue at all for their fees, and the fees which barristers' clerks receive by custom according to a fixed scale are mere gratuities and cannot be sued for though they are recognized on taxation: *Cotton, Ex parte* (1). Solicitors' charges are now the subject of legislative enactment in England resembling the provisions in the Legal Practitioners Act as to charging more than the regulation fees. But even before these enactments, such agreements were jealously scrutinized and required to conform to the dictates of public policy. In *Pomfret* v. *Murray* (2), speaking of a novel stipulation by an attorney who was also a trustee, Lord Hardwicke said:

"This is a case of great consequence..... and it is incumbent on the Court to proceed warily before they allow such a demand,"

an observation which appears to me to be peculiarly applicable to the present case. In *Saunderson* v. *Glass* (3) the same great Judge observed:

"It is truly said at the Bar, that a security obtained by an attorney, whilst he is doing business for his client, or whilst a cause is depending, appears to this Court in a quite different light than between two common persons; for if an attorney, pendente lite, prevails upon a client to agree to an exorbitant reward, the Court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled ..... and if the Court did not observe such a rule, it would expose clients very much to the artifices of attornies."

See also *Drax* v. *Scroope* (4) and *Philby* v. *Hazle* (5), where Erle, C. J., and Williams and Byles, JJ., all speak of agreements by solicitors of the kind there in question as being in the words of Williams, J., manifestly "contrary to the general policy of the law." It is clear then that we shall be introducing no new law if we apply the test of public policy to agreements of the character now sued on. We have not been referred to any case in England in which a solicitor's clerk has stipulated with his employer's client for remuneration for giving special attention to his business. Such conduct might very possibly afford good ground for his immediate dismissal, and the fact that in this case the vakil does not object to his clerk's adopting this course in this and other cases, far from making the case any better, opens out a fresh vista of undesirable possibilities, and only makes it the more incumbent on us to interfere for the protection of clients by refusing to enforce such agreements as contrary to public policy. I would allow the appeal and dismiss the suit with costs throughout.

Ayling, J.—I concur.

Kumaraswami Sastri, J.—I agree.

S.N./R K. *Appeal allowed.*

1. (1846) 9 Beav 107.
2. (1740) 9 Mod 230.
3. (1742) 2 Atk 296.
4. (1831) 2 B & Ad 581.
5. (1860) 8 C B 647.

A. I. R. 1918 Madras 504 (2)
Full Bench.

WALLIS, C. J., AYLING AND KUMARASWAMI SASTRI, JJ.

Pa'akkunnath Illath Govindan Nambudri—Plaintiff—Appellant.

v.

Ottathayil Moidin—Respondent.

Case Ref. No. 7 of 1916, Decided on 11th October 1917, made by Dist. Judge, North Malabar in O. S. No. 675 of 1915.

Stamp Act (1899), Sch. 1, Art. 25—Marupat must be stamped as counter part and as mortgage—Malabar Law.

A marupat, which is a counterpart of a lease or deed executed by a Malabar tenant promising certain rent, must be stamped both as a counterpart and as a mortgage. [P 505 C 1]

Judgment.—A marupat is a counterpart of a lease or a deed executed by a tenant promising certain rent : Moore's Malabar Law. We think it must be stamped both as a counterpart and as a mortgage.

S.N./R.K. *Answer accordingly.*

A. I. R. 1918 Madras 505

AYLING AND SADASIVA AIYAR, JJ.

Rangadu and *another* — Accused — Petitioners, In re.

Criminal Revn. Nos. 9 and 12 of 1917, and Criminal Revn. Petns. Nos. 7 and 9 of 1917, Decided on 27th July 1917, from judgment of Joint Magistrate, Tiruputhur, in Criminal Appeals Nos. 27 and 28 of 1916.

(a) Madras Forest Act (1882), S. 26—Right of free grazing is not affected by S. 26.

The language of S. 26 and the rules framed thereunder make it clear that a right of free grazing vested in the tenants of a village prior to the extension to that village of S. 26 is not affected by the Government Notifications under the Act. [P 505 C 2]

(b) Madras Forest Act (1882), S. 26 — Rules framed under—Rules are valid.

Clause 2, S. 26 and the rules framed thereunder are perfectly legal and valid. [P 506 C 1]

(c) Madras Forest Act (1882), S. 26 — Delegation of authority by legislature to executive officer to frame and enforce rules is valid.

Per *Ayling J.*—It is competent to the legislature to authorise an executive officer to frame rules under an Act and to apply at his discretion the penalty prescribed by the legislature for breach of those rules. [P 506 C 1]

(d) Madras Forest Act (1882), S. 26 — Scope.

Per *Sadasiva Aiyar, J.*—By the last sentence of S. 26, the legislature really meant to conditionally prescribe the penalty for the breach of the rules made by the Government as regards matters mentioned in S. 26, Cls. (a) to (h), subject to the Governor-in-Council embodying in any rule or rules the same penalties for acts done in a particular area which acts and which areas were also in the contemplation of the legislature. [P 509 C 2]

C. Padmanabha Aiyangar—for Petitioners.

Public Prosecutor—for the Crown.

In Cr. R. C. No. 9 of 1917.

Ayling, J.—Petitioner was convicted of illicit grazing of cattle in an unreserved forest in the Kangundi zamindari. In 1912 on the zamindar's application under S. 32, Madras Forest Act, S. 26 of the same was extended to the said zamindari and rules were made by Government under the latter section to regulate grazing, felling of timber, collection of forest produce, etc., vide Ex. A. It is not disputed that petitioner grazed his goats without permit contrary to the above Rr. 5 and 8: but it has throughout the proceedings been contended that he did so in the exercise of a mamul right of free grazing, to which both S. 26 and all rules thereunder are subject.

The case in fact turns solely on the existence or non-existence of this right : and the Joint Magistrate's judgment appears to me to be defective in that it contains no discussion, nor indicates any appreciation of the evidence on the point. He merely remarks that the

"host of defence witnesses have not succeeded in establishing the mamul right of free grazing or adduced any evidence of value to appellant."

but that is all, and it is not the way in which a contention of wide general importance should be treated. From the concluding sentence of para. 3 of the judgment it would even seem that the Magistrate has taken an erroneous view of what the accused had to prove. He says, "it is not clear that such a right ever existed but it is apparent that no such right exists now."

I can only interpret this as meaning that it is useless to prove the existence of such right before the application of S. 26 of the Act in 1912, unless its continued subsequent existence is also proved. Now it is made perfectly clear, both by S. 26 itself and by the rules contained in Ex. A, that if the right of free grazing was vested in the villagers prior to 1912, as contended by the defence, that right remained unaffected by the Government Notifications, and it is not suggested how it was otherwise terminated. The existence of the right of free grazing prior to 1912 is therefore the crux of the whole case : and the appeal must be remanded that it may receive adequate consideration. On this ground I would set aside the order of the Joint Magistrate and remand the appeal for disposal according to law. At the same time in view of the importance of the case I would tranfer it for disposal to the file of the District Magistrate of North Arcot.

Another argument was put forward on petitioner's behalf, which I am unable to accept. It was contended that the conviction must in any case be set aside because para. 2, S. 26, Forest Act, empowering the Governor-in-Council to prescribe

penalties for infringement of the rules made by him, was itself ultra vires and illegal: and hence the penal rule in Ex. A (No. 11) has no effect. The sole authority quoted in support of this somewhat startling proposition is that of the majority of the Full Bench in *Empress* v. *Burah and Book Singh* (1). This decision was reversed on appeal by their Lordships of the Privy Council to whose judgment reported as *Empress* v. *Burah* (2) we must look for an authoritative exposition of the law as to the validity of conditional legislation. I can find nothing in this judgment helpful to the petitioner. The learned vakil for petitioner admits that it would be legal for the legislature to itself prescribe unconditionally the penalty for breach of rules to be made by the Governor-in-Council at his discretion. I fail to see why it is less competent to the legislature to leave the application of the penal rules also to the discretion of the same authority. As their Lordships of the Privy Council say (p. 182):

"Where plenary powers of legislation exist as to particular subject whether in an Imperial or in a Provincial legislature they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation conditional on the use of particular powers or on the exercise of a limited discretion entrusted by the legislature to persons in whom it places confidence is no uncommon thing; and in many circumstances it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian legislature contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred, It certainly used no words to exclude it."

I must therefore hold that Cl. 2, S. 26, and the rules framed thereunder are perfectly legal and valid, and this contention of petitioner should in my opinion be rejected.

In Crl. R. C. No. 12 *of* 1917

This case is precisely similar to Criminal Revision Case No. 9 of 1917, and although the Joint Magistrate has written a separate judgment, this indicates no more proper or adequate consideration of the evidence as to the mamul right of free grazing claimed by petitioner than does the judgment in the last mentioned case.

I would, therefore, set aside the Joint Magistrate's order dismissing the appeal and remand the latter for disposal transferring it to the file of the District Magistrate.

Sadasiva Aiyar, J.—The preliminary question in these cases is whether the provision enacted almost at the end of S. 26, Madras Forest Act (5 of 1882), which empowers the Governor-in-Council not only to make rules classified as (a) to (h) in the former part of the section but also to

"prescribe by such rules, as penalties for the infringement thereof, imprisonment for a term which may extend to one month, or fine which may extend to Rs. 200 or both"

is within the competency of the Indian Legislature or whether that provision is ultra vires. The phrase 'Governor-in-Council' in S. 26 admittedly means Governor and the Executive Members of his Council (see paras. 4 and 6 of the Government of India Act as to the distinction between the Governor-General and his Executive Council on the one hand and between the Governor-General and his Legislative Council on the other). The Governor and his Executive Council have accordingly made a certain rule under Ss. 26 and 32, Forest Act (read together), which rule (see R. 5 in Ex. A) applies to the grazing of cattle in an unreserved forest of the Kangundi zamindari, and a further rule (R. 11 in Ex. A) by which such act of grazing in contravention of R. 5 is made punishable with imprisonment upto one month or a fine upto Rs. 200 or both. In *F. W. Biddle* v. *Tarranychurn Bonnerjea* (3) decided in 1850 [see p. 513, of the Indian Decisions (old series), Vol. 2, reprinted by the Law Printing House, Madras] it is said:

"A delegation to commissioners of. . . . framing rules. . . . to compel discovery by modes not defined, and subject to penalties of their imposition, appears prima facie to be an excess of Legislature, as a delegation of what is virtually legislative power; and the provision that such rules should be approved after they are framed by the Governor of Bengal, and the Governor-General in Council, if understood of them acting in their executive character, would not remove the illegality."

In *Empress* v. *Burah and Book Singh* (1) the questions for disposal were, (1) whether the Governor General in Council had power to delegate his legislative functions to the Lieutenant Governor of Bengal (an Executive Officer), and (2) whether the provision in S. 9, Act 22, of 1869, called the Garo Hills Act, em-

1. (1877-78) 3 Cal 63 (F B).
2. (1879) 4 Cal 172=5 I A 178 (P C).
3. (1850) 2 Ind Dec (o s) 503=1 Taylor & Bell 391.

powering the Lieutenant-Governor to extend all or any of the provisions of the Act to the Cossyah and Jynteeah Hills, was a delegation of legislative functions to the Lieutenant-Governor of Bengal. Seven Judges considered the question and four of them held that the Governor-General had no power to delegate his legislative functions to the Lieutenant-Governor of Bengal three held that he had such power. Markby, J., who wrote the leading judgment of the majority says at p. 91:

"But when a Legislative Council was constituted in India distinct from the Executive Council with power to make laws at meetings held for the purpose, I think it was clearly intended to restrict the Legislative Council to the exercise of functions which are properly legislative, that is to the making of laws which (to use Blackstone's expression) are rules of action prescribed by a superior to an inferior, or of laws made in furtherance of these rules. . . . The Indian Legislative Council cannot, in my opinion, do all that Parliament can do, even whether there is no express prohibition. The powers concentrated in Parliament are in India divided between the Executive and the Legislative Councils. . . . The Legislative Council has the power of making laws only. . . . There is no legal impediment to Parliament taking upon itself executive functions, and the executive authorities are all responsible to Parliament for the way in which they exercise their executive powers. Indeed, to some extent, Parliament does exercise purely executive functions, as, for example, when it fixes the amount of the naval and military forces, or appropriates the public revenues. The difference in India is this. That the Executive Council and the Legislative Council are two co-ordinate and independent bodies, each having its own separate functions with which the other cannot legally interfere. For these reasons, I think that the legislative Council, when it merely grants permission to another person to legislate, does not make a law within the meaning of the Act from which it derives its authority."

Then at p. 95 he says :

"These Acts of Parliament nowhere confer any express power upon the Indian Legislature to change the machinery of legislature in India . . . . . The existence of the legislative Council secures publicity and deliberation in regard to the legislative action of Government."

Then at p. 96 :

"The laws must now be made publicly and with deliberation. I do not think this provision either worthless or unimportant, and its worth and importance is greatly increased by the fact that it is the only protection which exists in this country against hasty or arbitrary legislation. . . . . , I think this protection was provided by Parliament for the people of India, and that it is only under the express authority of Parliament itself that they can be deprived of it. The delegation of a power to abolish all the existing Courts of Justice in a large district and to substitute such new ones as the delegatus, may deem advisable,"

was (in the opinion of Markby, J., at p. 104) a delegation of an authority by a legislative Council to an Executive Officer and was ultra vires of the Indian legislature. Then the learned Judge says .

"there may be a difficulty in some cases in saying whether the Act amounts to a transfer of legislative power. There would be precisely the same difficulty in drawing an exact line between the functions of the legislative and the functions of the Executive Council—between the powers which Judges possess to make rules of procedure, and the power they do not possess to make rules of substantive law. But this does not prove that these distinctions do not exist or that they are not to be observed. . . . . I say with confidence that this Court (the only one of which I have a right to speak) has always shown the greatest care and circumspection in questioning the validity of Acts passed by the Indian legislature."

The majority of the learned Judges, having held that the Governor-General in Council could not delegate their functions of legislation by any form of enactment to the Lieutenant Governor of Bengal, further held that the provisions of S. 9, Garo Hills Act empowering the Lieutenant-Governor from time to time, by notification in the Calcutta Gazette, to extend all or any of the provisions contained in the other sections of the Act to other specified territorial areas was a delegation of legislative powers to the Lieutenant-Governor of Bengal and therefore ultra vires. This case in *Empress* v. *Burah and Book Singh* (1) went up to the Privy Council and the judgment of their Lordships of the Privy Council is reported as *Empress* v. *Burah* (2). Their Lordships do not, as I understand, dispute the soundness of the general rule laid down by the majority of the Calcutta Judges that the Indian legislature cannot delegate the functions of legislation to an executive authority by any enactment. At p. 180 their Lordships say :

"The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers."

At p. 181 they say :

"Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils Act."

But their Lordships proceed to point out that when the Governor-General and his legislative Council have first

"determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices to be appointed by, and responsible to, the Lieutenant-Governor of Bengal leaving it to the Lieutenant-Governor to say at what time that change shall take place and also enabling him not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, 'in the other territories subject to his Government,'"

the legislature is not acting ultra vires

. . . . .

"The proper legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditonally as to all these things . . . . . Legislation, conditional on the use of particular powers or on the exercise of a limited discretion entrusted by the Legislature to persons in whom it places confidence,"

is not ultra vires of the Indian Legislature, and "when the conditions are fulfilled, the legislation becomes absolute." Their Lordships held that, by S. 9, Garo Hills Act, the Legislature had legislated conditionally in regard to the areas to be brought under the Act other than the Garo Hills and that S. 9 giving discretion to the Lieutenant-Governor to exercise it as to the particular areas to be so brought from time to time within it was not ultra vires.

In the present case, the question for consideration is whether the discretion given by S. 26, Forest Act to the Governor-in-Council to make rules "to prescribe as penalties for the infringement of" others rules (also to be made by the Governor's Executive Council) imprisonment or fine, is merely a discretion as to the time and the manner of carrying into effect the provisions which, the Legislature had already determined, shall take effect in certain areas, or whether the discretion granted was a discretion, firstly, to legislate for those areas and, secondly, to determine the times and the portions of the areas when and where that legislation shall take effect.

I must admit that I was very much impressed at the hearing by the able argument advanced by Mr. C. Padmanabha Aiyangar for the petitioners in these cases. He argued that the language of the last sentence in S. 26 of the Act gives the discretion to the Excutive Council to embark on new legislation. S. 21 of the same Act enacts that a person who does any act prohibited by S. 21 shall be punished with imprisonment which may extend to six months or a fine which may extend to Rs. 500.

On the other hand, S. 26 now in question leaves it to the discretion of the Governor in Council: "to make rule prescribing penalties" of imprisonment or fine or both upto a certain extent. I think it cannot be denied that the language of the last clause of S. 26 is ambiguous and that the Legislature would have done well if it had indicated clearly that the Legislature itself prescribed conditionally the penalties of imprisonment or fine or both for the infringement of the rules which may be prescribed by the Governor-in Council for certain Acts. Can a discretion to "make rules to prescribe penalties" be treated as merely a discretion to settle the time and place for the coming into operation of penalties already prescribed conditionally by the legislature? I think it is a fair argument that the Legislature has left to the Executive Council the power to create new offences out of particular acts done in particular areas, and not that the Legislature conditionally created the new offences for defined areas and merely left it to the discretion of the Executive Council to notify at what times and in what particular areas the provisions creating such offences shall come into operation.

In the Privy Council case in *Empress* v. *Burah* (2) the particular areas to which (or to the portions of which) the Lieutenant Governor was given the power to extend the provisions already framed by the Legislature were made definite, whereas in the Madras Forest Act (S. 32) the land to which the Government may apply the provisions of the Act is "any land" to which the owner thereof might thereafter wish the Act to be extended by Government. To vest the Government with the discretion to prescribe or not to prescribe penalties for acts done in indefinite tracts seems perilously near to the giving of a discretion to the Executive Government to treat an act as an offence or not an offence, and so to give it a power of independent legislation. There is, however, the principle enunciated by Markby, J., that

"the greatest care and circumspection should be shown in questioning the validity of Acts passed by the Indian Legislature."

It is, also, not uncommon to find very loose and slipshod language used in Indian Acts. Again, their Lordships of the Privy Council [see *Empress* v. *Burah* (2)] seem to deprecate the restriction of the powers of the Indian Legislature, unless those powers are expressly conditioned or restricted

("in which category would, of course, be included any Act of the Imperial Parliament at variance with it.")

I have, therefore, though not without much hesitation, found it possible to hold that by the last sentence of S. 26 the Legislature really meant to itself conditionally prescribe the penalty for the breach of the rules made by the Government as regards matters mentioned in S. 26, Cls. (a) to (h) subject to the Governor-in-Council embodying in any rule or rules the same penalties for acts done in a particular area which acts and which areas were also in the contemplation of the Legislature. I might in conclusion state that I am glad that I have not had the misfortune to differ on this point from the conclusions of my learned brother, as I was first very much afraid that I might be obliged to so differ.

In the result, I agree with the orders proposed by my learned brother.

S.N./R.K. *Petition allowed.*

A. I. R. 1918 Madras 509

BAKEWELL AND PHILLIPS, JJ.

Kuttikatta and *others*—Defendants—Appellants.

v.

Kunhikavamma and *others*—Plaintiffs—Respondents.

Second Appeal Nos. 1450, 1926 and 2598 of 1914, Decided on 11th October 1917, from decrees of Dist. Judge, South Malabar, in Appeal Suit Nos. 928 and 929 of 1912.

(a) Malabar Law—Kanom—Construction—Perpetual demise with covenant for renewal every 12 years—Redemption held not barred—Conditions did not amount to clog—Transfer of Property Act (4 of 1882), S. 60.

A kanom deed, which recited the existence of a prior kanom and a pattam chit under which a certain amount was due, stated that the land was demised in perpetuity and that the kanom was to be renewed every 12 years. The deed also mentioned the number of trees and tanks upon the property:

Held: that the conditions did not constitute a clog on the equity of redemption and that the kanom was redeemable only after the expiry of 12 years and before the kanomdar initiated renewal proceedings. [P 510 C 1]

(b) Practice—New Plea—Defendant minor—Fresh pleas cannot be allowed to be raised on attainment of majority in second appeal.

Per *Phillips, J.*—A defendant cannot raise new defences in second appeal on the ground that he had attained majority since the date o the lower appellate Court's decree and that the decree was not binding on him so long as he was represented by guardian. It is open to him to get the decree set aside, in appropriate proceedings, on the ground of fraud. [P 511 C 1]

(c) Deed—Construction — Vagueness—Intention of parties should be considered.

Where the terms of a document are capable of two constructions the intention of the parties should be considered. [P 510 C 2]

C. V. Anantha Krishna Aiyar and *T. R. Ramachandra Aiyar*—for Appellants.

K. P. M. Menon and *A. S. Venku Aiyar*—for Respondents.

Bakewell, J.—The decision in this case depends upon the true construction of a kanom deed, dated 13th July 1897. The deed commences by reciting two previous documents, a kanom and a pattom chit under which a balance of Rs. 600 was due from the defendants' tarwad and then demises the land in perpetuity and contains a covenant for renewal after every 12 years. In Malabar it is customary to create a usufructuary mortgage of lands by a demise for 12 years and the mortgage is not redeemable until the expiration of that period. This practice resembles that of English conveyancers in creating terms to secure jointures or for raising portions or sub-terms as mortgages of lease-hold interests. Having regard to the facts that the purpose of the document was to discharge previous incumbrances and that the rent reserved is nominal, and to the recital of the number of trees and tanks upon the property which would furnish evidence in estimating any improvements claimed to have been made by the lessee, I am of opinion that the intention of the parties was to create a mortgage and the deed should be read as if it contained a proviso for redemption. Since the demise is made with the object of creating an interest in the land to be held by the kanomdar as security for the re-payment of the amount due by the lessor, it is in this respect immaterial whether the grant is made in perpetuity or for a specified term of years; the right of redemption is not affected thereby. The local usage however restricts the right of redemption for a cer-

tain period and when the period does not exceed 12 years, the custom has always been enforced by this Court, and the restriction may be accepted as reasonable and therefore not invalid as a clog or fetter on the right of redemption. [See *Morgan* v. *Jeffreys* (1)].

Having regard to the usage, I think that the provision for a renewal amounts to a covenant by the lessor mortgagor that the mortgage shall not be redeemable for a period of 12 years and that if he fails to redeem at the expiration of any such period the lessee shall upon payment of a certain sum be entitled to retain possession for a further period of 12 years. Under S. 98, T. P. Act, 1882, the rights and liabilities of the parties are determined by their contract and local usage, and this implied covenant is binding upon them. Any other construction would, as pointed out in the decision in *Neelakandhan* v. *Ananthakrishna Ayyar* (2), deprive the mortgagor of his right of redemption, which is of the essence of the transaction. That decision was with reference to a document almost identical in its terms with the kanom deed in this case and I should have regarded myself as bound by it, had not the learned Judges expressly declined to consider the provisions of the Transfer of Property Act which did not apply to the case before them. In *Gopalan Nair* v. *Kunhan Menon* (3) the term granted had expired and the mortgagor had the right to redeem at once, and it was held that the kanomdar could not set up a right of specific performance of a covenant of renewal in defence to a suit for redemption. It may also be pointed out that the Court will not enforce specific performance of an agreement to mortgage. In the present case the kanomdar is in possession under a lease in perpetuity and there is no need of a fresh grant and therefore the agreement to renew cannot be construed as one to create a new demise. The mortgagor in the present case did not redeem the property on the expiration of the first period of 12 years and did not bring his suit for redemption until nearly two years afterwards, and not until the kanomdar had commenced proceedings to enforce his right of renewal. I think that under these circumstances the implied covenant to postpone redemption for a further period of 12 years has come into force and that the mortgagor cannot redeem until it has expired. I agree with my learned brother that defendant 7 in *Second Appeal No.* 1926 *of* 1914 cannot raise any plea based on his authority in these proceedings. For these reasons I would affirm the decrees of the lower appellate Court and dismiss these appeals with costs of respondent 1.

Phillips, J.—*Second Appeal No.* 1450 *of* 1914.—Two questions arise in this appeal, (1) whether the suit document, Ex. A, is a perpetual kanom deed, and (2), if so, whether the deed is invalid as it contains a provision which is a clog on the equity of redemption. The language of the document is exactly similar to the document considered in *Neelakandhan* v. *Ananthkrishna Ayyar* (2), and it was there held that it constituted a mortgage with a covenant by the mortgagor to renew every 12 years on the terms provided for, and I agree that this is also a correct interpretation of the suit document. In the two lower Courts it was not disputed that the document contained a covenant for perpetual renewal, and consequently the interpretation was not discussed. When the terms of a document are capable of two interpretations we have to consider the intention of the parties to the document. In the present case the parties have all along treated the document as a perpetual kanom or sasvitam and this fact strengthens me in adopting the same interpretation. As regards the second point we have the ruling in *Neelakandhan* v. *Ananthakrishna Ayyar* (2) that the provision for perpetual renewal is invalid, but in that case the document under consideration was executed before the passing of the Transfer of Property Act and it was held unnecessary to express an opinion as to the effect of S. 98 on such covenants. In *Gopalan Nair* v. *Kunhan Menon* (3) the learned Chief Justice (then Wallis, J.,) expressed on opinion that a covenant for a perpetual renewal in a kanom deed governed by the provisions of the Transfer of Property Act would not be invalid, as a kanom is an anomalous mortgage within the meaning of S. 98, T. P. Act. A perpetual kanom was recognized by this Court so long ago as 1871: vide, *Kottal Uppi* v. *Edavalath Thathan Nambudiri* (4), and

1. (1910) 1 Ch 620.
2. (1907) 30 Mad 61.
3. (1907) 30 Mad 300.
4. (1870-71) 6 M H C R 258.

was held to be valid in *Kolangorath Raman Nayar* v. *Kannoth* (5).

No doubt a mortgage usually implies a possibility of redemption but in the present kanom I think that possibility is contemplated in case of forfeiture of the demise. If the demise were forfeited for any reason such as refusal to pay renewal fee every 12 years, I do not think the jenmi could enforce the forfeiture without paying up the mortgage amount, and in this contingency we discern a possibility of redemption and it also may account for the enumeration of the trees in existence at the time the deed was executed. I see no reason therefore for differing from the opinion frequently expressed in this Court that a kanom is an anomalous mortgage within the meaning of S. 98, T. P. Act. This being so, the conditions, even though they constitute a clog on redemption can be enforced. I would therefore dismiss this appeal with costs of respondent 1. Second Appeal No. 1926 of 1914 is a similar appeal filed by defendant 7 alone. He was a minor at the date of the lower appellate Court's decree and now wishes to raise new defences in second appeal and contends that the decree is not binding on him. He was represented in the suit by a guardian whose interests are identical with his and there is no reason to suspect any fraud in the conduct of the defence. If defendant 7 thinks he has been defrauded by his guardian, he has remedy, but until he establishes fraud or misconduct the decree is binding on him. The appeal therefore follows *Second Appeal No.* 1450 *of* 1914 and is also dismissed with costs of respondent 1. *Second Appeal No.* 2598 *of* 1914, which relates to the connected suit filed for redemption of the perpetual kanom, must also fail and is dismissed with costs of respondent 1.

S.N./R.K. *Appeals dismissed.*

5. (1915) 31 I C 184.

A. I. R. 1918 Madras 511

ABDUR RAHIM AND KUMARASWAMI SASTRI, JJ.

Alagappa Chettiar—Appellant.

v.

Muthukumara Chettiar—Respondent.

Letters Patent Appeals Nos. 247 and 248 of 1916, Decided on 16th July 1917, against judgment of Srinivasa Aiyangar, J., in Civil Revn. Petn. Nos. 591 and 592 of 1915.

Interest—Money deposited in Court withdrawn on giving undertaking— Other party succeeding in appeal, money was ordered to be refunded—Person wrongfully using it is liable to pay interest till date of payment—Civil P. C. (1908), S. 144.

A certain sum of money was in deposit in Court on behalf of a judgment-debtor and a dispute arose as to who was entitled to the money. Appellants filed a suit to establish their right and obtained a temporary injunction restraining the respondent from drawing the money. The latter gave an undertaking to the Court which made no mention of interest and was allowed to draw the money. Appellants succeeded in establishing their title and claimed interest on the amount drawn by the respondent till the date when he paid back the amount.

Held: that inasmuch as the respondent had no title to the money obtained from it the Court by representing that he had a title and thus had wrongful use of the appellants' money he was bound to pay interest during the time he used the money. [P 512 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

S. Muthiah Mudaliar—for Respondent.

Judgment.—In this case there was a certain amount of money in deposit in Court and there was a dispute as to who was entitled to that money the appellants whose claim was based on a certain trust deed or the judgment-debtor of the respondent. The appellants filed a suit to establish their right and obtained a temporary injunction restraining the respondent from drawing the money. Thereupon the respondent on giving an undertaking to the Court was allowed to draw the money. The appellants succeeded in establishing their title and the only question now before us in the Letters Patent Appeal is whether the appellants are entitled to interest on the amount drawn by the respondent till the date when he paid back the amount. Srinivasa Aiyangar, J., has decided against the appellant's contention on the ground that the undertaking given by the respondent did not provide for the payment of interest. We do not think that this is a conclusive factor. There is no express provision in the Civil Procedure Code or any of the other Indian Acts which we have been referred which covers the question. S. 144 of the Code provides proper orders being passed as regards payment of interest or damages in cases of restitution. This is not exactly a case of restitution though the principle of that section has been applied to a case somewhat similar to this by a

Bench of this Court in *Tangutur Subrayudu* v. *Yerram Setti Seshasani* (1). We have also been referred to a decision of the Patna High Court in *Indra Chand Bothra* v. *Mr. A. H. Forbes* (2). There also though it was not a case exactly covered by S. 144, the principle of that section was applied. The Privy Council has laid down the principle applicable to such cases in *Rodger* v. *Comptoir d' Escompte de Paris* (3). Here the facts show that the appellants were entitled to this money and the respondent who had a no title to the money obtained it from the Court by representing that he had a title. The principle therefore applies that having had wrongful use of the appellants' money he is bound to pay interest during the time he had the use of the money.

The learned pleader for the respondent argued that the Court had no power to order the payment of the money or interest thereon in this proceeding. But the order is simply to enforce the undertaking which was given by the respondent to the Court, and we have no doubt in holding that the Court had inherent power to enforce that undertaking on the faith of which the respondent obtained the money. We must allow the appeals reversing the judgment of the learned Judge and the decree will be varied in this way; the decree will provide for payment of interest by the respondent at 6 per cent from the date he drew the money from Court till the date of re-payment. The respondent must bear the costs of these appeals and of the revision petitions. The memoranda of objections are dismissed.

S.N./R.K. *Appeals allowed.*

1. (1917) 40 Mad 299=33 I C 739.
2. (1917) 2 P L J 149=39 I C 22.
3. (1871) 3 P C 465.

A. I. R. 1918 Madras 512

ABDUR RAHIM AND BAKEWELL, JJ.

Vadlamany Venkatesam and *another*—Appellants.

v.

Mangipudi Viswanadham and *another*—Respondents.

Appeal No. 38 of 1916, and Civil Revn. Petn. No. 276 of 1916, Decided on 10th August 1917 against the appellate order of District Judge, Vizagapatam, in A. S. No. 83 of 1915.

(a) Civil P. C. (1908), S. 73—Questions to be considered under S. 73 by Court, stated.

The only questions for consideration under S. 73, Civil P. C., are whether the decrees in respect of which rateable distribution is sought are against the same judgment-debtor and whether the applications for rateable distribution were presented before the assets were received by the Court. [P 512 C 2]

(b) Civil P. C. (1908), S. 73—Decree against judgment debtor as representative of his father — Priority cannot be claimed over decree against judgment-debtor personally.

A decree-holder, holding a decree against the assets of the judgment-debtor's father in the hands of the judgment-debtor cannot, in respect of the amount of his decree, claim priority over another decree-holder holding a decree against the judgment-debtor personally. [P 513 C 1]

B. Narasimha Rao—for Appellants.

P. Narayanamurthi—for Respondents.

Judgment.—The appellant had a decree against respondent 2 for money and respondent 1 had also a decree against respondent 2 for money as legal representative of his father, and the amount payable under the decree was out of the assets of respondent 2's deceased father in the hands of respondent 2. The respondent 1 attached the property in 1913 and the appellant attached it in 1914. The property was sold in execution of the appellant's decree in 1914 and the money was brought into Court. Then both of them applied for payment of the money in satisfaction of their decrees. There can be no doubt that S. 73, Civil P. C., applies to this case, as respondent 1's application for execution had been made before the assets were received by the Court. The learned vakil for respondent 1 supporting the order of the lower Court contends that his client is entitled to priority in respect of the amount of his decree, inasmuch as his decree was against respondent 2 as legal representative of his father and only to the extent of the assets of the deceased in his hands. The only question for consideration under S. 73 is whether the two decrees are against the same judgment-debtor, and that point is settled by this Court in the decision reported as *Kaliappan Servaikaran* v. *Varadarajulu* (1) and *Srinivasaiengar* v. *Kanthimathi Ammal* (2).

The latter decision, though it was a judgment of a Single Judge, has been confirmed in Letters Patent Appeal. The petition of respondent 1 was put in under S. 73 and all that he can claim is what that section allows him. He would have

1. (1910) 33 Mad 75=3 I C 737.
2. (1910) 33 Mad 465=5 I C 917.

no locus standi in these proceedings unless he wanted to avail himself of the provisions of this section. The learned vakil for respondent 1, however contends that under the Hindu law, his client being a decree-holder with respect to the assets of the deceased, the property of the deceased in the hands of the respondent 2 must, first of all, be applied in payment of the creditors of the deceased and it is only the balance that is available to the creditors of his heir. It is unnecessary for us to deal with that general question. We are only concerned with an application under S. 73, Civil P. C., and under that section respondent 1 is not entitled to anything more than a rateable share of the money in Court. The decrees of both the lower Courts will be modified and the money in Court will be divided between the appellant and respondent 1 in proportion to their decrees. Each party will bear the costs of this appeal.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 513

WALLIS, C. J. AND OLDFIELD, J.

V. Krishnaiya—Appellant.

v.

C. Gajendra Naidu and *others*—Respondents.

Original Side Appeal No. 93 of 1915, Decided on 20th March 1917, from judgment of Bakewell, J., in Civil Suit No. 203 of 1899.

(a) Civil P. C. (1908), O. 21, R. 22—Notice must go to parties against whom it is sought to revive decree.

Both on the reason of the thing and on the analogy of the provisions of the Civil Procedure Code, which apply the doctrine of revivor to India, as regards the revivor of the decrees of the High Court, original side, notice must go to the parties against whom it is sought to revive the decree. [P 513 C 2]

(b) Limitation Act (1908), Art. 182, Expl. 1, Col. 3—Applicability of.

Explanation 1 in Col. 3, Art. 182, refers only to applications under the article and has nothing to do with the revivor of original side decrees. [P 514 C 1]

Venkatasubba Rao and *Radhakrishnayya*—for Appellant.

K. Ramachandran, *T. Venkatasubba Aiyar* and *Narayana Sastri*—for Respondents.

Judgment. — This appeal raises an interesting point as to which Mr. Venkatasubba Rao has candidly put the authorities before us. The question is whether Bakewell, J., was right in holding that an order of revivor of a decree on the original side made against defendant, under S. 248 of the old Code was inoperative as against defendant 2 to whom no notice went. The term "revivor" in Col. 3, Art. 183, as is well known, refers to the Common Law practice which prevailed in the Supreme Courts in India under which, if a writ of execution was not sued out within a year and a day, it was necessary to revive the decree by a process known as *scire facias* or more fully *scire facias quare executionem non habeat*, that is to say, by calling on the judgment-debtor to show cause why the plaintiff should not have execution against him. When the Code of Civil Procedure came to be enacted, the rule was embodied in what was S. 248 of the old Code and now O. 21, R. 22, under which, when an application for execution is made more than one year after the date of the decree, notice is to go to the person against whom execution is prayed, requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.

This rule requires notice to go against the person against whom execution is applied for, and sub-S. 6, Col. 3, Art. 182, Lim. Act, provides that when such notice has been issued, the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him is to form a fresh starting point. We think both on the reason of the thing and on the analogy of the provisions of the Code which apply the doctrine of revivor to India that as regards the revivor of original side decrees, notice must go to the parties against whom it is sought to revive the decree. The whole doctrine, as is explained in the passage from Blackstone cited in Bakewell, J's judgment, had its origin in the presumption of satisfaction which was held to arise when execution had not been applied for within a year after the date of the judgment. As regards Art. 182, Expl. 1 in Col. 3 provides that where the decree or order has been passed severally against more persons than one, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall

take effect against them all. This only applies to applications under Art. 182, which in terms excludes applications such as the present provided for by Art. 183. The explanation refers only to applications under Art. 182 and has nothing to do with the revivor of original side decrees. For these reasons we think that the judgment of Bakewell, J., is right and that the appeal must be dismissed with costs of respondent 1.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 514

AYLING AND NAPIER, JJ.

Ratna Mudali and *another* — Petitioners, In re.

Criminal Revn. No. 807 of 1916 (Criminal Revn. Petn. No. 657 of 1916) and Criminal Revn. Case No. 821 of 1916 (taken up No. 42 of 1916), Decided on 14th February 1917, against judgment of Sess. Judge, Chingleput, in Criminial Appeal No. 30 of 1916.

(a) Criminal P. C. (1898), S. 54—Exercise of power of arrest is not restricted only to officer to whom warrant is directed.

Section 54, Criminal P. C., does not prevent any police officer from arresting a person where a warrant for his arrest has already been issued by a Magistrate, and the exercise of the power is not restricted only to the officer to whom the warrant is directed: 44 *Cal.* 76; 18 *All.* 246 and 19 *Mad.* 310, *Dist.* [P 514 C 1, 2]

(b) Criminal P. C. (1898), S. 54—Code gives widest power to police in cognizable cases.

Per *Napier, J.*—The object of the Code is to give the widest powers to the police in cognizable cases and the only limitation is the necessary requirement of reasonability and credibility of the information to prevent the misuse of the powers. [P 514 C 2]

T. *Rangachariar*—for Petitioners.

Public Prosecutor—for the Crown.

Ayling, J.—The only point argued is that the arrest was illegal. It is in evidence that a warrant had been issued for the arrest of Velan and Kuppan on a charge of a cognizable offence, that the constables knew of this, and had been directed by their Sub-Inspector to be on the lookout for them, and arrest them if found. In such circumstances I have no hesitation whatever in deciding that they were justified, under S. 54, Criminal P. C. in making the arrest. Of the cases quoted by Mr. Rangachariar *In the matter of Charu Chandra Majumdar* (1) is clearly distinguishable on the ground that no warrant had been issued. The other cases, *Abdul Gafur* v. *Queen-Empress* (2), *Queen Empress* v. *Dalip* (3) and *Queen Empress* v. *Kalian* (4), appear to me to have no bearing on the applicability of S. 54, Criminal P. C. There is no reason for interfering with the convictions; but I regard the imposition of a fine on accused 1 as unnecessary and would remit that portion of the sentence. The fine, if paid, should be refunded.

Napier, J.—This point is to my mind not arguable. A clear distinction is made in the Criminal Procedure Code between cognizable and non-cognizable cases. S. 54 empowers any police officer to arrest without an order from a Magistrate and without a warrant any person who has been concerned in a cognizable offence or against whom a reasonable complaint has been made or credible information received or a reasonable suspicion exists of his having been so concerned. The object of the Code is to give the widest powers to the police in cognizable cases and the only limitation is the necessary requirement of reasonability and credibility to prevent the misuse of the powers. The legislature could have confined the power to officers in charge of a police station, as is done in S. 55, where matters are dealt with which are not offences, but has not thought fit to do so. The suggestion that a police officer who suspects a man of having committed a cognizable offence may arrest, but that he may not arrest when a warrant has been issued has nothing in the language of the section to support it and would enable a man wanted by the police on a charge of murder, for instance, to defy every police officer except the one who held the warrant. The case reported as *In the matter of Charu Chundra Majumdar* (1) is one where the accused was wanted by the Police in Bombay and he was arrested in Bengal at their request, and there is no evidence that a warrant had been issued. There is, in my opinion, nothing in the learned Judge's observations which supports the argument addressed to us. I agree with the order of my learned brother.

S.N./R.K. *Petition partly allowed.*

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1. (1917) 44 Cal 76=37 I C 57.
2. (1896) 23 Cal 896.
3. (1896) 18 All 246.
4. (1896) 19 Mad 310.

A. I. R. 1918 Madras 515

WALLIS, C. J. AND OLDFIELD, J.

Banghy Abdul Razack Sahib — Plaintiff—Appellant.

v.

Khandi Rao and *another*—Defendants--Respondents.

Original Suit Appeal No. 22 of 1916' Decided on 29th March 1917, from judgment of Bakewell, J., in Civil Suit No. 229 of 1915.

Contract Act, S. 59, Illus. (d)—Construction—Contract for supply of goods by agent of enemy firm — Declaration of hostilities before arrival of vessel—Capture of vessel by condemnation by Prize Court and subsequent release — Defendants held not liable under the contract — Commercial intercourse with Enemies Ordinance (6 of 1914).

Defendants, agents of a German firm, contracted on 25th August 1914 to deliver to plaintiff at Madura certain casks of dye in three instalments of two casks each "to be delivered on arrival of the steamers, one lot of two casks to be delivered each time at R. 501-4-0 for each cask." The defendants were not to be responsible if the steamers did not come to Madras or Tuticorin, the port for Madura, where the goods were to be consigned. One of the steamers, "Barenfels," left Hamburg and Antwerp before the outbreak of war, but before it could arrive, war had broken out and the Commercial Intercourse with Enemies Ordinance was in force. The "Barenfels" and her cargo were captured in October 1914 and condemned by the Prize Court. She was however subsequently released and allowed to proceed on her voyage to Colombo. The defendants were precluded from taking delivery of the goods, unless they deposited a sum amounting to twice the invoice value of the goods. In an action for damages for breach of contract against the defendants:

Held : that the defendants were not liable inasmuch as:

(1) on the true construction of the contract the defendants were not liable to deliver the goods even if the steamers did arrive when there were no such goods in it; *Hale* v. *Rawson*, (1858) 27 *L. J. C. P.* 189, *Dist.*

(2) the capture of the ship was one of the possibilities contemplated under the clause in the contract relating to the non-arrival of steamers which relieved the defendants from the obligation to supply the goods on the said contingency.

(3) the condemnation of the goods related back and divested the owners of the goods as from the date of seizure and the effect of the proclamation was to render the further performance of the contract illegal.

(4) the subsequent release of the vessel and her cargo did not impose in the defendants any obligation to purchase the goods at a greatly enhanced price from the Prize authorities and make them over to the plaintiff. [P 516 C 1, 2]

Grant and *Greatorex* — for Appellant.

Short, *Bewes* and *Co.* — for Respondents.

Judgment.—This is a suit for breach of contract entered into between the plaintiffs who are merchants at Ambur and the defendants who were importers of German dyes to Madras and Tuticorin, entered into on 25th August 1914 after the outbreak of the war, by which the defendants undertook to deliver certain casks of dye from the lot to arrive per SS. Steinturn and certain other casks from what is described as the "Bombay lot" meaning the lot imported by the defendants at Bombay. The contract went on to stipulate for three deliveries of two casks each of the weight and description mentioned

"to be delivered on arrival of other steamers, one lot of two casks to be delivered each time at the above-mentioned rate, i. e., Rs. 501-4-0, for each cask. We are not responsible for the supply of goods if steamers do not come to Madras or Madura."

The evidence shows that the defendants had arranged for consignments by successive steamers and having regard to this we have no doubt that what the defendants understood to deliver was two casks of the required description arrive in the ordinary course in successive steamers consigned to the defendants at Madras or Tuticorin, the port for Madura. In the case of Tuticorin, the ship either touched at Tuticorin or landed the goods at Colombo for transhipment. One of the steamers, "Barenfels" had left Hamburg and Antwerp before the outbreak of war and, according to the evidence, should have arrived in Madras about 17th August in the ordinary course. On the date of the contract she was overdue, and the defendant says he did not know what had happened to her. She did arrive ultimately in May 1916, and the first contention of the learned Advocate-General was, that under the contract on the arrival of the "Barenfels', the defendants became bound to make delivery even if the goods were not on board, citing *Hale* v. *Rawson* (1). In that case, which was an action for failure to deliver tallow on the arrival of a certain steamship, it was held that they were not relieved of their obligation because it turned out the ship had no tallow on board. Here, we think, it is clear from the language of Ex. A, and having regard to the course of business and the stipulation as to the non-arrival of the steamers, that the defendants were only bound

1. (1858) 27 L J C P 189.

to make deliveries out of the lots consigned to the defendants in the ordinary course of business by the steamers referred to and arriving therein, and that they were not bound to make any such delivery on the arrival of the steamer without having on board any such goods consigned to the defendants. This being the interpretation of the contract, as the goods had not arrived before the coming into force of the proclamation of 9th September 1914 against trading with the enemy, the effect of that proclamation was to render the further performance of the contract illegal, as it would admittedly have been impossible for the defendants to take up the goods and pay for them and to put an end to the contract: *Karbergl (Arnhold) & Co.* v. *Blythe Green, Jaurdian & Co.* (2).

The case may also be disposed of on another ground. The "Barenfels" and her cargo were captured in October 1914 as prize of war and taken into Alexandria for condemnation, and they were subsequently condemned as prize of war in September 1915, a condemnation which related back and divested the owners of the goods as from the date of seizure: *The Odessa* (3), *The Zamora* (4). Under the contract, as already stated, the defendants were not to be responsible for the supply of goods if steamers did not come to Madras or Madura, and these steamers clearly were the "other steamers," already mentioned, by which the three consignments were coming out. In these circumstances, the capture of the "Barenfels" which must have been one of the possibilities contemplated, in our opinion, relieved the defendants of liability under this clause and put an end to the contract so far as this particular consignment was concerned. And it seems to us immaterial that some six months later the ship and cargo were sent out to Colombo, Madras and Calcutta by bailees from the Prize Court who landed the goods in question, which were consigned to Tuticorin at Colombo, and did not forward them by transhipment to the defendants, the consignees at Tuticorin. There was no certificate of release from the prize Court in respect of these goods which at the time were being proceeded against for condemnation and the only terms on which the defendants were able to obtain delivery of them was by depositing a sum amounting to twice their invoice value and by agreeing that, if the goods were condemned, as happened, this sum should be treated as the sale price paid to the prize authorities as vendors. It cannot be said that the defendants were under any obligation to purchase these goods at a greatly enhanced price from the prize authorities and make thom over to the plaintiff, and we think the plaintiff's claim in respect of these casks fails.

The case as regards the plaintiff's other ground of claim on account of the consignment on the SS. "Frimley" is even clearer. The evidence, for there is nothing explicit in the plaint, is that kegs of 16 per cent. strength arrived by that ship. The contract being for delivery of kegs of 40 per cent. strength it was for the plaintiff to show that the defendants were in a position to deliver dye such as that described in the contract. We think it is clear that the plaintiffs have not done so and that the discription of the dye on the "Frimley" differs in toto from the description stipulated for. We may add that on the evidence the plaintiffs failed entirely to establish that the dye on the "Frimley" could be accepted as equivalent to that referred to in the contract, the only witness who had any practical knowledge of dyeing deposing that dye of 16 per cent strength could not produce the same quality of colour as that of 40 per cent. strength after admixture. In the result the appeal fails and is dismissed with costs. (Two counsel).

S.N./R.K. *Appeal dismissed.*

2. (1916) 1 K B 495=85 L J K B 665.
3. (1916) A C 153=85 L J P C 49.
4. (1916) 2 A C 77.

A. I. R. 1918 Madras 516

ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

Secy. of State—Defendant—Appellant.

v.

Ambalavana Pandara Sannadhi—Plaintiff—Respondent.

First Appeal No. 181 of 1915, Decided on 12th April 1917, against decree of Sub-Judge, Tinnevelly, in Original Suit No. 38 of 1913.

(a) Madras Land Encroachment Act (1905), S. 2—"Standing or flowing water"—Meaning of, stated.

The declaration in S. 2, Madras Land Encroachment Act, that all standing or flowing water belongs to Government, must be under-

stood to mean the water and the land on which it stands or over which it flows, the whole taken together collectively, and not the mere liquid apart from and separate from the land. The words " all standing or flowing water " are intended to include all land covered with water or forming a watercourse. [P 519 C 2]

(b) Madras Land Encroachment Act (1905), S. 2—S. 2 deals with unappropriated properties.

In S. 2, Land Encroachment Act, the legislature has dealt with unappropriated properties and not with unappropriated things. [P 520 C 1]

(c) Madras Land Encroachment Act (1905), S. 2—Riparian rights of owners in adjacent stream—Government does not possess independent right in water and cannot claim from owners any price for use of water.

Each proprietor of adjacent land has a right to the usufruct of the stream which flows through it, and in that sense the stream is the common property of all the riparian proprietors If the Government happens to be a riparian proprietor, it has a right to the usufruct of the river in the same way as other riparian proprietors.

The provisions of the Land Encroachment Act cannot be understood as laying down that even in those streams and rivers in which the riparian rights of zamindars or other owners of adjacent lands exist, a separate and independent proprietary right in the water subsists in the Government, entitling it to demand from the owners of the lands on the banks any price it chooses for the use of the water. [P 521 C 1]

To what extent the right of a riparian proprietor to utilize the water for irrigation purposes exists must depend upon the capacity of the stream and the extent of land of the other riparian proprietors standing in need of irrigation : *Norbury (Lord)* v. *Kitchin*, (1863) 7 *L T* 685 ; *Minor* v. *Gilmour*, (1858) 12 *Moore P C* 131 ; *White* v. *White*, (1906) *A C* 72 ; *Lyon* v. *Fishmongers' Company*, (1876) 1 *A C* 662 and *Chasemore* v. *Richards*, (1859) 7 *H L C* 349, *Foll.* [P 521 C 2]

(d) Madras Land Encroachment Act (1905), S. 2—Reparian owner—Meaning of, stated.

Where a stream flows through a zamindari or inam village cultivated by raiyats and tenants, and where it is the duty and interest of the zamindar or inamdar to supply tenants with water for purposes of irrigation, he must be deemed to be the riparian owner representing the tenants as a body. [P 522 C 1]

In case of small rivers and streams running through the land, the use of the words "besides poramboke" in an inam title-deed or permanent sanad would be in favour of the inclusion of river beds while the phrase may not ordinarily be applied to the beds of large rivers. [P 522 C 2]

(e) Madras Irrigation Cess Act (1865), S. 2—Liability under S. 2 arises from entire or substantial use of water of stream belonging to Government.

The irrigation which makes a man liable to cess under S. 2, Irrigation Cess Act, must be with water derived either entirely or at least to a substantial extent from a river, stream or channel belonging to Government : 37 *Mad* 322; 37 *Mad* 369 *note* and 32 *I C* 279, *Foll.* [P 523 C 1]

(f) Madras Irrigation Cess Act (1865), S. 2—Zamindar is entitled to convert dry land into wet, unless otherwise provided in sanad without additional payment.

Except where it is expressly provided otherwise in the sanads or title-deeds, the zamindars or inamdars are entitled to bring into cultivation land which was lying uncultivated at the time of the settlement and to raise additional crops by the user of natural streams to the extent of the quantity lying within the anaicut of those streams without making themselves liable to a further payment, whether by way of water cess or other payment. [P 522 C 2]

The fact that in an inam title-deed or sanad, the quantity of lands under wet cultivation is mentioned cannot lead to an inference that the zamindar or inamdar is not entitled to irrigate and bring into cultivation the waste lands with water of natural streams passing through the village without making himself liable to additional payment. [P 522 C 2]

Where it is not shown that a zamindar has been taking more water than before, the mere fact that he has been cultivating more land is not sufficient to justify the Government in levying water cess. [P 523 C 2]

(g) Madras Irrigation Cess Act (1865), S. 2—Onus is on Government to show that zamindar takes more water than he is entitled to.

Even where a stream belongs to the Government the burden is on the latter to show that the inamdar has been actually storing in his tanks more water than he was entitled to do under the engagement with the Government at the time of the inam enfranchisement and settlement. [P 524 C 1]

S. Srinivasa Aiyangar—for Appellant.

T. Rangachariar and *S. Muthiah Mudaliar*—for Respondent.

Abdur Rahim, J.—This appeal is preferred by the Secretary of State for India in Council against the judgment of the Subordinate Judge of Tinnevelly in a case in which the right of the Government to levy water cess on 33 odd acres of land in the inam village of Vadagarai belonging to the plaintiff-respondent is in dispute. The Government claims the right to levy cess on the allegation (para. 2 of the written statement) that the waters of a Government channel called Karimandy Ammankal mingled with the water in the Shamalanadhi river, more generally known as the Pachayar, which supplies the channel and the tanks by means of which the plaintiff's village is irrigated, and that they are entitled to charge water rate on any land cultivated in excess of the quantity which was under cultivation at the time of the enfranchisement and confirmation of the inam in 1864-65. It is then claimed (para. 4 of the written statement) that the river Pachayar itself belongs to the Government. On the other side, it is alleged (see plaint para. 9) that the whole course of the river from beginning to end lies with-

in the plaintiff's inam limits. That statement is found to be not correct and no argument on the basis of it has been pressed before us. This river has its source in the hills which divide Travancore from the British territory in this locality, and it flows up to and a little way below the anicut at the point where the channel which irrigates the plaintiff's lands takes off, along the plaintiff's inam village. On the southern there is the village called Arasapattu, the greater portion of which amounting to 390 acres is inam land belonging to the plaintiff and a very small portion amounting to 55 acres is raiyatwari. Below the anicut and on the southern side there is a raiyatwari village called Pattai which is also irrigated by this river.

Admittedly, the quantity of plaintiff's land in the inam village of Vadagarai, which was cultivated with water of the Pachayar river at the time of the inam settlement, was about 115 acres and since then 33 more acres odd have been converted into wet, and it is with reference to the right to irrigate these 33 acres with water of the Pachayar that the question has arisen. The claim of the Government is founded mainly on the ownership of the Pachayar river and also on the allegation that the water of a Government hill stream or "odai" called Karimandy Ammankal gets mingled with the water of the Pachayar river above the anicut.

It will appear from the map that in its upper reaches the Pachayar bounds the inam village of Vadagarai on the north and the village of Arasapattu on the south. On the east of Arasapattu is the Government village of Pattai through which the river continues its course and we may take it, as contended by the learned Advocate-General appearing for the Secy. of State, that the Pachayar flows thereafter through a number of raiyatwari villages. Though the Pachayar is not an altogether small stream, it is a non-tidal and non-navigable river and like most of such rivers, there is very little water in its bed in the dry season. One important question of fact which was argued before us was whether the banks of the Pachayar above the anicut belong on the southern side, as they admittedly do on the northern side, to the plaintiff. It is not easy to locate the raiyatwari land in the Arasapattu village as no definite evidence was adduced on the point, but considering its small extent, we are not prepared to assume for the purpose of this case that the 55 acres of raiyatwari land all stretch along the bank of the Pachayar and are thus riparian property, and that the rest of the lands amounting to 390 acres are all non-riparian situated at the back. The only evidence with respect to the possession of the southern bank is in favour of the plaintiff's case. For such evidence as there is on the point shows that acts of possession, such as, by the leasing of korai grass on the islands and on the banks, have been for a long time exercised by the plaintiff. This evidence has been accepted by the Subordinate Judge and in fact there is nothing to rebut it. We must therefore hold that both the banks of the river above the anicut are owned by the plaintiff.

It is not disputed that this is a pre-settlement inam having been granted by some ruler of the country before the advent of the British Government. The anicut has been in existence for a long time and was constructed by the predecessors of the inamdars and so also the channels and the tanks by which the Vadagarai lands are irrigated. It is not suggested that the Government has constructed any works of irrigation in connexion with this stream, at any rate, above the anicut. Nor is there evidence that they have in any way exercised acts of ownership with respect to this portion of the river. Under S. (1), Madras Irrigation Cess Act of 1865, whenever water is supplied or used for purposes of irrigation from any river, stream or channel belonging to or constructed by Government, the Government is entitled to levy a separate cess for such water, provided the zamindar or inamdar whose land is so irrigated is not entitled, by virtue of engagements with the Government, to irrigation free of separate charge.

In order to justify the imposition of cess under this Act, it must be made out that the irrigation is caused by water supplied or obtained from a stream or river belonging to the Government. The question as to what classes of rivers, streams or channels belong to the Government has recently been the subject of much discussion in this Court giving rise to a considerable conflict of opinion, so that it is difficult to say that there is any consistent statement of the law of binding authority which one can follow. One point

of view is represented by the judgment of Miller and Munro, JJ., in the well-known Urlam case [*Kandukuri Mahalakshmamma Garu* v. *Secy. of State* (1)] and followed by Oldfield and Bakewell, JJ., in *Secy. of State* v. *Kannepalli Janakiramayya* (2) and also approved by White, C. J. and Ayling, J., in *Secy. of State* v. *Ambalavana Pandara Sannadhi* (3). On the other hand Sankaran Nair, J., in more than one case has expressed the opposite view in elaborate judgments and his view has found acceptance with Sadasiva Aiyar, J., in his dissentient judgment in *Secy. of State* v. *Kannepalli Janakiramayya* (2), while the learned Chief Justice and Seshagiri Aiyar, J., [in *Secy. of State* v. *Maharaja of Bobbili* (4)] would seem to steer a middle course between the two positions. Further the *Urlam* case [*Kandukuri Mahalakshmamma Garu* v. *Secy. of State* (1)] as well as the judgments in *Secy. of State* v. *Maharaja of Bobbili* (4), *Secy. of State* v. *Kannepalli Jankiramayya* (2) and *Appeals Nos.* 182-184 *of* 1914 are under appeal to His Majesty in Council. In this state of the authorities, I think it is desirable that I should state my own view of the law and the reasons for the conclusion at which I have arrived. The entire basis of the decision of the *Urlam* case [*Kandukuri Mahalakshmamma Garu* v. *Secy of State* (1)] is the provisions of the Madras Land Encroachment Act 3 of 1905, S. 2 of which declares

"all public roads.....ditches.....the bed of the sea, barbours and creeks below high-water mark, and all rivers, streams, nullahs, lakes and tanks, and all canals and water-courses and all standing and flowing water, and all lands wherever situated, save in so far as the same are the property of any zamindar.....inamdar ....."

to be the property of the Government,

"except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other landowners and to all customary rights legally subsisting."

The very title of the Act and its preamble show that, as stated there, the Act is intended to provide measures for checking unauthorized occupation of lands which are the property of Government by the provision of penal or prohibitory assessment or charge. S. 2 declares what are the properties of the Government. The rest of the sections deal with the mode of levying assessment on Government land, the penalty for unauthorized occupation of such land by any person, his liability for eviction therefrom, the notice to be given to him, the power to decide the question of assessment, all referring to land. There is not a single section which provides for the levying of any assessment, charge or penalty or any other mode of redress with respect to unauthorized user or appropriation of water standing or flowing as apart from the land it occupies.

The judgment in the *Urlam* case (1) is founded in the first place on the supposition that the words "standing and flowing water" mean the liquid as separate from the reservoir or stream containing it or through which it flows. With the greatest respect, I think, it is perfectly clear that what is meant is the water and the land on which it stands, or over which it flows, the whole taken together collectively, and not the mere liquid apart and separate from the land.

It is possible that the idea sought to be conveyed by the legislature might have been more tersely expressed without sacrificing clearness: some of the words used are evidently superfluous. It is however clear to me that what the phrase "all standing and flowing water" was intended to include was all land covered with water or forming a water course. Any other interpretation would lead to imputing to the legislature an intention, which it is difficult to conceive, it could have ever entertained. The interpretation which has been sought to place upon this section on behalf of the Government would logically result in declaring that the water even in wells, tanks and reservoirs or in springs and streams wholly situate in the land of a zamindar, inamdar or any other proprietor, belongs prima facie to the Government unless it can be shown that it belongs to the landowner. When this was pointed out to the learned Advocate-General during the course of the argument he said he was not prepared to go so far, but it is difficult to see how if the reasoning of the *Urlam* case (1) is right, the extreme conclusion could be resisted. Then is it correct to say that the effect of S. 2 is to cast the onus of proof on any person whose right to the subjects of property mentioned in S. 2 is contested by the Government ?

1. (1911) 34 Mad 295=8 I C 67.
2. (1915) 30 I C 609.
3. (1911) 34 Mad 366=8 I C 257.
4. (1916) 32 I C 270.

I venture to think that this is not so. The scope of this section, in my opinion, is only to declare that certain classes of properties which do not belong to any individual private proprietor belong to the Government ; I do not see how from this any inference could be drawn that if the Government chooses to assert a right to land, stream or any other class of property mentioned in the section as against the person in possession or enjoyment thereof, that thereupon without anything more and without regard being paid to any other facts, such as possession and user of the property in question, the burden is thrown upon him of proving that the property belongs to him. If that construction were right, it would make no difference in this respect whether the Government was seeking to eject the person in occupation or to levy on him a penal assessment or a water cess.

I venture to think that such a radical and comprehensive subversion of the ordinary law of proofs was never contemplated. If it had been, one would have expected to find a clear and direct statement of such an intention. On the other hand, I find nothing in the words of S. 2 to warrant the supposition that the Government was there laying down a new rule of evidence or procedure of such general and far-reaching significance. It is hardly possible that an important alteration like this in the law of evidence, if contemplated, should not have been dealt with by a clear express enactment but left as a matter of merest inference to be drawn from the provisions of an Act addressed to the limited purpose of providing special remedies for cases of encroachments on Government lands. Laying the burden of proof, in my opinion, wrongly on the person in possession or enjoyment of a stream or river to show that it belongs to him the next step in the argument on behalf of the Government is stated in this simple form. According to ordinary notions of jurisprudence, flowing water cannot be the property of any private individual and therefore by virtue of S. 2 it becomes the property of the Government. In the first place, this argument overlooks the fact that by S. 2 the legislature is dealing with unappropriated properties, and not with unappropriated things, supposing that flowing water comes within the latter category. Reliance is placed upon the definition of a stream as given by Lord Watson in *MacNab* v. *Robertson* (5), "as a body of water having as such a continuous flow in one direction," as showing that the bed and the banks do not enter into the conception of a stream. In that case, all that Lord Watson wanted to make clear was that only a continuous body of flowing water with a well-defined course, and not water

"which does not flow onward with any continuity of parts but becomes dissipated in the earth's strata,"

can be called a stream. It is obvious to me that Lord Watson could never have meant to suggest that the bed and the banks do not form parts of a stream or a river, which indeed would be opposed to our ordinary conceptions. In the well-known text-book of Angell on Water Courses, it is stated at p. 2 that "a water course" — which includes rivers and streams—"consists of beds, banks and water :" see also Coulson's Law of Water-courses, p. 77. Nor do I find anything in S. 7, Easements Act, to support a contrary notion. On the other hand the illustrations appended to that section particularly are in accordance with the ordinary conception of a river as consisting of the beds, the banks and the water.

Nor is the proposition that flowing water cannot be the subject of private property quite accurate. For instance, it can hardly be disputed that the water of a stream flowing entirely within the limits of a man's zamindari or inam is as much and as absolutely his property in every sense of the term as the soil over which it flows. With reference to a stream or a river flowing through the lands of a number of owners, it has long been established that such flowing water is not bonum vacans, but that it is publici juris in the sense only that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself except in that particular portion which he may choose to abstract from the stream and take into his possession: [see *Mason* v. *Hill* (6) per Lord Denman, and *Embrey* v. *Owen* (7)]. It comes to this:

Each proprietor of the adjacent land has a right to the usufruct of the stream

5. (1897) A C 129.
6. (1832) 3 B & Ad 304.
7. (1851) 6 Ex 353.

which flows through it, and in that sense the stream is the common property of all the riparian proprietors. If the Government happens to be a riparian propritor, it has a right to the usufruct of the river in the same way as other riparian proprietors. I do not understand the provisions of the Land Encroachment Act as laying down that even in those streams and rivers in which the riparian rights of zamindars or other owners of adjacent lands exist a separate and independent proprietary right in the water subsists in the Government entitling it to demand from the owners of the lands on the banks any price it chooses for the use of the water. If that were the correct interpretation of S. 2, the value of riparian rights in this Presidency would be very little indeed, and I no not find sufficient justification for such a construction. On the other hand the clause "subject always to all rights of way and other public rights and to the natural and easement rights of other landowners" points in my opinion to a contrary inference, showing that the Government's claim to streams, rivers and all standing and flowing water is in the character of a landowner.

Let us now consider the nature and extent of the right of user of the Pachayar river as claimed by the inamdar as a riparian owner. In the first place, by virtue of his proprietorship of the land bordering on the river for a considerable length, he claims the right to conduct a portion of the water by means of channels into his tanks for purposes of irrigation. We may take it that the water so abstracted would not be returned to the river but would for the most part be absorbed in the soil in the process of irrigation. What the length is of these channels or the distance of the tanks from the river is not in evidence. But it is beyond doubt that the present mode of irrigating the inam lands has been in use from time immemorial. It is not alleged that by diverting a portion of the water into the channel, such a diminution is caused in the volume of water flowing down to the lower tenements as to cause material injury to their owners, among whom the Government may be included with respect to the raiyatwari tracts. In fact, it is common ground that this river, like many other similar rivers in this Presidency, is and has always been used in this way in irrigating lands situated on both sides. In this country, the user of streams and rivers for irrigation through a system of connected tanks which are filled with water obtained by means of channels is a most valuable right and has been recognized from the most ancient days. In fact, it would have been an inconceivable disaster to the country if the water of rivers in this Presidency were allowed to run to waste in seasons of rain when there is abundance of supply and was not stored in large reservoirs and tanks, so that it might be utilised according to the requirements of cultivation. Even in England where the rainfall is much better spread over different parts of the year, the use of natural streams by the riparian owners for purposes of irrigation is fully recognzed no less than its use for manufacturing purposes.

The mode and extent of the exercise of a right of this character must necessarily very with the necessities of each country and should be ascertained mainly with reference to the prevalent usage. Judged by that test, the right of a riparian owner in this country to use a natural stream for purposes of irrigation cannot be said to be confined to any narrow strip of land along the banks. No authority has been brought to our notice which purports to define the limits of this right by the extent or depth of the areas sought to be irrigated. To what depth of the lands on the bank of a stream the right of irrigation extends must depend on the capacity of the stream and the extent of the land of the other riparian proprietors standing in need of irrigation. This is in accordance with the principle laid down in *Norbury (Lord)* v. *Kitchin* (8), *Miner* v. *Gilmour* (9) and *White* v. *White* (10). In this Presidency, in most cases where the stream is small, the whole or a greater portion of the water is diverted by means of channels into tanks by the different proprietors putting up dams in the streams in turn for some days. If the supply is not sufficient for all the adjacent proprietors, the quantity and extent of land which each proprietor is entitled to irrigate may depend on well-established usage, on mutual arrangement or on the terms of a grant. There is no rule of law

8. (1863) 7 L T 685.
9. (1858) 12 Moore P C 131.
10. (1906) A C 72.

in this country, so far as it can be ascertained, that the right to irrigation by a riparian owner is confined to any particular quantity of land. The criterion is, whether the extent or mode of enjoyment claimed is reasonable; see *Embrey* v. *Owen* (7), and *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (11). A user which is not objected to and is in fact adopted by and is for the benefit of all the riparian proprietors must, in my opinion, be held to be reasonable and it is not open to a third person such as the Government, unless it happens to be a riparian proprietor, to raise any question so far as this is concerned.

Then it cannot be said that, where the lands in a zamindari or an inam village are cultivated by raiya and tenants, it necessarily follows that only the parcel on the bank in the occupation of a particular individul raiya will be treated as a riparian tenement and not the other holdings in the interior, so far as any question arises between the zamindari or inamdar whose tenants they are on the one hand and the other riparian proprietors on the other. In such cases, where it is the duty and interest of the zamindar or inamdar to supply the tenants with water for purposes of irrigation, he must be deemed to be the riparian owner representing the tenants as a body. I may here refer to a very instructive judgment in an American case to which my attention has been drawn and which lends support to the general view of the law as I have expressed it: *Crawford Co.* v. *Hall* (12). Sankaran Nair, J., in *Secy. of State* v. *Kannepalli Janakiramayya* (13) has fully discussed the question as to how far the zamindars and inamdars are entitled to irrigate their lands, free of charge, from a natural stream flowing through the zamindari or inam village with reference to the history of the Permanent Settlement and the enfranchisement of inams and the Customary law of the land. I agree with his general conclusion that, except where it is expressly provided otherwise in the sanads or title-deeds, the zamindars or inamdars are entitled to bring into cultivation land which was lying uncultivated at the tim eof the settlement and to arise additional crops by the user of natural streams to the extent of the quantity lying within the ayacut of those streams as explained at p. 333 and 334 of 37 Mad. in *Secy. of State* v. *Kannepalli Janakiramayya* (13), without making themselves liable to a further payment whether by way of water cess or other assessment. I further agree with him and with Sadasiva Aiyar, J., in *Secy of State* v. *Kanneppalli Janakiramayya* (2), that no inference can be drawn from the fact that in the sanads or title deeds the quantity of lands under wet cultivation is mentioned, that the zamindar or inamdar is not entitled to irrigate and thus bring into cultivation the waste lands with water of natural streams passing through a village without making himself liable to additional payment. The above view of the law is also, in my opinion, in agreement with the trend of decisions of this Court until the date of the Urlam case (1): see *Ponnusami Tevar* v. *Collector of Madura* (14); *Maharana Futtehsangji Jasmantsangji* v. *Desai Kullianaraiji Hakoomutraiji* (15); *Narasimha Sastrial* v. *Secy. of State* (16) and *Secy. of State* v. *Perumal Pillai* (17)].

The question whether the use of the phrase "besides poramboke" in the inam title-deed shows that the river bed is included in the grant, is one mainly of interpretation. It seems to me that no uniform rule can be laid down in this connexion whether river beds were or were not meant to be included in the words "besides poramboke." This must depend on the character and size of the river, the extent of the grant and the surrounding circumstances. In cases of small rivers and the streams running through the lands of a few large proprietors, the presumption would be in favour of inclusion of river beds, while the phrase may not ordinarily be applied to the beds of large rivers like the Cauvery: [see *Secy. of State* v. *Raghunatha Thathachariar* (18) and *Papala Narayanasawmi Naidu* v. *Pensolani Kanniappa Naidu* (19). In the present case I should be inclined to hold that as the inam village Vadagarai did not extend to both

11. (1878) 4 A C 121.
12. (1903) 60 Law Rep Anotd 889.
13. A I R 1914 Mad 534=37 Mad 322 =18 I C 770.
14. (1869-70) 5 M H C R 6.
15. (1873-74) 1 I A 34=13 B L R 254 (P C).
16. (1891) 1 M L J 167.
17. (1901) 24 Mad 279.
18. (1915) 38 Mad 108=18 I C 41.
19. (1912) 14 I C 41.

sides of the river, no specific intention could be imputed to the Government of granting any portion of the bed of the river. The claim of the Government is also based on the ground that one of the sources from which the Pachayar river derives its water supply is a small hill stream or odai flowing through raiyatwari land. It is argued that inasmuch as the water of this stream, which may be taken to belong to Government, mingled with the water of the Pachaysr river, it must be deemed to be a case in which the plaintiff's land is irrigated by water of a stream belonging to Government, within the meaning of S. 2, Irrigation Cess Act. I do not find any warrant for such a wide construction of the section, which would mean that because a river happens to receive a supply of water, however small in proportion to the entire volume, from a stream running through the Government land, therefore, any riparian owner using the water of the river must be deemed forsooth to be using water from a stream belonging to the Government, because it is not possible to separate the quantity of water introduced by such a stream. The untenable character of such an argument if stated without any limitation becomes obvious, when it is seen that it might logically be extended even to cases where surface water from land belonging to Government is drained into a riparian stream. The irrigation which makes a man liable to cess under that section must, in my opinion, be with water derived either entirely or at least tc a substantial extent from a river, stream or channel belonging to the Government,

To hold otherwise would be putting a strained and unnatural construction on the words of the legislature. I say this in spite of the respect which I owe to the decision of the learned Judges who decided the *Urlam* case (1) and those who have substantially followed that judgment. Having thus far inicated my own view of the law which is in accordaunce with what has been laid down by Sankaran Nair, J, in several cases, to one of which, *Secy. of State* v. *Ambalavana Pandara Sannadhi* (20), I was a party, I shall now very briefly point out to what extent I am free to give effect to it, so far as the question involved in this appeal is concerned. A Full Bench of this Court by a majority (Sadasiva Aiyar, J., dissentiente) held in *Secy. of State* v. *Kannepalli Janakiramayya* (2), in an appeal under the Letters Patent arising from a difference of opinion between Sankaran Nair, J., and Munro, J., that where only one of banks of the river belongs to a zamindar or inamdar, the water obtained from that river is liable to be assessed under the Act, as in such a case the river must be said to belong to the Government. But in a later case reported as *Secy. of State* v. *Maharaja of Bobbili* (4), a Divisional Bench consisting of the learned Chief Justice and Seshagiri Aiyar, J., were of opinion that the decision in the *Urlam* case (1) which was of another Divisional Bench went too far. They were, however, bound to accept the law as laid down in the decision of Oldfield, J., and Bakewell, J., in the Letters Patent appeal mentioned above, but only on the point actually decided in that case, namely that where only one bank of a river is shown to belong to a zamindar he is not entitled to the user of the water of that river for purposes of irrigation free of charge. They felt themselves free to decide otherwise in a case where both the banks at the point where the water was taken were shown to be within the zamindari limits. I must admit that it is difficult to perceive any logical foundation for this distinction.

The rights of a riparian owner which are fully recognized in this country (see S. 7, Easements Act, S. 2, Irrigation Cess Act, itself and the cases above cited) are based not on the ownerships of the bed but on the ownership of the adjacent lands on the bank which give the owner the right of access to the stream. No doubt the owner of the land on the bank is also presumably the owner of half the bed of the stream opposite his land and the owner of land on both the banks is the owner of the entire bed lying between those banks. But the owner of adjacent lands on both sides of a stream has no higher right of usufruct in connexion with the tenement on one side than he would have if he did not possess the tenement on the opposite bank The riparian right is based on the possession of a natural advantage arising from the vicinity of a stream and is like the right of lateral support which a man has for his land from his neighbour's land.: see

20. A I R 1914 Mad 552=37 Mad 369=18 I C 294.

Lyon v. *Fishmongers' Company* (21), *Miner* v. *Gilmour* (9) and *Chasemore* v. *Richards* (22). There is no reason so far as I can see for denying the full enjoyment of that advantage to the owner of adjacent lands on one bank. That is, however, the ruling in *Secy. of State* v. *Kannepalli Janakiramayya* (2), and I agree with the learned Chief Justice and Seshagiri Aiyar, J., that it should not be extended any further.

But I think I ought to mention that there is force in the argument of the learned vakil for the respondent that since it is not shown that his client has been taking more water than before, the mere fact that he has been cultivating more land is not sufficient to justify the Government in levying water cess. It is not the case of the Government that either the channel or the tanks have been widened or deepened but we are asked to presume that the larger cultivation was due not to a more economical use of the water but to the use of more water than the inamdar has been accustomed to receive. In the circumstances the burden was in my opinion on the Government to show, even supposing that the stream could be said to belong to the Government, that the inamdar has been actually storing in his tanks more water than he was entitled to do under the engagement with the Government at the time of the inam enfranchisement and settlement. The view is in accordance with the decision in *Secy. of State* v. *Perumal Pillai* (17), the principle of which was accepted in *Maria Susai Mudaliar* v. *Secy. of State* (23); though it is opposed to the decision in the *Urlam* case (1).

I hold, therefore, that the conclusion of the Subordinate Judge is right and the appeal must be dismissed with costs to be paid within three months from this date. Civil Miscellaneous Petition No. 159 of 1916 is also dismissed.

Srinivasa Aiyangar, J.—I agree that the appeal fails. I have come to this conclusion on the ground that the plaintiff is not drawing more water than what he and his predecessors-in-title have been taking from time immemorial that the present system of irrigation has been in existence from before the inam settlement and that the plaintiff is now using the existing system of irrigation in the same way as his predecessor was using at the time of the inam settlement. As the question of the Government ownership of waters and the construction and effect of the Madras Land Encroachment Act is likely to be decided soon by the Lords of the Judicial Committee *Kandukuri Balasurya Prasadha Rao* v. *Secy. of State* (24) it is unnecessary for me to express any opinion on these questions in this case.

S.N./R K. *Appeal dismissed.*

21. (1876) 1 A C 662.
22. (1859) 7 H L C 349.
23. (1904) 14 M L J 350.
24. A I R 1917 P C 42 =41 I C 98=40 Mad 886 =44 I A 166 (P C).

A. I. R. 1918 Madras 524

ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

Ghulamsa Ravuthar and *others*—Defendant—Appellants.

v.

S. M. R. M. S. V. Visvanathan Chettiar—Plaintiff—Respondent.

Civil Appeals Nos. 235 and 440 to 442 of 1915, Decided on 24th January 1917, against decrees of Sub-Judge, Mayavaram, in Original Suits Nos. 66 of 1913 and 16 to 18 of 1914.

(a) Negotiable Instruments Act (1881 S. 28—S. 28 applies also to payee.

The principle underlying S. 28 of Act that if a promissory note is made payable by a person as agent of another, the latter is not liable personally on the note, applies also to the case of a payee. [P 525 C 2]

(b) Nattukottai Chetties—Custom—Drawing in name of agent of firms is customary—But firm and not agent named is payee—It is purely question of construction of deed.

It is a well-known usage among Natukottai Chetties to draw hundies, bills and promissory notes in the name of the agent of a firm represented by the firms, vilasam, and in such cases it is the firm indicated by the vilasam which is intended to be the payee and not the agent whose name appears on the instrument. The question is entirely one of construction of a document. [P 525 C 1]

(c) Contract Act (1872), S. 128—Debts borrowed on different promissory notes—Surety for amalgamated amount—Cause of action arises on separate dates—Surety's liability is also separate—Civil P. C. (1908), O. 2, R. 2.

Where a person makes himself liable as surety for a consolidated amount, the amounts themselves having been borrowed under several promissory notes from time to time, the cause of action as against the surety arisss on each of the dates on which the sums borrowed under the several promissory notes become payable. Where the cause of action is separate, the liability of the surety is also separate with respect to each of the promissory notes. [P525 C 2]

T. R. Venkatarama Sastri—for Appellants.

T. Narasimha Aiyangar and *R. K. Narayanasami Aiyar*—for Respondent.

Judgment.—The first objection raised in these appeals is that the plaintiff's firm was not entitled to maintain the suits, inasmuch as the promissory notes on which the suits are based are made out in the name of "S. M. R. M. S. V. Raman Chetty," the contention being that the payee that is intended is Raman Chetty, the agent of the firm, indicated by the letters prefixed to his name, and not the firm itself. The question is entirely one of construction. We have to consider whether when the notes purport to be made payable to S. M. R. M. S. V. Raman Chetty what was intended was that the payee was to be the firm as indicated by the letters of the vilasam and represented by Raman Chetty the agent, or whether the payee was to be Raman Chetty who was in fact the agent of the plaintiff's firm. No evidence has been adduced in this case as to any particular usage obtaining among the Nattukottai Chetties, in describing the firm either as maker of the promissory note or as payee. But there is a decision, *Mungamal Jesse Singh* v. *A. L. V. R. C. T. Firm* (1), of Wallis, J., as he then was, sitting on the Original Side of this Court where he held on the evidence adduced in that case that it was a well-known usage among chetties to draw hundis, bills and promissory notes in this form and that in such cases, it is the firm indicated by the vilasam which is intended to be the payee and not the agent, though his name appears on the instrument. This decision was appealed from and confirmed by this Court in Original Side Appeal No. 58 of 1908.

There is an allusion to this usage to be found also in *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar* (2), and the learned Subordinate Judge in this very case also holds it to be clear that the person indicated as the payee on these promissory notes is the firm and not Raman Chetty, the agent. We, therefore, read the promissory notes as meaning that the amounts were to be paid to the firm as represented by Raman Chetty. But even if we were to read the notes as contended on behalf of the appellants, as if they were made payable to Raman Chetty the agent of the plaintiff's firm, that will not in any way help them. It has been laid down by the Full Bench in *Koneti Naicker* v. *Gopala Aiyar* (3) that if a promissory note is made by a person as agent of another, the latter is not liable personally on the note. This is the effect of S. 28, Negotiable Instruments Act, and we think the principle underlying the section is applicable also in the case of a payee.

We, therefore, hold that this objection to the suits is not tenable. The next question which is argued by Mr. T. R. Venkatarama Sastriar is that inasmuch as defendant 1's liability was based on Ex. E according to which he made himself liable to the extent of Rs. 15,000, the entire cause of action arose at the date of the institution of the Original Suit No. 16 of 1914 and the subsequent suits were barred by virtue of O. 2, R 2, corresponding to S. 43, old Civil P. C. It is contended that the liability of defendant 1 under Ex. E was a single liability with respect to the entire amount borrowed, though different amounts were borrowed from time to time under separate promissory notes. We do not think there is any force in this contention. The cause of action on each of these promissory notes was separate and that being so, the liability of defendant 1 who stood in the position of a surety was also separate with respect to each of the promissory notes. The objection therefore fails. It is also argued that defendant 1 was not the partner of the firm, but we have not the slightest doubt that the finding of the Subordinate Judge on this point is right. Another objection had been taken to the suits that inasmuch as the partnership of the defendants was not registered according to the Ordinance of Ceylon, they would not be liable for the debts contracted from the plaintiff. The Ordinance itself in express terms says that the absence of registration would not affect the liability of the partners to third persons. Then it was argued that the Subordinate Judge ought to have appointed a Commissioner to take the accounts. But with respect to the amounts borrowed, there are the promissory notes on which the suits are based and there was no necessity for any accounts being taken since the amounts due upon the promissory notes

1. (1908) 4 M L T 309.
2. (1905) 28 Mad 544
3. (1915) 38 Mad 482=21 I C 417.

were proved before the Subordinate Judge. All the appeals are dismissed with costs.

S.N /R.K. *Appeals dismissed.*

✻ A. I. R. 1918 Madras 526

AYLING AND SRINIVASA AIYANGAR, JJ.

Chunduru China Lakshmi Narayana and *others*—Defendants—Appellants.

v.

Neralla Venkata Subba Rao and *others* —Plaintiffs and Defendants — Respondents.

Appeal No. 194 of 1915, Decided on 31st January 1917, against the decree of Addl. Temporary Sub-Judge, Guntur, in O. S. No. 30 of 1913.

✻ **(a) Probate and Administration Act (5 of 1881), S. 4—Legatee is not entitled to sue debtor of estate—Executors alone can sue—Failure of executors to sue—Legatee is entitled to sue executors for legacy and join debtor as party—Suit against stranger debtor to estate — Limitation is three years from date of debt becoming payable.**

A legatee is not entitled to sue a debtor of the estate for the debt. The only persons who can sue are the executors appointed under the Will. [P 528 C 1]

If, however, the executors fail to do their duty and refuse or neglect to sue, a legatee may sue the executors for his legacy in due course of administration and may join the debtor or his representatives as parties and claim payment of the debt to the estate. [P 528 C 1]

Where the claim is against a stranger indebted to the estate, the suit should be filed within three years from the date when the debt becomes payable. [P 528 C 1]

(b) Trusts Act (2 of 1881), S. 87—Debtor becoming executor—Debt payable becomes part of assets of deceased testator in his hands.

If the debtor himself is one of the executors in whom the estate vests, in legal theory the debt payable by him is assumed to have been paid by him to himself and becomes part of the assets of the deceasad testator in his hands. [P 528 C 1]

This is the case whether the executor proves the Will or not, provided he acts as executor. [P 528 C 1]

(c) Trusts Act (2 of 1881), S. 87—Executor indebted to estate, renouncing office or dying without having acted or obtaining probate—Executor is stranger debtor — Limitation to recover debt is three years.

If a person appointed an executor renounces the office or dies without having acted or obtaining probate, he will be in the position of a stranger debtor, and an action to recover the debt will be barred unless brought within the time limited for an action to recover a debt. [P 528 C 2]

(d) Probate and Administration Act (5 of 1881), S. 4— Executor is not entitled to sue co-executor—Surviving executors entitled to sue legal representatives of deceased executor for recovery of assets.

One of two executors cannot sue his co-executor for payment of the assets in the latter's possession, but on his death the surviving executor can sue the legal representatives of the deceased executor for recovery of such assets. [P 528 C 2]

(e) Probate and Administration Act (1881), S. 4—Creditor or legatee can sue for debt or legacy and claim account—Suit is governed by Limitation Act (9 of 1908), Art 123.

A creditor or a general legatee may for the purpose of recovering his debt or his legacy bring a suit for administration and in that suit claim an account from the representatives of the deceased executor and payment of whatever is found due. [P 528 C 2]

In such an action, it may not be necessary to join as parties persons beneficially interested in the estate, but the decree in such a suit would not be for payment of the debt as a debt, but would be for an account of the moneys belonging to the testator's estate in the hands of the executor. [P 528 C 2]

Such a suit when brought by a legatee is one to recover a legacy, and is governed by Art. 123, Lim. Act. [P 529 C 1]

(f) Civil P. C. (5 of 1908), O. 6, R. 17 — Plaint containing all necessary allegations —Suit not framed as one for administration —Plaint can be allowed to be amended.

Where the plaint does not expressly contain a prayer for administration, either general or limited, and the claim is not made for the recovery of a legacy, but it contains all the necessary allegations to give the plaintiff the relief to which he is entitled, it may be allowed to be amended and the necessary parties may be ordered to be added. [P 529 C 2]

(g) Will — Legacy — Legatee not entitled to payment of legacy at date of decree — Amount should be paid into Court and invested.

Where the plaintiff legatee is not entitled at the date of the decree to payment of his legacy under the term of the Will, the proper order is to direct the executors and debtors to the estate to pay the amounts due into Court and direct their investment. [P 530 C 1]

(h) Trusts Act (2 of 1881), S. 87—Executor indebted to estate is liable to pay interest.

Where an executor who is indebted to the estate retains the amount of the debts as assets of the estate, he is liable to interest on it at six per cent. per annum if he does not invest the same. [P 530 C 1]

T. R. Ramachandra Aiyar and *T. Ramachandra Rao*—for Appellants.

V. Ramesam and *P. Narayana Moorthy* —for Respondents.

Judgment.—Several questions were raised at the hearing of the appeal, but at the close of the arguments there finally emerged for decision two substantial questions: (1) Whether the suit was barred by the Statute of Limitations, and (2) whether the suit as brought was maintainable. The appellants challenged the findings of fact of the lower Court, but as we agree with those findings, it is scarcely necessary to deal with the evidence in detail. The facts which are

either admitted or proved may be shortly stated. One Mangayya and Chunduri Subbarayudu, the father of defendants 1 and 2 and the grandfather of defendants 3 to 6, had dealings with each other, which resulted in mutual accounts. There were three accounts, one for cash dealings, another for purchase and sale of goods on each other's account, and a third called the Rice Mills Factory Account. The last account requires some explanation. Subbarayudu and others were working some rice mills in Bezwada in partnership and Mangayya was a sub-partner with Subbarayudu in that concern. Moneys advanced by Mangayya to Subbarayudu for the working of the rice mills were entered in the third account. In December 1900, a sum of over Rs. 10,000 was owing to Mangayya from Subbarayudu on No. 1 account and it appears that he was pressing Subbarayudu for payment of the sums due to him, but Subbarayudu instead of paying him appears to have asked Mangayya for money for the working expenses of the rice mills and proposed that Rs. 5,000, out of the amount which was owing to Mangayya on No. 1 account, should be transferred and debited to the rice mills account; the result of such transfer would be that the sum of Rupees 5,000, instead of being a personal debt of Subbarayudu, would become an item of account in the partnership between the two. Mangayya agreed to this and the necessary adjustments were made on 11th January 1901; but a year later, either because Mangayya was not bound to contribute any such sum of Rs. 5,000 for the working expenses of the rice mills or for other reasons, the debit of Rs. 5,000 to the rice mills account was cancelled, and that sum was carried to a separate account to the debit of defendant 1, Lakshminarayana.

That was on 25th January 1902. On the same day the credits and debits in No. 2 account were taken over to No. 1 account and thereafter No. 2 account ceased to exist. That these adjustments were made with the consent of Subbarayudu is established by the evidence. Though the sum of Rs. 5,000 was debited in the name of Lakshminarayana, it was a debt owing by Subbarayudu and the joint family consisting of himself and his sons. Lakshminarayana does not say that it was a personal debt of his own. He had nothing to do with this adjustment and in fact he disclaims all knowledge of it. Mangayya died on 24th November 1903, and before his death on 6th November 1903, made his Will by which he appointed Subbarayudu, his debtor Krishnayya, his son-in-law, and another Sambayya executors. He gave authority to his widow Sitamma to adopt and bequeathed 2/3rds of the residue of his property to the boy to be adopted and the remaining 1/3rd to Sitamma. The legacies were payable, on the boy to be adopted attaining the age of majority. Sambayya, one of the executors, declined to act and Subbarayudu and Krishnayya entered on their duties, though probate was not taken out (no probate was necessary as the Hindu Wills Act does not apply), and Subbarayudu took a leading part in the administration of the estate.

It appears, however, that the widow Sitamma was in actual custody of the moneys belonging to Mangayya's estate though Subbarayudu was in the direction of affairs. Krishnayya, the other executor was receiving salary from the estate and was looked upon as practically a servant. Sitamma was pressing Subbarayudu to repay the sum of Rs. 5,000 and interest, but Subbarayudu declined to pay on the ground that the money was in his hands and he, as executor, was entitled to keep it. He also claimed to retain what may be found due to him on taking the accounts of the rice factory. There was practically no balance due either way on No. 1 account. Sitamma, finding that Subbarayudu was not paying the debt due to her husband's estate in spite of repeated demands, applied for a succession certificate jointly with Krishnayya to collect this debt and certain small debts due to her husband's estate from others, and in spite of opposition from Subbarayudu she and Krishnayya obtained a succession certificate on 19th October 1905. The plaintiff was adopted by Sitamma on 5th June 1905, and Subbarayudu died in June 1906. The present suit was instituted on 21st August 1911 by the adopted son, who is still an infant, againstt he defendants, the sons and grandsons of Subbaravudu, to recover the said sum of Rs. 5,000 and interest. Neither Sitamma, nor Krishnayya the surviving executor is a party to the suit, though both of them are named as the next friends of the minor plaintiff.

In this state of things the first question for determination is as to the nature

of the right of the plaintiff in the estate of Mangayya and against the defendants, for on that would depend the Article of the Limitation Act applicable to the suit. The estate of Mangayya on his death vested in his executors Krishnayya and Subbarayudu under S. 4, Probate and Administration Act. As the plaintiff does not repudiate the will and claim the estate as the surviving member of a joint Hindu family—according to the decisions of this Court, he could not have done so—he is not entitled to sue a debtor of the estate for the debt and the only persons who could sue are the executors. If, however, the executors fail to do their duty and refuse or neglect to sue, a legatee may sue the executors for his legacy in due course of administration and may join the debtor or his representatives as parties and claim payment of the debt to the estate: see *Consett* v. *Bell* (1) and *Morley* v. *White* (2), but whatever be the form of action the same Article of Limitation would apply, and if the cause of action had accrued, and time commenced to run during the lifetime of the testator, it would continue to run, except in the case specially provided for by S. 9, Limitation Act: see *Soni Ram* v. *Kanhaiya Lal* (3). If, therefore, Subbarayudu had been a stranger debtor, the claim to recover the debt would certainly be barred by limitation as the debt became due in January 1902 during the lifetime of Mangayya, and the period of limitation for a suit to recover the debt is three years.

The acknowledgments of liability referred to by the lower Court, even if they satisfy the conditions of S. 19 of the Act, would be of no use as there is none within three years of the date of the suit. If however the debtor himself is one of the executors, in whom the estate vests, in legal theory, the debt payable by him is assumed to have been paid by him to himself and becomes part of the assets of the deceased testator in his hands. *Bourne*, In re; *Davey* v. *Bourne* (4), S. 87, Trusts Act. This seems to be the case whether the executor proved the will or not, provided he acted as executor, *Wankford* v. *Wankford* (5) and *Applebee, In re*, *Leveson* v. *Beales* (6). If, however, a person appointed an executor renounces the office or dies without having acted or obtaining probate, he will be in the position of a stranger debtor and an action to recover the debt will be barred unless brought within the time limited for an action to recover a debt [*Ingle* v. *Richards* (7)]. As one executor is as much entitled to be in possession of the assets of the testator and expend it in due course of administration as his co-executor, there can ordinarily be no suit against him by the co-executor to pay over the assets to him [*Beall* v. *Hilliary* (8)]; but on the death of one of two executors, the powers of the office are vested in the servivor, and he then may have a right to claim the assets from the representatives of the deceased executor. Also a creditor or a general legatee may for the purpose or recovering his debt or his legacy bring a suit for administration and in that suit claim an account from the representatives of the deceased executor and payment of whatever is found due.

Now that Subbarayudu himself was an executor, the co-executor Krishnayya could not bring an action at law to recover the debt due from Subbarayudu but can, if at all, only sue for administration to secure the payment of the debt due to the estate. In such an action, it may not be necessary to join as parties persons beneficially interested in the estate: but the decree in such a suit would not be for payment of the debt as a debt but would be for an account of the moneys belonging to the testator's estate in the hands of an executor. See *Peake* v. *Ledger* (9), for form of decree the same case reported in 4 De G. & Smole p. 137. But Krishnayya was not bound to bring such a suit so long at any rate as Subbarayudu was alive and the plaintiff cannot be prejudiced by any inaction on the part of Krishnayya [See *Pardoe, In re*; *McLaughlin* v. *Penny* (10)]. The plaintiff in this case is only a legatee and does not represent the estate and has no direct claim against any debtor to the estate. His only right under the will is to recover as legatee his share of the residue which was bequeathed to him from the executors and

1. (1842) 1 Y & C C C 569.
2. (1873) 8 Ch App 731.
3. (1913) 35 All 227=19 I C 291=40 I A 74 (P C).
4. (1906) 1 Ch 697.
5. 1 Salk 299=91 E R 265.
6. (1831) 3 Ch 422.
7. (1860) 28 Beav 366.
8. 54 Am Dec 649=1 Maryland 186.
9. (1850) 8 Hare 313.
10. (1906) 1 Ch 265.

if the executors had died possessed of property belonging to the testator, to recover the same from their representatives; for there can scarcely be any doubt that the defendants, as representatives of their father Subbarayudu, would be bound to pay to the estate of Mangayya any assets which remained in the hands of Subbarayudu.

As the debt due to Mangayya by Subbarayudu became assets in his hands on his appointment as executor, the plaintiff is entitled to two-thirds of the money which remained in the hands of Subbarayudu at the time of his death and the defendants are liable to pay that sum to the plaintiffs. It is not said that any debts or other legacies remain to be paid and any further administration of the estate, except dividing the residue between the plaintiff and Sitamma, is not necessary. The plaintiff's right then is to recover a legacy, and even if he were an adult, his suit would not be barred, as he has under Art. 123, 12 years from the time when he becomes entitled to receive it. *Rajamannar* v. *Venkatakrishnayya* (11), *Johnson, In re; Sly* v. *Blake* (12) and *Davis, In re; Evans* v. *Moore* (13). But whatever Article of Limitation applies, as the cause of action accrued to the plaintiff for the first time after the death of Mangayya, and as he is still an infant, his right of action could not be barred. The next question is whether the plaint is so framed as to give the plaintiff the relief he is entitled to. The claim made in the plaint, as it now stands, is undoubtedly a legal claim to recover a debt due to the estate as if the plaiutiff is the present owner and representative of the estate, and the lower Court has given a decree to the plaintiff for the whole amount sued for on that basis. That, as has already been stated, is not his right. There can scarcely be any doubt that the plaintiff and his advisers have managed to go wrong as often as they can, and although the plaint was allowed to be amended in the lower Court, it is obviously still defective. At the close of the arguments in the appeal, the plaintiff applied for permission to further amend the plaint in accordance with his actual rights in the estate of his adoptive father and subsequently filed a petition for that purpose. This application is opposed by the appellants and the question is whether we should allow it now. The plaint contains all the necessary allegations to give the plaintiff the relief to which he is entitled, though there is no specific prayer for administration, either general or limited, and the claim is not made as for the recovery of a legacy. It is to make the plaint regular, by claiming proper reliefs, and to cure the defect as regards parties that the application to amend the plaint has been made in this Court. Inasmuch as the plaintiff is still an infant, and as his claim is certainly not barred, to avoid further litigation and expense, we think we should allow the amendment now asked for, if we can do so without prejudice to any vested rights of the defendants

Inasmuch as the rest of the properties belonging to Mangayya's estate, except the sum due from Chunduru Subbarayudu, is said to be now in the possession of Sitamma as guardian of the minor plaintiff and inasmuch as both Sitamma and Krishnayya agree to account to the minor for his share of the residue of the testator's estate and to be bound by all the proceedings which had hitherto been taken in this suit, there is no need to pass a decree for general administration or to send the case back for taking general accounts. In the view we have taken, namely, that the claim of the plaintiff is not a legal claim to recover a debt, but only a right to recover his share of the residue, Subarrayudu and his representative would be entitled to claim, if they so desired, an enquiry as to whether Subbarayudu during his lifetime made any payments or was entitled to retain any sum as executor out of the funds which were in his hands. No suggestion was made in the course of the trial in the lower Court that any disbursements were made or expenses incurred by Subbarayudu as executor of the estate of Mangayya, but it was said that if the account of the rice factory partnership is adjusted, it will be found that Mangayya's estate was indebted to Subbarayudu. If the defendants insist on an enquiry they are entitled to it. As we can direct this enquiry in this suit, the amendment should, we think, be allowed and to obviate any possible objection as to want of parties, we also order Krishnayya the surviving executor and Sitamma, the other residuary legatee, to

11. (1902) 25 Mad 361.
12. (1885) 29 Ch D 964.
13. (1891) 3 Ch 119

be added as defendants, reserving, however, the right of the plaintiff to an account of and payment of his share of the residue in their hands.

As the plaintiff is only entitled to 2/3rds of the amount, the decree of the lower Court directing the payment of the whole sum to the plaintiff cannot stand. Further, the residue is not payable till the infant plaintiff attains the age of majority. As the legacy is payable according to the terms of the will on the plaintiff attaining majority, it is clear that Sitamma's claims to her legacy is also not barred. In these circumstances it is unnecessary to drive Sitamma to a separate suit to recover her share of the legacy. The proper order then to make in view of the rights of the parties is an order directing defendants 1 to 6 to pay into Court, out of the joint family property in their hands, the sum for which on taking accounts they are found liable and directing its investment, when paid, under the directions of the Court. For out of the invested funds the plaintiff should be paid his share, namely 2/3rds, and Sitamma the remaining 1/3rd, when plaintiff attains the age of majority, liberty to be reserved to apply for this purpose.

There is one other question in the case, viz., as the debt due to Mangayya from Chunduri Subbarayudu became assets in the hands of Subbarayudu on the death of Mangayya, whether he was bound to pay interest thereon according to the rate stipulated in the contract between the parties or whether after that date he was to be treated as executor with the money of his testator in his hands for which he has not accounted and whether he was chargeable with any interest. It is clear that the moneys of Mangayya which were in the hands of executors could have been invested and lent out for interest, and as it is not proved that they could have been lent out at any particular rate, we think 6 per cent. interest from the date of the death of the testator on the sum then due till date of payment should be charged There will be no costs in this Court. The costs of the lower Court will be providd. for in the final decree to be passed on taking accounts. There will be a preliminary decree for accounts and inquiries in this Court.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 530

SPENCER AND SESHAGIRI AIYAR, JJ.

Suri Markandeya Sastri—Plaintiff—Appellant.

v.

Gottumukkala Subhanadharacharyulu and *others*—Defendants—Respondents.

Second Appeal No. 369 of 1916, Decided on 24th July 1917, against decree of Sub-Judge, Bezwada, in A. S. No. 56 of 1915.

(a) Civil P. C. (1908), O. 34, R. 6—Mortgagor is personally liable unless specific contract to contrary—Stipulation that "we shall discharge debt" in mortgage-deed shows that mortgagor is personally liable.

In the absenee of a specific contract to the contrary the personal liability of a mortgagor to pay the mortgage money is ordinarily presumed. Where a mortgage-deed contained a stipulation by the mortgagors in the words "we shall discharge the debt:"

Held: that the mortgagors were personally liable to pay the mortgage money. [P 530 C 1]

(b) Civil P. C. (1908), Appendix D—Form of mortgagee decree—Mortgage decree should be in form prescribed and right to proceed against person of mortgagor should be reserved by decree.

A mortgage decree should be in the form prescribed in Appnx. D, Civil P. C. and the right to proceed against the person of the mortgagor, if the mortgaged property is found insufficient to satisfy the amount, should be specifically reserved by the decree itself. [P 530 C 1; P 531 C 1]

P. Nagabhushanam—for Appellant.

T. Prakasam—for Respondents.

Judgment.—We cannot agree with the Subordinate Judge in his opinion that the mortgage deed in this case contains no personal covenant to pay. The words "we shall discharge the debt" make this a stronger case than that of *Abbakke Heggadthi* v. *Kinhiamma Shetty* (1), where it was held that the personal liability of the mortgagor would ordinarily exist in the absence of a specific contract to the contrary. The Subordinate Judge would have been on safer ground if he had based his refusal on the second ground mentioned in his judgment, namely, that the decree-holder was entitled to proceed against the person of the defendants under O. 34, R. 6, only after the proceeds of the sale of the mortgaged property proved to be insufficient to pay the amount due (O. 34, R. 6, Civil P. C). But the District Munsif's decree did not conform to the form for mortgage decrees printed in Appnx. D, inasmuch as it did not expressly reserve this right, and the Subordinate Judge, having recognized

1. (1906) 29 Mad 491.

that according to that form the right should have been reserved, should have provided accordingly in his decree. We must reverse decree of the lower appellate Court and direct the addition of Cl. 3, of form 4 of Appnx. D to be made to the decree of the Court of first instance. Appellant will get his costs of the appeal in this Court. In the lower appellate Court each party will bear his own costs.

S N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 531

SADASIVA AIYAR AND SPENCER, JJ.

Appan Patrachariar — Plaintiff—Appellant.

v.

V. S. Srinivasachariar and *others*—Defendants—Respondents.

Second Appeal No. 1379 of 1915, Decided on 6th February 1917, against decree of Temporary Sub-Judge, Trichinopoly, in Appeals Suits Nos. 266 and 320 of 1914.

(a) Hindu Law—Will—Joint family—Father can with consent of adult son and relations provide for female members of family.

The father in a joint and undivided Hindu family can, with the consent of his adult son and with the consent of his relations who are interested in a minor son of his, make valid provisions by will in favour of the female members of his family, provided the said provisions are reasonable in extent and value. [P 532 C 1, 2]

(b) Hindu Law—Will—Ancestral property—Nature of.

A disposition by will of ancestral property may in certain circum-tances, stand on the same footing as a disposition by deed inter vivos provided the consent of the party to be affected is obtained. [P 533 C 1]

G. S. Ramachandra Aiyar—for Appellant.

T. R. Venkatarama Sastri and *M. S. Vythinatha Aiyar*—for Respondents.

Sadasiva Aiyar, J.—The plaintiff is the appellant. He purchased the plaint lands in December 1909 from defendant 1. Defendant 1 had a minor step brother who is defendant 2 and also an uterine sister, defendant 3. Defendant 1 and 3's mother was the predeceased first wife of one Srinivasachariar who died on 14th November 1908. Within a fortnight before his death and on 1st November 1908 (when he was on his death bed and with the knowledge that his dissolution was not far off) he executed the will Ex. 5 (a), by which he gave the properties mentioned in Sch. A attached to the will to his eldest son defendant 1, gave the properties mentioned in Sch. B to his minor son, defendant 2 and the land mentioned in the Sch. C to his daughter, defendant 3, besides making some other provisions. It is not denied that relatively to Schs. A and B properties bequeathed to the two sons, Sch. C property left to the daughter is one of small value and it would not be an unreasonably large gift to be made by a very well-to-do father to his only daughter, though he has two undivided sons. It is further found that defendant 1, the elder of the two sons who was a major at the time of the will, consented to this provision being made in favour of his sister and attested the will and that defendant 2's mother, the testator's second wife, also consented. Within a year of the testator's death, however, the widow acting as the guardian of her minor son (defendant 2) repudiated in one respect the validity of the very fair testamentary arrangements made by her husband and while willing that Sch. A properties which were given to her step-son, defendant 1, for his share by her husband should be his and that Sch. B properties given to her son, defendant 2, should belong to the said son absolutely, grudged the gift of Sch. C properties to her step-daughter, defendant 3.

Thereupon on 3rd November 1909, defendant 1 and the step mother acting as guardian of defendant 2 executed the agreement Ex. K, by which Sch. C properties were arranged to be sold and converted to cash and the sale proceeds divided equally between the two sons. It was in pursuance of this agreement that defendant 1 sold the properties to the plaintiff in December 1909 under Ex. A. The lower appellate Court held that though the properties dealt with under the will Ex. 5 (a) were ancestral properties in which the two sons of the testator owned interests by birth, a reasonable gift could be made by the father in favour of his only daughter so as to bind his sons and that such a gift, even though made by will would be binding on the sons if they consented to it. It also held that defendant 1 having consented to the dispositions in the will was bound thereby, and that defendant 2 though a minor at the time was also bound as consent could be given on his behalf by his mother in his interests and such consent was given. On these findings it held that defendant 3 became the sole owner

of Sch. C properties, that is, the plaint lands by the testamentary gift and that the plaintiff purchased nothing but a bag of wind under the sale-deed Ex. A. The lower appellate Court accordingly dismissed the plaintiff's suit with the costs of defendants 2 and 3. The plaintiff's memorandum of second appeal contains 12 grounds, but leaving aside the general grounds and those which relate to the binding nature of the plaintiff's sale-deed on defendant 2 and those which relate to question of fact, those which attack the legal validity of defendant 3's title as claimed under the will Ex. 5 (a) may be shortly stated thus:

(1) 'The will can only operate from the date of the death of the testator at which time all the properties would pass to the two sons by right of survivorship, being ancestral property." (2) "It is not within the scope and powers of the guardian of a minor son to consent to the giving of property by a father to a third person. (3) The said consent is aiso inoperative as it was given by a person who was not the guardian at the time, when she so consented. (4) The authorities relied upon by the Subordinate Judge are clearly distinguishable and they only refer to gifts inter vivos and not to testamentary dispositions."

Besides these 4 grounds, Mr. G. S. Ramachandra Aiyar who appeared for the appellant raised a new contention before us that the document Ex. 5 (a) was not a will but was a settlement inter vivos and as it was not registered, it was wholly inoperative and invalid. But this contention was not raised in the lower Courts and not even in the grounds of the second appeal memorandum and I must decline to allow it to be raised at this stage. As regards grounds, 2 and 3 I agree with Mr. Ramachandra Aiyar that defendant 2's mother was not the legal guardian of defendant 2 so long as his father was alive. His consent, therefore, to the testementary dispositions under Ex. 5 (a) cannot give legal validity to the will, but can only be an item of the evidence proving that the dispositions under the will were in the nature of a fair family settlement to take effect after the death of the testator and were intended to avoid disputes and litigation and to promote peace. Of course the father himself as guardian of his son could act in his son's interest. I shall now consider the first and the fourth contentions which may be dealt with together. I think that on the authorities, the father in a joint and undivided family can, with the consent of his adult son and with the consent of his relations who are interested in a minor son of his, make valid provisions by will in favour of the female members of his family provided the said provisions are reasonable in extent and value. I shall refer only to a few cases. The first and the most important case is the Privy Council decision in *Brijraj Singh* v. *Sheodam Singh* (1). The following sentence occurs in the judgment of their Lordships of the Privy Council at p. 346:

"But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by will of that property among the various members of the family *execept with their consent.*"

The words I have italicised afford, in my opinion, clear indication of their Lordships' view that with "their" consent, (that is the consent of other members of the family) a disposition of property by will by the managing member would be binding on them after his death. No doubt, the observation is an obiter dictum, as their Lordships found in that case that the document called "will" was really a disposition inter vivos, but I think that the dictum which was so clearly laid down is binding on this Court especially as, in my opinion, there is nothing in the Hindu Shastras opposed to the above dictum, which (if I may say so with respect) is eminently just and equitable. In *Kudutamma* v. *Narasimhacharyulu* (2) it was held that a Hindu brother who is the managing member of a joint Hindu family would not be acting in excess of his powers as such, in giving away a reasonable portion of the joint family property to his sisters, who though married in their father's lifetime were left, for some reason or other, without a marraige portion. In *Anivilla Sundararamayya* v. *Cherla Sitamma* (3) it was held that a gift of 8 acres of ancestral land by a Hindu father to his daughter after marriage when the family was possessed of 200 acres of land was valid against his adult sons even without their consent. I shall next consider the case of *Arunachalla Pillai* v. *Sampurna Thachi* (4) which, in my opinion, is a very strong case. There the undivided

1. (1913) 35 All 337=19 I C 826=40 I A 161 (P C).
2. (1907) 17 M L J 528.
3. (1912) 35 Mad 628=10 I C 56.
4. A I R 1915 Mad, 421=26 I C 208.

paternal grandfather of a minor gave a portion of the family property (about 30 per cent. in value of the whole) to his third wife and daughters with the consent of his only grandson's widowed mother. It was held that the gift was binding upon the grandson. The learned Judges say:

"It is clear that it was open to the grandfather if he had chosen and without any one's consent to effect a partition and leave the whole of his half share to his third wife and her daughters and it was, in our opinion, clearly for the benefit of the minor for his guardians to avoid an eventuality so injurious to his interests by consenting to the alienations effected by Ex. I"

In the present case also, the testator could have separated from his two sons and taken 1/3rd share as his separate share and given it away to his daughter, defendant 3. This would have been much more to the detriment of defendant 2 than the provision made in the will, by which he got half of the whole ancestral properties except Sch. C properties. In the present case, the testator could have made a gift of Sch. C properties validly to his daughter and effected a partition between his two sons during his lifetime. But with the consent of his major son and with the consent of his minor son's mother, and in what he himself, as the guardian of his minor son, considered to be in the interests of his said son, he made a gift by will to take effect after his death, instead of by a deed to come into effect at once. I think that on the logical application of the principles laid down in the cases I have referred to above and seeing that their Lordships of the Privy Council treated the disposition by will in certain circumstances, though of ancestral property, as standing on the same footing as dispositions by deed inter vivos, provided the consent of the parties to be affected is obtained, the family settlement made by the will Ex. 5 (a) in this case ought to be upheld. In the result the second appeal will be dismissed with costs.

Spencer, J.—I concur.

S.N./R.K *Appeal dismissed.*

A. I. R. 1918 Madras 533

ABDUR RAHIM AND SPENCER, JJ.

Swaminatha Aiyar—Appellant.

v.

Srinivasa Aiyar—Respondent.

Second Appeal No. 2155 of 1914, Decided on 2nd November 1916.

(a) Trusts—Loan to trustee on personal security—Creditor is not entitled to recover debt out of trust property — Money utilised for benefit of trust—Decree cannot be made charge on trust property.

Where money is lent or goods sold to trustee on his own personal security, though for purposes of the trust, the creditor cannot realise the debt out of the trust property. [P 534 C 2]

The fact that the money was utilised and was intended to be utilised for the benefit of the trust will not entitle the creditor to the decree charging the amount due against the trust property. 28 *Cal* 574; *Strickland* v. *Symons* (1884) 26 *Ch D* 245 and *In re Johnson Shearman* v. *Robinson* (1880) 15 *Ch* 548 *Ref*; 31 *Mad* 47 *Expl.* [P 534 C 1]

(b) Trusts—Pro note by trustee signed in individual capacity —Liability of trust property is not affected by that fact.

Where the debt is evidenced by a promissory executed by the trustee, the mere fact that he did not sign it as trustee will not affect the liability of the trust property for the debt, if the creditor is otherwise entitled to relief against the trust property. [P 533 C 2]

C. V. Ananthakrishna Aiyar — for Appellant.

T. R. Venkatarama Sastri and *V. Vishwanadha Aiyar*—for Respondents.

Judgment. — The appeal has been argued before us on the basis that defendant 1 at the time when the promissory note in question was executed by him was a trustee of the temple concerned in the suit. Defendant 2 was appointed trustee about two years before the institution of the suit. The plaintiff has obtained a personal decree against defendant 1. But he says that he is also entitled to a decree as against the temple property, that is to say, to a direction that the amount due to him may be obtained out of the trust property. But the lower Courts have held that inasmuch as defendant 1 did not sign the promissory note as manager, all that the plaintiff was entitled to was a decree against him personally. The suit as framed, however, appears to be not merely on the basis of the promissory note but also for debt, and issues were framed raising the questions whether the debt was contracted for the benefit of the temple, whether the note was supported by consideration and whether the plaintiff was entitled to any relief against the trust property. If the plaintiff be entitled to any relief against the trust property, the mere fact that defendant 1 in executing the promissory note did not sign as manager or trustee of the temple would not make any difference, for, as we have stated, the suit was not merely on the promissory note but

also on the debt. This is a well recognised distinction and none of the cases which are cited in the judgment of the District Munsif can be said to have held otherwise.

But the difficulty in the way of the appellant is that he is not entitled to any but a personal decree against defendant 1. He did not obtain any charge upon the temple property; all that he obtained was a promise on the part of defendant 1 to pay the debt. The fact that the money was utilised and was intended to be utilised for the benefit of the temple cannot entitle the plaintiff to have a decree charging the amount due under the promissory note against the temple property. The law is clearly laid down by Lord Selborne in *Strickland* v. *Symons* (1) and Sir George Jessel, Master of the Rolls, in *In re Johnson Shearman* v. *Robinson* (2). In the first case, it is stated by Lord Selborne that:

"There is no principle or authority for saying that if a trustee makes himself personally liable for goods, the cerditor thereby obtains a lien on the trust property. There is not the least authority for such an action as the present. It is an action for an equitable execution against the trust estate in respect of a judgment against the trustee. There is no evidence of any contract for any security on any part of this estate. There was only an ordinary contract for goods supplied to a person who happened to be a trustee".

Here the liability arose out of the money borrowed by the trustee on a promissory note. That stands exactly on the same footing as if the debt was contracted for goods supplied for the benefit of the trust. Sir George Jessel, Master of the Rolls, also in the other case lays down the law practically in the same terms. In England, however, a distinction is made in cases where a certain specific trust property is set apart or earmarked for the carrying on of a business by the trustee. If in such a case, a debt is contracted by the trustee in the course of the business, it has been held that the creditor will be entitled to stand in the shoes of the trustee and to recover the money advanced out of that particular fund. But even here there is a clear limitation to such a right expressed by a condition that the trustee himself should have a right of indemnity against the trust fund. If there was nothing due to the trustee, then, as pointed out by the Master of the Rolls, the creditor can get nothing out of the trust fund. As regards the right of the creditor in an ordinary case where he lends money to the trustee or sells goods to him, there is no authority, so far as one can gather from the English cases, for the proposition that he is entitled to have his debt realised out of the trust property. This seems to be quite reasonable, for supposing, that at the time the creditor advanced the money, money was required for the benefit of the trust, still the trustee who borrowed might not be entitled to receive any money from the trust property, but on the other hand might be indebted to the trust. It would then be clear injustice to pass a decree making the trust property liable for the debt, the creditor having lent money on the personal security of the trustee. In India, this view of the law was adopted in a Calcutta case, *In the matter of Shard* (3) by Sale, J. who followed the rulings in *Strickland* v. *Symons* (1) and *In re Jhonson, Shearman* v. *Robinson* (2). There is however, a decision of this Court, *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mahomed Routhan* (4), where it was held that for debts contracted by the head of the mutt for purposes binding on the mutt, a decree in respect of such debts may be passed against his successor charging the income of the mutt property, though such debts were not expressly charged on the income of the mutt. This decision may perhaps be explained, as suggested by the learned Pleader for the respondents, on the ground that according to the then prevalent view as to the legal rights of the head of a mutt, the succeeding Matathipathi might be regarded as being in the position of an heir to the last head of the mutt.

That does not, however, it must be admitted, appear to be the ratio of the decision in *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mahomed Routhan* (4). The learned Judges proceeded on a dictum of their Lordships of the Privy Council in *Konwar Doorganath Roy* v. *Ram Chunder Sen* (5), that a trustee of a temple occupies a position similar to that of a guardian towards an infant. But the case of *Konwar Doorganath Roy* v. *Ram Chunder Sen* (5) was one in which the validity of alienations was in question and the analogy which was drawn in

1. (1884) 26 Ch D 245.
2. (1880) 15 Ch 548.
3. (1901) 28 Cal 574.
4. (1908) 31 Mad 47.
5. (1876-77) 2 Cal 841=4 I A 52 (P C).

in that case between the trustee of a temple and the guardian of an infant could not have been intended to convey that the rights of a creditor who lent money to a trustee of a temple on personal security stand on the same footing as the rights of a creditor lending money to the guardian of an infant. The question whether a debt which is contracted by a trustee on his own personal security, although for purpose of the trust, can be made a lien on the trust estate does not appear to have been fully argued before the learned Judges in *Srimat Daivasikamani Pandarasannidhi* v. *Noor Mahomed Routhan* (4) and none of the cases to which we have been referred were brought to their notice. The law as laid down in the two English cases referred to above as well as in *In the matter of Shard* (3) is clear; and if a different view was taken in *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mahomed Routhan* (4), we venture to think with all respect that it is not correct.

Mr. Ananthakrishna Aiyar suggested that we might order an enquiry as to whether the defendant 1 was entitled to receive any money from the temple and if so, a decree might be given making the temple property liable for plaintiff's debt to that extent. But there was no allegation whatever in the plaint nor was any question raised by the issue that the temple was indebted to defendant 1. We do not think that it would be the right course in this suit to order any such enquiry as has been suggested. It may be that Mr. Ananthakrishna Aiyar's client has a remedy by a suit properly framed against the trust property if, as matter of fact, the trust property is liable to defendant 1 on a proper account being taken.

The appeal fails and must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 535

ABDUR RAHIM AND NAPIER, JJ.

Kasiyana Koundan — Plaintiff—Appellant.

v.

Thima Naicken and *others*— Defendants —Respondents.

Second Appeal No. 1266 of 1915, Decided on 29th March 1917, against decree of Dist. Judge, Madura, in Appeal Suit No. 208 of 1913.

(a) Civil P. C. (5 of 1908), O. 1, R. 13—Non-joinder—Objection should be taken before settlement of issues.

Under O. 1, R. 13, an objection as to non-joinder of parties should be taken before the settlement of issues. That rule applies even in cases where the plaintiff claims a joint right along with others but does not make the latter parties to such suit: *A. I. R.* 1915 *Mad.* 319 *Foll*: 1 *I. C.* 530 and 25 *Bom.* 433 *Dist.*

[P 536 C 2]

(b) Civil P. C. (5 of 1908), O. 1, R. 15—Non-joinder of parties — Enforcement by father of joint mortgage—Adult sons jointly interested not made parties to suit—Objection as to non-joinder after settlement of issues held too late.

A debt was due on a mortgage to a joint family consisting of a father and son. There was a partition among the members of the family and the mortgage debt was not included in the partition, as it was then considered as barred by limitation. Subsequently after the new Limitation Act came into force the father alone brought a suit on the mortgage. After the settlement of issues objection was taken by the defendants that the sons were necessary parties to the suit, and that the suit was therefore bad for non-joinder:

Held, that the objection was taken too late.

[P 537 C 2]

T. R. Venkatarama Sastri—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Napier, J.—The suit out of which this appeal arises was brought by the plaintiff on a mortgage dated 15th July 1878, executed by defendant, in favour of one Ramasami Gounden. Defendants 2 and 3 are the sons of defendant 1, and defendants 5, 6, 7 and 8 are members of the plaintiff's family. They were made parties on allegation in para. 6 of the plaint that there was a partition between the plaintiff and those defendants of their family properties, in which partition the plaint mortgage fell to the share of the plaintiff. Defendant 15 is a purchaser from defendant 1. Defendants 9 to 14 made no claim to any share in the property, admitting that it had fallen to the share of the plaintiff. Defendants 1 to 4 and 15 set up a case of discharge. The sole issues raised were whether the bond was true and whether there had been a full discharge. The issues were settled on 17th March 1911. The case went to trial and on 2nd July 1912 the plaintiff in his examination as P. W. 1 admitted that he had sons and alleged that there had been a division between himself and them and a partition of their properties. It appeared, however, that this mortgage was not named in the partition list and it is

perfectly obvious that it was omitted, being thought to be, as it was under the then existing state of the law, time-barred. In consequence of the passing of the new Limitation Act the right to sue revived and the plaintiff, therefore brought the suit.

On this admission by the plaintiff the defendants raised the objection for the first time that the suit was bad for non-joinder of the plaintiff's divided sons as parties. The effect of a finding in favour of the defendant on this issue would be, subject to an objection to be considered later, that the plaintiff being only a tenant-in common with his sons was not entitled, without making the sons parties, to recover either the whole or a proportionate share of the mortgage debt by sale of the property or the proportionate share. This was conceded by the appellant. On the trial of this issue the plaintiff adduced the evidence of his sons to the effect that prior to the suit they had relinquished their rights in the suit amount in his favour. Both the lower Courts have, however, declined to accept this story as true and it is urged that in second appeal we must accept this finding. In argument before the first Court it was contended that even if the relinquishment is not true, the objection on the score of non-joinder of parties was taken too late and no issue should have been framed. It is pointed out that the plea is purely technical and that the sons have raised no objection to their father alone bringing the suit and that the sole object of the objection is to protect the defendants from liability, it being too late to add the sons either as plaintiffs or as defendants, for in both cases it is clear on the authorities that limitation would operate to prevent their getting a decree jointly with their father for the whole amount with the necessary consequence that the father's suit must also fail. That this is the only defence to the suit is made clear on the finding that the plea of discharge is false. It being, therefore, impossible to give the plaintiff any relief by joinder of his sons, he is compelled here to fall back on the only remaining defence, that the objection for want of parties is too late. O. 1, R. 13, Civil P. C. is as follows:

"All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objetion not so taken shall be deemed to have been waived."

Mr. T. R. Venkatarama Sastri relies on the latter part of the rule and contends that the ground of objection has not arisen subsequent to the settlement of issues. This is undoubtedly true. The ground of objection was there from the very inception of the suit. The defendant could have ascertained that the plaintiff had sons alive and could have asked for issues, whether the plaintiff was entitled to sue on behalf of his sons or whether in any partition this particular debt had fallen to his share. If those issues had then been raised, they might have been fatal to the suit. In my opinion the case comes within language of the rule and it has been decided by this Court in Second Appeal No. 1629 of 1912 in *Kollichina Venkatarmayya* v. *Gudavalli Subbarayudu* (1) that the objection as to non-joinder of parties applies even where the ground was not known to the defendant at or before the settlement of issues. Unless therefore the rule has no application to suits of this nature, the objection under R. 13 must prevail. It is however urged that this rule has no application to cases where the right to sue is vested in certain persons jointly and no one of them can recover without the presence of all. The authority relied on for this proposition is *Dursan Singh* v. *Durbejay Singh* (2). This was a decision under S. 34 of the old Code corresponding to this rule. The acutal decision in the case was that any member of a Mitakshara family is entitled, as against a trespasser or a person who seeks wrongfully to seize the property in execution of a decree obtained against a stranger, to recover possession or ask for a declaration that the properties are not liable to be sold in execution, and in this view the Court decided that the objection for want of parties was bad.

But at p. 626 (*of* 9 *C. L. J.*) the Court expresses the opinion that the section will not prevent a Court dismissing a suit in toto where the application of the section would operate to give a plaintiff a measure of relief larger than the right he really possesses. I do not gather from the dictum in this case whether the learned Judges intended to go as far as to lay

1. A I R 1915 Mad 319=25 I C 122.
2. (1909) 1 I C 530.

down that the sections in the old Code to which this S. 34 was an exception have also no application to such cases. It seems to me that this result must logically follow from the decision of the Court, for S. 34 is part of Ch. 3 dealing with "parties and their appearance, applications and acts" If this be so, it seems to me a strong proposition that the Court cannot, in a suit of this nature, order that a person may be joined as plaintiff or that a person who has been made a defendant be made a plaintiff. It would come to this, that if the objection had been taken at an earlier stage the Court could not have given permission to the plaintiff to join his sons as co-plaintiffs. The principle cannot, in my opinion, be founded on the objection that all the parties entitled must sue, because it is clear that where a person is jointly entitled to sue with other persons and cannot get relief except by making them parties, he is entitled, when they refuse to be plaintiffs, to join them as defendants. The object of this recognized principle is obvious, namely, that otherwise it will be in the power of one of several persons jointly entitled to prevent the others recovering their claims against a third party by refusal to join as co-plaintiffs. It must therefore be conceded that it is not necessary for all persons jointly entitled to sue and therefore it cannot be said that one of such persons has no right to sue alone.

All that is required is that he should make persons jointly entitled with him defendants, who will not join as plaintiffs. That being so, I am unable to accept the broad proposition laid down by the learned Judges in the above case. I do not wish to lay down any general rule, but in a case such as this where the right exists in the plaintiff but he cannot enforce it to any extent even without other persons jointly interested being parties to the suit, the objection does seem to me to be one as to parties and covered by the law of procedure, though probably it does not apply to a case where there is an absolute defect in the plaintiff's title and the persons really entitled to the exclusion of the plaintiff was not a party to the suit; vide *Heiniger* v. *Droz* (3). I may add that I can find no decision of this Court or any other Court in which the view enunciated in *Dursan Singh* v. *Durbejoy Singh* (2) has been accepted. I am, therefore, of opinion that the rule does apply, that the objection is taken too late and the appeals must be allowed. The appeals will be remanded to the lower appellate Court for trial on the other issues. Costs will abide.

Abdur Rahim, J.—I agree.

S.N./R.K. *Appeal allowed.*

3. (1901) 25 Bom 433.

A. I. R. 1918 Madras 537

SPENCER AND KRISHNAN, JJ.

Muthukumara Chettiar—Defendant—Appellant.

v.

Alagappa Chettiar and *others*—Plaintiffs—Respondents.

Second Appeal No. 601 of 1916, Decided on 6th August 1917, against decrees of Sub. Judge, Negapatam, in A. S. No. 324 of 1914.

(a) Civil P. C. (1908), O. 21, R. 63 and O 38, R. 8—Property attached before judgment—Suit for declaration of title is maintainable.

The wording of O. 21, R. 63, is sufficiently wide to include claims to property attached before judgment as well as claims to property attached in execution of decrees. [P 537 C 2; P 538 C 1]

(b) Transfer of Property Act (1882), S. 53—Transfer by judgment-debtor before attachment cannot be avoided unless shown to defeat or delay creditors.

A judgment-creditor cannot avoid a transfer of the judgment-debtor's property prior in date to his attachment without its being shown to have been made with an intent to defeat or delay creditors of the transferor and thus voidable under S. 53, T P. Act. [P 538 C 1]

(c) Hindu Law — Alienation—Manager—Manager describing himself as guardian—Alienation is binding on all members.

An alienation of joint family property by the manager on behalf of the family is binding on all the members of the family, and the fact that the manager misdescribes himself as the guardian of the minor members is immaterial. [P 538 C 1]

S. Muthiah Mudaliar—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Judgment.—In this case the appellant attached property before judgment and the respondents, who hold the property of the judgment debtors under deeds of trust for distribution to their creditors, brought this suit to establish their right to the property. It is first argued that the suit is not maintainable, as O. 38, Civil P. C., does not expressly provide a right of suit in the case of claims preferred to property attached before judgment. We think that the wording of O. 21, R. 63, is sufficiently wide to include claims to property attached before judgment as well as claims to property

attached in execution of decrees. Moreover, 38, R. 8, provides that claims to property attached shall be investigated in the manner provided for the investigation of claims to property attached in execution of decrees for the payment of money. The next argument is that the transfer by debtors of the whole of their property for distribution among their creditors was an act of insolvency and therefore void. In support of this proposition appellant's vakil quotes *Manmohandas Ramji* v. *Macleod* (1). That decision only declared that assignments in favour of trustees by persons who were subsequently adjudicated insolvents were void as against the Official Assignee. Appellant has shown no authority under which he can avoid a transfer prior in date to his attachment without its being shown to have been made with an intent to defeat or delay creditors of the transferor and thus voidable under S. 53, T. P. Act, and in this case the finding on the question of fact by the appellate Court is that the transaction was perfectly bonafide.

The last point taken was that the trust deeds (Ex. E and E-1) did not pass the property of the minor sons of the transferor's deceased brother, as Somasundaram, who was the manager of the joint family and executed Ex. E-1, described himself as the guardian of the minors whereas their mother was their lawful guardian. If Somasundaram was in fact manager of the family, we do not think his misdescription of himself as guardian will affect the title which he purported to convey on behalf of the family and the Subordinate Judge has stated that the trust deed was executed for their benefit. As for Ex. E-1, it may have been a superfluous document executed ex abundante cautela but the operation of Ex. E will not be diminished thereby. The second appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

1. (1902) 26 Bom 765.

A. I. R. 1918 Madras 538

AYLING AND NAPIER, JJ.

Sunnasi Kudumban — Petitioner.

v.

Sivasubramania Kone and *others*— Opposite Parties

Criminal Revn. No. 680 of 1916 and Criminal Revn. Petn. No. 557 of 1916, Decided on 21st March 1917.

(a) Criminal P. C. (1898), S. 344—Adjournment—Magistrate can grant adjournment on payment of costs.

It is competent to a Magistrate, in a pending trial or proceeding, to grant an adjournment conditionally under S. 344, on the payment of costs. [P 538 C 2]

The words 'on such terms as it thinks fit' in the section being wide enough to cover an order making the payment of costs by one party to another a condition of granting an adjournment. [P 538 C 2]

(b) Criminal P. C. (1898), S. 344—Adjournment—Power can be exercised in case on Police Report against informant virtually prosecuting case.

The power can be exercised, in a case tried on a report by the Police against the informant to the Police who, though a witness. virtually prosecutes the case: 28 *All* 207 and 9 *C. W. N.* 18, *Ref.* [P 540 C 1]

(c) Criminal P. C. (1898), S. 439—Power of revision should be freely exercised.

The High Court should freely exercise the power to revise any order passed under the section for the very reason that the words are so wide. [P 540 C 1]

S. Panchapakesa Sastriar for *K. S. Jeyarama Aiyar*—for Petitioner.

Public Prosecutor—for the Crown.

Ayling, J.—The main point involved in this petition is whether S. 344, Criminal P. C., authorizes a Magistrate to grant an adjournment conditionally on the payment of costs. The power, if it exists, is certainly one very rarely exercised; on the other hand, the words of the section ("on such terms as it thinks fit") seem wide enough to cover an order making the payment of costs by one party to another a condition of granting an adjournment. This is the contention of the learned Public Prosecutor, and the only cases to which our attention has been directed: [*Mathura Prasad* v. *Basant Lal* (1) and *Sew Prasad Poddar* v. *Corporation of Calcutta* (2), and a recent decision of a single Judge of this Court in Criminal Revision Cases Nos. 485 and 486 of 1916], are all in his favour. It is pointed out that the Code contains no provision for the recovery of costs ordered to be paid under this section; but this is not conclusive, for Ss. 433 and 488 are instances in which Courts are specifically empowered to award costs without any provision as to their realization. As at present advised I must hold that S. 344 confers the power in question. Our attention is drawn to the fact that this case was taken upon a Police charge sheet filed on information furnished by peti-

1. (1906) 28 All 207.
2. (1905) 9 C W N 18.

tioner. It appears, however, that petitioner had himself engaged a vakil, and that he (petitioner) applied for the adjournment in consequence of the vakil's absence. In such circumstances the fact that he was not a complainant under S 200, Criminal P. C., would not be a bar to an order being passed against him. The petition should be dismissed.

Napier, J.—In this case we are asked to revise the order of the Second Class Magistrate of Madura Taluk directing the payment to the pleader defending the accused of Rs. 25 for costs of the day, the case having been adjourned at the instance of the prosecution. The charge before the Magistrate was on a police report, but the informant was represented at the hearing and joined in the application for adjournment made by police officer on the ground that this vakil was absent. The order was passed under S. 344 Criminal P. C , which is as follows:

"If from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn an inquiry or trial, the Court may, if it think fit, by order in writing stating the reason therefor, from time to time postpone, or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may by a warrant remand the accused in custody."

We are asked to hold that the words "on such terms as it thinks fit" do not include the power to give costs. It is certainly true that such orders are very rarely made. It is also true that the granting of costs is specifically provided for in certain cases. Ss. 148, 433 and 488 contain such a power. It is urged also with considerable force that it is not an incident of ordinary criminal procedure that costs should, so to speak, follow the event. And lastly, we are pressed with the argument that, if the power to give costs was intended under this section, some provision would have been made for their recovery. These are certainly formidable arguments against reading this power into the words of the section. On the other hand, it must be noted that this S. 344 applies to inquiries and trials and has no reference to the particular proceedings in which special provisions for costs are made. S. 148 is part of the procedure for prevention of the offences. S. 433 is a special provision for the High Court acting on reference and revision. S. 488 also does not apply to inquiries and trials, being part of the chapter on maintenance of wives and children. The principle that where special provision is made in some cases, a like power should not be read into general words does not therefore, apply as between the sections. S. 344, which is under consideration, covers the whole field of criminal proceedings in which a person is an accused before a Court exercising ordinary jurisdiction. Nothing in it could be read to to make any provision in the exercise of jurisdiction in the other classes of proceedings dealt with above, and it may well be that the legislature in making provisions covering this whole field, thought it advisable to give wide powers to judicial officers to be exercised with proper discretion in dealing with cases coming before them in their ordinary procedure.

The argument that there is no provision for the recovery of costs would have more force if the legislature had been careful where it does make specific provision for costs, to provide also for their recovery, but it is clear that neither in S. 433 nor in S. 488 has this been done. In S. 433, the words are 'the High Court may direct by whom the costs of such reference shall be paid." In S. 488, although power is given to issue a warrant for levying the amount due for maintenance in manner hereinbefore provided for levying fines, sub-Cl. 8 simply states that the Court shall have power to make such order as to costs as may be just. It may be arguable that on the true interpretation of the section, these costs can be levied by a warrant, but the fact remains that there is nothing specifically laid down by the terms of the section. Apart from the very wide power given by this S. 344. there is the use of the word "terms." "Upon such terms" means something more than a mere general power to adjourn. It implies that a concession is granted to one side only on the condition that the other side suffers in some manner; and bearing in mind the wide meaning attached to the words "on terms" in civil procedure, it is difficult not to assume that the legislature had in mind this ordinary form of terms, namely the payment of costs. It is true that the language of O. 9, Civil P. C., is "upon such terms as to costs or otherwise." But this argument of the specific mention of costs can be used against the contention, because it is clear that the legislature in-

tended the granting of costs as coming within the word "terms." If the language in the Code had been "upon such terms as the Court directs and may also award costs," the petitioner's argument would have more weight. Turning to authority we find that the Allahabad High Court in *Mathura Prasad* v. *Basant Lal* (1) has held that S. 344 does give this power. It has also been so held by the Calcutta High Court in a case reported as *Sew Prosad Poddar* v. *Corporation of Calcutta* (2), and a Judge of this Court has quite lately followed these two decisions (Criminal Revision Cases Nos. 485 and 486 of 1916). Where the language used by the legislature is intentionally wide, as it is in this case, I think that on the whole, it is best not to attempt to limit it, but to leave to the legislature the task of imposing limitation if it is found that any power exercised under this rule operates in a manner which the legislature thinks unjust. I am, therefore, of opinion that the power to award costs is vested in the Court under this section

It is next urged that we should interfere with this order, as it was made against a person whose position in the trial was that of witness only. I quite agree that we have power to revise any order under this section and to use that power freely for the very reason that the words are so wide. But in this case, I see no reason why we should interfere. The petitioner was, in addition to being a witness, the informant to the police. An informant is a person recognized in criminal procedure as initiating criminal proceedings. A person considering himself aggrieved can either lay a complaint before a Magistrate under S, 190 or give information to the police under S. 154 and in either case he occupies virtually the same position in that he is seeking protection from the Courts exercising criminal jurisdiction. As stated above, the informant in this case employed a vakil and was virtually the prosecutor. I see no reason, therefore, why he should not be made responsible to the accused for the costs of the adjournment which he asked for. I would dismiss the petition.

S.N./R.K. *Petition dismissed.*

A. I. R. 1918 Madras 540

SADASIVA AIYAR, J.

Public Prosecutor—Appellant.

v.

Tsandra Ramaswamy and *others*—Accused—Respondents.

Criminal Appeal No. 693 of 1916, Decided on 16th February 1917, against order of Second Class Magistrate, Tenali, in calendar case No. 313 of 1916.

Penal Code (1860), S. 379—Theft of earth from channel bed belonging to Government—Dishonest intention cannot be assumed unless accused is shown to know of notification that removal would injure pecuniary interest of Government.

Dishonest intention cannot be assumed where the charge is of theft of clods of earth worth 6 pies from a public channel bed belonging to Government, unless it is shown that the accused knew that the public officers in charge of the bed had notified that the removal of earth would injure the pecuniary or other interests of Government or from the clandestine nature of the act such knowledge could be inferred; 27 *Mad* 531 and 10 *Mad* 255, *Ref.* [P 540 C 2]

Public Prosecutor—for the Crown.
S. Swaminadhan—for Accused.

Judgment.—The reasons given by the Sub-Magistrate for acquitting the accused are clearly erroneous: [see *Suri Venkatappaya Sastri* v. *Madula Venkanna* (1) overruling *Queen-Empress* v. *Kotayya* (2).] But where the charge is for theft of clods of earth worth 6 pies from a public channel bed belonging to Government, dishonest intention need not be assumed unless it is shown that the accused knew that the public officers in charge of the bed had notified that the removal of earth would injure the pecuniary or other interests of Government or unless from the clandestine nature of the act, such knowledge could be inferred. The act in this case was committed in daylight (at 4 p. m.) and the evidence does not disclose any dishonest intention. I, therefore, dismiss this appeal filed by the Government and confirm the order of acquittal, though not on the grounds set forth in the Sub-Magistrate's judgment.

S.N./R.K. *Appeal dismissed.*

1. (1904) 27 Mad 531.
2. (1887) 10 Mad 255.

A. I. R. 1918 Madras 541

AYLING AND SESHAGIRI AIYAR, JJ.

Viswanatha Pandara Sannadhi—Defendant—Appellant.

v.

South India Bank, Ltd. Tinnevelly, and *others*—Plaintiffs—Respondants.

Second Appeals Nos. 34 and 140 of 1912, Decided on 23rd August 1917, against decree of Sub-Judge, Negapatam, in O. S. No. 41 of 1910.

(a) Execution—Debts due to judgment-debtor sold—Purchaser suing—Evidence is admissible to identify debts.

Where in a suit to recover the amount of a debt purchased in the execution of a decree it is found that there are discrepancies between the description of the debt in the attachment list and its description in the plaint, evidence can be let in to explain the discrepancies so as to identify the debt. [P 542 C 1]

In all such cases only a reasonable amount of certainty can be expected having regard to the knowledge of and the circumstances of the plaintiff. [P 542 C 1]

(b) Limitation Act (1908), Art. 116—Money bond—Registered deed for payment of debt executed on same day—Suit to recover money after default is governed by Art. 116.

Subsequent to the execution of a simple money bond, a registered deed was executed on the same day which provided for the payment of the debt in a particular manner. Default was made in the payment of the debt as provided by the deed:

Held: that the bond and the deed were part of one and the same transaction, and that a suit to recover the amount of the debt after default was governed by Art. 116 of Sch. 1, Lim. Act. [P 542 C 2]

(c) Trust—Income more than sufficient to meet current expenses—Trustee is personally liable for debts incurred by him.

Where the income of a temple is more than sufficient to meet its current expenses, the trustee is personally liable for debts incurred by him during his period of management. He is not so liable, however, for debts incurred by a previous trustee before he took over management of the temple. [P 543 C 1]

T. Rangachariar and *G. S. Ramachandra Aiyar* —for Appellants.

M. D. Devodoss, *T. Naraisimha Aiyangar* and *V. Purushottama Aiyar* — for Respondents.

Judgment.—The plaintiff obtained a decree against one Nataraja Aiyar in Original Suit No, 30 of 1908 on the file of the Court of the Subordinate Judge of Tinnevelly. Certain debts due to Nataraja Aiyar were attached and brought to sale. Plaintiff became the purchaser. One of the debts thus purchased was due on a bond executed by defendant 1. He was at the time of the bond (16th June 1904) the Srishta Adhinakarta of the Devastanam. In order to understand the position of defendant 1, it is necessary to state that a large number of families in Jaffna are the hereditary trustees of the Devastanam. They appoint one among themselves as the principal manager or "the Srishta Adhinakarta." Transactions connected with the temple are entered into by him. There can be no question that he acts as the representative of all the trustees and represents the temple as well. To go back to the claim in the suit, the suit was instituted in June 1910. A number of defences were raised. It was pleaded that defendant 1 was not personally liable, that the debt was not properly identified and that the claim was barred by limitation.

The Subordinate Judge held that the suit was in time, but that defendant 1 was personally liable and not the Devastanam. Both the plaintiff and defendant 1 preferred separate appeals. Both of them wanted that the liability should be laid on the trust. On the first occasion when the appeal was heard, we found that Mr. T. Rangachariar appeared for defendant 1 in his individual capacity as well as in his capacity of representing the trust. Although we felt no doubt that the learned vakil was trying to advance the claims of both the interests dispassionately we thought it desirable that the trust should be separately represented. Consequently, with his consent, the Devastanam is now separately represented by Mr. T. Narasimha Aiyangar. The arguments on behalf of defendant 1 may first be dealt with. The first contention that there is no evidence of a bond having been given for the debt comes too late. It was not raised in the Court below and it is not in the grounds of appeal to this Court. Further, there is reliable evidence that a bond was executed.

The second contention of the learned vakil is that in execution of the decree in Original Suit No. 30 of 1908 on the file of the Court of the Subordinate Judge of Tinnevelly what was attached was (1) a claim for Rs. 12,000, (2) on a registered bond, (3) executed by defendants 1 and 2. It was argued that this description in no way tallies with the claim now put forward. After the attachment, a list of the properties to be sold was prepared. That was Ex. B. In that the debt is mentioned as on a bond for Rs. 8,000 and the date is given as 16th June 1904.

The mistakes as to execution by the two defendants and about registration are repeated. The contention for the appellant is that the plaintiff is only entitled to what he purchased or purported to purchase, and that as there are material discrepancies between the plaint claim and the claim as indicated in the attachment proceedings, plaintiff should be nonsuited. *Raja Thakur Barmha* v. *Jiban Ram Marwari* (1) was relied on for this proposition. In that case, evidence was sought to be adduced to contradict a plain statement in the order of attachment. In the present case, the evidence let in only tends to explain certain discrepancies. What the Courts have to find out in such cases is whether the claim agrees substantially with the subject-matter of the purchase. A reasonable amount of certainty is all that can be expected having regard to the knowledge of, and the circumstances of the plaintiff. The principle enunciated by Lindley, M. R., in *Cowen* v. *Truefitt Limited* (2) applies to this case. Vide also *Palaniappa Tevan* v. *Sahdagopa Mudaliar* (3). We hold that the subject-matter of the suit is identical with what was purchased by the plaintiff.

We might deal with the question of limitation before considering the liability of defendant 1. Mr. T. Narasimha Aiyangar contended that the evidence shows that there was a stipulation that if one of the instalments was not paid, the whole was to become payable. The evidence of witness 8 for the plaintiff is absolutely worthless. We do not attach any weight to the deposition of defendant 1. He is interested in saying that the claim is barred. He did not allege the bar of limitation in his reply notice. The further question is whether the suit is not governed by the three years' rule under Art. 87, Limitation Act. The Subordinate Judge has found that a sum of Rs. 3,000 was paid on two different occasions. In all likelihood, there was authority to make these payments, but the plaint does not say that limitation has been saved by these payments. The defendants rightly contend that they had no opportunities of showing that the payments were unauthorised. We do not therefore base our judgment on these payments. We think Ex. A extends the period to six years. A perusal of that document shows that it was a consolidated agreement by which defendant 1 undertook to discharge the debts due to Nataraja Aiyar in a particular manner. One of the debts to be paid off was the plaint one. The document was executed on the same date on which the plaint bond was signed. We think the Subordinate Judge is right in his view that the bond sued on and Ex. A formed part of the same transaction. As Ex. A was registered and as it was in carrying out the terms of that document that default was made, in our opinion, Art. 116 applies to this case and the suit is in time. See *Tricomdas Cooverji Bhoja* v. *Gopinathji Thakur* (4).

The main contention related to defendant 1's personal liability. The history of the transaction is this. In 1878, one Sattanatha, the then managing trustee, borrowed money. His successor Kailasanatha Pandaram borrowed from the same creditor in 1881. Sattanatha again became manager and he executed a document for Rs. 4,000 in 1897. The present defendant 1 succeeded him in 1904. He found that the old debts were subsisting. He himself borrowed on a promissory note Rs. 1,000 as soon as he entered office. He gave a consolidated document for Rs. 8,000 in June 1904. There is evidence that the monies borrowed by his predecessors were utilised for temple purposes. At any rate, a succeeding trustee should not be held responsible for antecedent mismanagement. Applying the principle of *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree* (5), which the Judicial Committee have repeatedly extended to religious endowments [vide *Konwar Doorganath Roy* v. *Ram Chunder Sen* (6)], we must hould that defendant 1 was justified in charging the temple with the debts incurred by his predecessors. At any rate, it is clear that he did not intend to hold himself personally liable for those debts. The debt borrowed by him personally stands on a different footing. There is evidence that the income of the temple

1. (1914) 41 Cal 590=21 I C 936=41 I A 38 (P C).
2. (1899) 2 Ch 309=68 L J Ch 563.
3. (1911) 9 I C 729.
4. A I R 1916 P C 182=39 I C 156=44 Cal 759=44 I A 65 (P C).
5. (1854-57) 6 M I A 393.
6. (1876-77) 2 Cal 341=4 I A 52 (P C).

is more than sufficient to meet its current expenses. He has not disclosed all the circumstances in his evidence which led him to borrow. Prima facie, the promissory note executed by him makes him personally liable. For these reasons, we are not satisfied that he is not personally liable to the plaintiff for the debt contracted by him after he became the managing trustee. The principle of *Swaminatha Aiyar* v. *Srinivasa Aiyar* (7) is applicable to this case. We are not now concerned with the equities that he may have against the Devastanam for re-imbursement. We think sufficient grounds have not been shown for charging the Devastanam with liability in the first instance for the debt contracted by defendant 1.

We must therefore modify the decree of the Subordinate Judge, by directing that out of the sum decreed, the temple shall pay Rs. 5,968-7-5 on account of the amount of money borrowed by the predecessors of defendant 1, and that defendant 1 shall pay the balance to the plaintiff. It has been brought to our notice that when execution was applied for, defendant 1 undertook to pay 10 per cent. per annum interest on the amount decreed from 28th February 1912. This undertaking cannot bind the temple ; but defendant 1 is bound by it. Consequently he must pay the additional 4 per cent. interest from 28th February 1912 upto this date. Interest will be at 6 per cent. per annum from this date.

As regards costs, we do not think that the temple should be made to pay the whole of it. If defendant had given before the Subordinate Judge the evidence which he has now given, he might not have been held personally liable for the whole amount. Under the circumstances, we think he should pay one-half of the costs of the plaintiff in this and in the Court below. The temple will pay the other half. We fix the Commissioner's fee at Rs. 150. This fee and the other costs of the commission shall be solely paid by defendant 1. The expenses of engaging a vakil for respondent 28 shall be paid by the temple and defendant 1 in the proportion already indicated.

S.N./R.K. *Decree modified.*

7. A I R 1918 Mad 533=38 I C 172.

A. I. R. 1918 Madras 543

AYLING AND NAPIER, JJ.

Anantanarayana Iyer—Appellant.

v.

Kozhilote Patinhare Kovialavath Thiruveerarayan and *others*—Respondents.

Second Appeal Nos. 1044 to 1046 of 1916, Decided on 7th March 1917, against the decrees of Sub-Judge, South Malabar in Appeal Suit Nos. 455 to 457 of 1915.

(a) Malabar Law—Stanom—Grant by stani of perpetual lease if for benefit is valid.

The grant by a stani of a perpetual lease of stanom properties is not necessarily bad, if it is for the benefit of the stanom: 3 *Mad* 384 (*P. C.*) and 5 *M. L. T.* 219, *Dist.* [P 544 C 2]

(b) Malabar Law—Melcharth—Grant of, —Validity—Burden of proof is on person challening validity.

Where a melcharth is granted for a certain number of years, its binding nature depends upon whether a reasonable rent is reserved for the period of the lease. [P 455 C 1]

Where such melcharth is sought to be declared void, it rests on the person who seeks to do so to show that it is not of a reasonable nature, and not granted in the ordinary course of business. [P 545 C 1]

(c) Malabar Law—Stanom property held on Verumpattom lease—Splitting of into different leases—Validity considered.

Where stanom property was held on verumpattom lease for one year and that lease was renewed from time to time in favour of the same tenant and at last the verumpattom lease was split up into three different leases and granted to three different lessees, to each of whom a melcharth for 12 years was granted:

Held: (1) that the melcharth was not necessarily bad, unless it was shown that the grant of a lease of this character was so unusual as evidently not to be in the ordinary course of business:

(2) that the fact that consideration was beneficial to the estate did not render splitting up of a lease invalid unless it was proved that it was not usual to grant such leases. [P 545 C 1,2]

K. R. Subramania Sastri and *K. P. Ramakrishna Aiyar*—for Appellant.

A. S. Vinku Aiyar and *P. V. Parameswar Aiyar*—for Respondents.

Napier, J.—This is a suit by a melcharthdar from the stani, the 4th Raja of Calicut, to recover from certain persons in possession of land under verumpattom lease the properties demised in the melcharth; the melcharathdar is plaintiff, 2, the demisor being plaintiff 1. Defendant 5 in the suit is a person to whom a melcharth had been granted by the predecessor of plaintiff 1 with respect to the same propertios and the plaintiffs claim that that demise was bad and not binding on the present plaintiff 1 as having been given without any consideration and for the purpose of depriving plaintiff

1 of his lawful income and not for the purpose of the stani. This question was made the subject of issue 7, namely.

"whether the lease relied on by defendant 5 is valid and bindlng on the plaintiffs."

We have already held in *Second Appeals Nos.* 581, 582 *and* 608 *of* 1916 that the property was held by the defendants in possession on a verumpattom lease and that they were, therefore, liable to surrender it. But the question we have to decide in this case is whether the prior melcharth granted to defendant 5 is valid, because, if so, the present plaintiff 2 has no title on which he can sue. The matter was considered carefully by the District Munsif, who held that the first melcharth was good. But it has been pointed out to us that the lower appellate Court has not given a finding on issue 7, having overlooked the necessity for it as the Court dealt with these cases and the prior cases *Second Appeals Nos.* 581, 582 *and* 608 *of* 1916 in the same judgment. The point urged by Mr. Subramania Sastri is really a point of law although it has to be applied to the facts of this case, and as we have those facts before us and as they are not really in dispute, we propose to act under S. 103 Civil P. C., and determine this issue ourselves. The argument put forward by Mr. Subramania Sastri is, that anything beyond a lease for a single year by a stani is voidable unless it has been shown to have been for the necessity of the stani. And he has invited our attention to a long series of cases beginning with two of the Sudder Adawlat Court. Those two cases are quoted in Moore's Malabar Law, p. 353, the subject being dealt with by the learned author from p. 348. We do not think that those two cases really lay down anything in the way of a general proposition. They seem to me to have been decided on the facts of each case and are cases where a Zamorin practically on his deathbed and a Raja of Plghat, who had just suffered from a paralytic stroke, endeavoured to defraud the person who would come into possession of the estate in a few months of the whole of what he might legitimately expect to get from the property. Great reliance has naturally been placed by Mr. Subramania Sastri on the decision of the Privy Council *Venkateshwara Iyer* v. *Shekhari Varma* (1), but I do not think that their Lordships intended to lay down that every lease. for however short a term, must be governed by the same rules as they applied in that case. That was a perpetual lease of stanom lands by a Raja, and their Lordships say with regard to that:

"The stanomdar represents the corpus of his stanom much in the same way as a Hindu widow represents the estates which have devolved upon her, and he may alienate the property for the benefit or proper expenses of the stanom."

Now I think it is clear that in using this language their Lordships were referring to alienations by sale and mortgage by a Hindu widow in circumstances which have been held to be binding on the reversioners, and I do not think that they had in their minds in the very slightest the granting of a lease for the purposes of the cultivation of the stanom property. Even this proposition has been held in a later case not to be of universal application for it was decided in *Mana Vikraman* v. *Sundaran Pattar* (2) that the granting of a perpetual lease is not necessarily bad if it is for the benefit of the stanom and on the facts the Court held that the approval of 8 stanis was sufficient to show benefit. In a later case dealing with a perpetual lease, *Mullath Tarwed Karnavan* v. *Mullath Unni Nambi* (3) it was laid down that such a lease is presumably beyond the powers of a stani as it amounts to an alienation. Now I do not think that we have to apply principles governing these cases at all. It seems to me that dealing with a lease for 12 years we have to consider the matter from a different standpoint. The property has not been "alienated" in the broad sense of the word. It remains for the benefit of the stanom and some rent is comingin and in course of time the lease will come to an end, and the new stani will get the benefit of the renewal. The tests to be applied to such a case have been considered in two very recent cases *Second Appeals Nos.* 1874 *and* 1875 *of* 1914 and *Second Appeal No.* 1449 *of* 1912. The first of these was a judgment of this Bench and second of Sadasiva Aiyar, J., and Bakewell, J. I prefer to take the latter judgment especially in view of the admittedly close acquaintance which one of those learned Judges has with Malabar customs and conditions. It was the grant of a melcharth for 12 years. The learned Judges say as follows :

1. (1881) 3 Mad 384=8 I A 143 (P C).

2. (1882) 4 Mad 148.
3. (1909) 5 M L T 219.

"The question is whether the previous stani in granting the melcharth to the plaintiff reserved a reasonable rent for the 12 years' period, she having only a life-interest in ths income and her successor not being bound by a melcharth which was not granted in the ordinary course of business or which did not reserve the proper and usual rent obtainable or renewal."

This of course is an entirely different test to that which has been applied to cases of peepetual leases and in my opinion it is one which we can very usefully adopt. Applying this test Mr. Subramania Sastri urges that on the facts it is destructive. He points out that these properties were previously granted to the defendants in possession on verumpatom tenure, that is a lease for a year. And he also points out that the properties have been consolidated into one melcharth, which has been granted by the stani to his own nephew. Giving all weight to there considerations I do not think that these facts are sufficient to bring the case within the mischief of the doctrine laid down especially as I am inclined to think that in the view of the learned Judges who decided that case, it rests on the person who seeks to have the melcharth declared void to show that it is not of a reasonable nature and not granted in the ordinary course of business. Although it is true that these properties were granted on verumpatom lease, namely, a lease for one year, the fact remains that between the year 1870 and the year 1913 there had only been four leases granted. The first was in 1870 and was renewed in 1881. It was renewed in 1888 and again in 1902, and the property was held under the last lease up to the date of this melcharth, which is 1912, so that as a matter of fact the same tenant held these properties for periods between 7 and 14 years on the nominal lease for one year. Then as to the question of consolidation it appears that it is only the last verumpatom lease that has been split up into three, for the previous leases were consolidated and the only reason why three different leases were granted in 1902 was because holders of the lease had made a partition and the parties desired to have a lease of the property held by each in his own name. So I do not think any importance can be attached to the consolidation. The District Munsif has expressed his opinion that consolidation may be very good business and also that it may be a benefit to the stanom to get a solvent tenant to take the property on a lease inetead of having the troubles of yearly lease with the possible insolvency of any lessee at any time. I think there is a great deal of force in this contention, and unless it was demonstrated by evidence that the grant of a 12 years' lease of this character was so unusual as evidently not to be in the ordinary course of the business, I should not be prepared to hold that was so. On the whole I have come to the conclusion that there is nothing in this melcharth which offends against the test applied in the judgment of this Court in *Second Appeal No.* 1449 of 1912, the reasoning of which I adopt The result will be that this issue is found against the plaintiff and the suits will have to be dismissed with costs of the tenants (respondents) one set and respondent 2 one set.

Ayling, J.—I agree.

S.N./R.K. *Appeal dismissed.*

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*A I. R. 1918 Madras 545

AYLING AND SADASIVA AIYAR, JJ.

Enuga Sundrama Reddi— Defendant —Appellant.

v.

Bezwada Pattabhiramireddi and *others* —Plaintiffs—Respondents.

Misc. Appeal No. 234 of 1913, Decided on 3rd April 1917, against order of Dist. Judge, Nellore, in Misc. Petn. No. 11 of 1913.

(a) Civil P. C. (1908), O. 32, R. 3 (4)—Appointment of guardian ad litem— Failure to give notice to minor— Appointment is not vitiated.

The mere omission to give notice to a minor party before the appointment of a guardian ad litem under O. 32, R 3, Cl. 4, does not vitiate the appointment of the guardian: 33 *I. C.* 805; and 21 *Mad.* 167 *Rel, on.* [P 547 C 2; P 548 C 1]

*** (b) Civil P. C. (1908), O. 32 R. 12— Minor defendant attaining majority during pendency of suit— Plaintiff is not bound to issue fresh summons.**

There is no provision in the Civil Procedure Code requiring a plaintiff to issue a fresh summons to a minor defendant after he attains majority. On the contrary the analogy of O. 32, R. 12, show that it is for the minor defendant attaining majority to elect to proceed with or abandon the defence. [P 547 C 2]

*** (c) Civil P. C. (1908), O. 3, R. 4—Client— Meaning of—Guardian ad litem has right to appoint vakil for minor—Vakalat, how determined stated.**

A guardian ad litem has a right to appoint a vakil for the minor party for whom he acts as guardian and under O. 3, R. 4, Civil P. C. the appointment of the vakil continues in force till the minor dies or till it is revoked in writing with the Court's permission. The word "client" in

the rule in such a case means the minor and not the guardian and the client's attaining his majority does not determine the authority of a vakil appointed for him. [P 547 C 1]

(d) Limitation Act (1908), Art. 164 — Ex-parte decree aginst party attaining majority during pendency of suit—Application to set aside after 30 days is barred— Civil P. C. (1908), O. 9, R. 13.

One of the defendants to a suit was appointed guardian ad iitem of his minor brother. The latter attained majority during the pendecy of the suit but the preceedings were continued without any amendment and a decree was finally passed against all the defendants. More than thirty days after the date of the decree the quondam minor applied to set the decree aside alleging that so far as he was concerned the decree was ex parte.

Held: that assuming that the decree was ex-parte against the applicant his application was barred by limitation inasmuch as it was made more than thirty days after the date of the decree the applicant having had knowledge of the proceedings and the decree all along.

[P 547 C 1]

L. A. Govindaraghava Aiyar—for Appellant.

T. V. Venkatarama Aiyar, *S. Varadachariar* and *R. Rajagopala Aiyar*— for Respondents.

Sadasiva Aiyar, J.— This is an appeal by defendant 3 in the suit against the order of the District Court refusing his application to set aside the decree passed against him. That application to set aside treated the decree as an ex parte decree so far as he was concerned. Turning to the decree itself. I find the wording is as follows:

"This suit coming on for hearing in the presence of Messrs T. V. Venkatarama Aiyar and R. Subbarayudu, Vakils for the plaintiffs and Mr. M Chengayya, Vakil for defendants this Court both order and decree that plaintiffs do recover from the family properties of all the defendants Rs. 4,204-6-2 and from defendant 1 personally and from the family properties of all the defendants Rs. 1,459-0-6 etc."

Thus on the face of it the decree was passed against all defendants 4 including the appellant (defendant 3), in the presence of and after hearing their vakil and it is therefore, on its face not an ex parte decree against him. The suit was brought on a promissory note executed by or under the directions of the father of defendant 4. Defendant 3 was a minor about seventeen years old when this suit was brought in July 1911. The decree was passed on 2nd December 1912. Defendant 1 the managing member of the defendant's family was appointed guardian of the minor defendants. 3 and 4 on the 4th August 1911, and he executed a vakalat to Mr. Chengayya to conduct the common defence on behalf of himself and of the minor defendants 3 and 4. Defendant 3 states in his affidavit that he attained majority about February 1912, and it may be taken as true. Mr. Chengayya, who was appointed his vakil when he was a minor in August 1911, continued to represent him till the decree was passed in December 1912. The record was however not amended after February 1912 by describing defendant 3 as having become a major.

On 20th January 1913, defendant 3 presented the petition to the District Court to set aside the decree as against him treating it as I said before as an ex parte decree. The affidavit in support of this petition significantly omits to state that he was not aware of the proceedings which were taking place in the Court with himself as a party both before and after February 1912 (when he became a major). Para 1 of the affidavit says:

"The plaintiff did not issue notice to me after I attained majority and did not bring me on record. I was unrepresented in the suit after I attained majority. The decree therefore was ex parte so far as I am concerned."

Then paras. 2 to 9 of the affidavit attack the plaintiffs claim and the evidence let in by the plaintiff in the case. In fact the grounds mentioned in the paras. 2 to 9 are exactly those which would be advanced (and which have been substantially advanced by the other defendants) in an appeal from the District Judge's decree. There is not a word in the affidavit to indicate that the othar defendants 1, 2 and 4 were not contesting the suit properly or that they omitted to adduce any evidence for the common defence so as to prejudice defendant 3. I here wish to emphasise what defendant 3 says in his affidavit that he was unrepresented in the suit only after he had attained majority. So far as representation before February 1912 is concerned the affidavit clearly implies that he was properly represented. Treating this as an application to set aside an ex parte decree i. e., as an application under O. 9, R. 13, the application falls under Art. 164, Limitation Act, and as the plaintiff in his counter affidavit in the lower Court alleged that the appellant (defendant 3) was aware all along of the proceedings in the suit, the time for the calculation of limitation began on the date of the decree, which is

also the date of the applicant's knowledge of the decree. Thirty days therefrom expired on 1st January 1913, and the application presented on 20th January 1913 was, therefore, clearly barred. The belated affidavit filed in this Court that defendant 3 got knowledge of the decree within thirty days before his application cannot be believed under the circumstances. On this short ground of limitation, this appeal can be at once dismissed, taking as correct the appellant's own presentment of his case as one arising under the law relating to the setting aside of an ex parte decree.

As, however, other aspects of the case involving other legal questions were strenuously argued, I shall shortly consider them also. I think there is much to be said in favour of the view that it was not an ex parte decree at all. A guardian for the suit has a right to appoint a vakil for the minor party (for whom he acts as guardian) till the decree is passed in the suit. Under O. 3, R. 4, the appointment of the vakil continues in force until determined (1) with the leave of the Court, (2) by a writing signed by the client or the pleader, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client. The "client" is the minor party and not the guardian. The vakalat, therefore, given by the guardian continues in force till the minor dies or till it is revoked in writing with the Court's permission. The client's attaining his majority does not, according to O. 3, R. 4, determine the authority of a vakil appointed for him. I am, therefore, clear that the petition itself (as one for setting aside an ex-parte decree) was wholly misconceived and on that ground also the District Judge's order can be uphold. (I, of course, assume that the guardian was validly appointed).

Then it was argued that this might be treated as a petition under S 151, Civil P. C., (the section which saves the inherent power of the Court to do substantial justice). The answer to this argument is that the petition itself indicates that substantial justice has not suffered, except in so far as the erroneous conclusions (if any) of the District Judge on the facts and law are concerned, and such erroneous conclusions can be set aside as regards the appellant also in the principal appeal against the decree itself filed by defendants 1, 2, and 4. Further, there is no appeal to this Court against orders on petitions filed under S. 151, Civil P.C., unless they fall under the category of orders from which appeals are allowed by the other provisions in the Civil Procedure Code. Lastly, even treating this appeal as a petition to revise (under S. 115, Civil P. C.,) the order of the District Judge (refusing to re-open the case on the petition filed under S. 151), this is not at all a fit case to exercise the revisional powers under S. 115, and the reasons why it is not a fit case have been sufficiently indicated already. Further, I am not sure that there has been any irregularity at all in connection with the trial of the case so far as defendant 3 is concerned, much less a material irregularity. There is no provision in the Code requiring the plaintiff to issue a fresh summons to a minor defendant after he attains majority. On the contrary, the analogy of O. 32, R. 12, (which relates to a minor plaintiff attaining majority) shows that it is for the minor defendant attaining majority to elect to proceed with or abandon the defence, and after he so notifies his election, the title of the suit may have to be changed as "A.B. late a minor by C. D. guardian for the suit, but now having attained majority." As regards the irregularity under O. 32, R. (4), by which notice is required to be given to the minor himself before a guardian is appointed for him in a suit, it is difficult to realize the reasons of the rule as enunciated by the Legislature in such very wide language. Supposing the minor is an infant, a month old, it is impossible to appreciate why the Legislature requires notice to be given directly to this infant in arms before the guardian for the suit is appointed for this infant. In fact, it is incapable of receiving and understanding the notice. (It was probably on that ground that the High Court on the recommendation of the Rule committee has on 2nd March 1914 amended this O. 32, R 3 (4), by deleting the words "to the minor"). As under O. 32, R. 15, the provisions contained in R. 3 (4) are made applicable also to lunatics or idiots it is difficult to see that the Legislature could have intended notice should go to a lunatic defendant who cannot understand the notice before a guardian in the suit is appointed for him.

In the next place, even if this was an irregularity, it did not vitiate the ap

pointment of the guardian and I need only refer to *Rambrichh Ram* v. *Tarak Tewari* (1) on this point the same case as 14 *A. L. J.* 589. Further, in a much stronger case where majors were treated as minors from the very beginning, it was held in *Ramachari* v. *Duraisami Pillai* (2) that they were estopped from re-opening the matter even by a fresh suit if they had knowledge of the proceedings and kept silent. In the result, I would dismiss the appeal with costs.

Ayling, J.—The only point in the case on which I feel doubt is that arising from the strict wording of Cl. 4, O. 32, R. 3, and this, I must confess, has occasioned me considerable difficulty. It has been argued with much force for appellant, that this clause renders any order of appointment of a guardian ad litem without the prescribed notice absolutely null and void. On the other hand a Bench of the Allahabad High Court, in a judgment which my learned brother is prepared to follow, *Rambrichh Ram* v. *Tarak Tewari* (1), has treated the absence of notice as a mere irregularity and that too in a case much stronger from the minor's point of view than the one with which we have to deal. In the Allahabad case, the guardian appointed was an official of the Court, who, in fact, made no defence of the minor's interests. In the present case the guardian appointed was the minor's own brother, who was himself a party, whose interests were apparently identical with those of the minor, and who strenously contested plaintiff's claim. In fact the objection on the ground of lack of notice does not seem to have been taken in the lower Court and is a purely technical one, based on no real grievance to the minor, and apparently raised solely for the purpose of delay. In such circumstances, I am not prepared to differ from the conclusion arrived at by my learned brother. If the appointment of defendant 1 as petitioner's guardian be treated as valid, I am satisfied that the appointment of the vakil engaged by him on the latter's behalf did not terminate with petitioner's attainment of majority and that petitioner cannot be treated as not represented at the close of the case. I agree that the appeal should be dismissed.

S.N./R.K. *Appeal dismissed.*

1. (1916) 33 I C 805.
2 (1898) 21 Mad 167.

A. I. R. 1918 Madras 548

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Doraisami Padayachi and *another*—Plaintiffs—Appellants.

v.

Vaithilinga Padayachi and *others*—Defendants—Respondents.

Second Appeal No. 1965 of 1914, Decided on 23rd February 1917, against decree of Sub-Judge, Kumbakonam, in Appeal Suit No. 491 of 1913.

(a) Specific Relief Act (1 of 1877), S. 21—Contract to refer dispute to arbitration—Suit is barred—Reference to arbitration pending—Suit is not maintainable.

A contract to refer a dispute to arbitration confers on the parties a right to have the question decided by arbitrators and not by suit. This is a substantive right of an important character, and S. 21, bars a suit pending disposal of the reference by the arbitrators. [P 549 C 1]

The institution of a suit after the contract to refer is a sufficient refusal to perform such contract to bar the suit under S. 21, Specific Relief Act. 33 *All.* 315, *Appr.* [P 549 C 1]

(b) Civil P. C. (1908), Sch. 2, Para. 22—Contract to refer to arbitration—Right accrued before enactment of Act of 1908 is not affected by repeal of Specific Relief Act (1 of 1877), S. 21.

The repeal of S. 21, Specific Relief Act by Cl. 22, Sch. 2, Civil P. C., does not affect a right which had accured under the former Act where the contract to refer was made before the enactment of Act 5 of 1908. [P 549 C 1, 2]

(c) Specific Relief Act (1 of 1877), S. 21—Death of arbitrator restores right of parties to suit—Limitation commences from date of death.

The death of the arbitrator however without disposing of the reference removes the bar created by S. 21 and restores to the parties the right of suit, and time commences to run for the suit from the date of the arbitrator's death. [P 549 C 2]

Per *Wallis, C. J.*—Whether the effect of S. 21, is merely to suspend, the running of time under the Limitation Act or to bring the case under Art. 120 of the latter Act, the cause of action for a suit arises only when, by the death of the arbitrator, further proceedings in the arbitration became impossible. [P 549 C 2]

(d) Interpretation of Statutes—Repealing Act—Vested right is not affected.

Per *Seshagiri Aiyar, J.*—A right of appeal granted under a repealed Act is not affected by the new Act.

A vested right is not ordinarily taken away by a new Act [P 549 C 2; P 550 C 1]

(e) Specific Relief Act (1 of 1877), S. 21—Right created by S. 21 operates as bar to suit so long as arbitration is operative—Reference to arbitration pending—Institution of suit would be overt Act indicating intention not to perform contract.

The right created by S. 21, Specific Relief Act, is not a mere incident of processual law and it

operates as an effective bar to a suit so long as the arbitration is operative. [P 550 C 1]

The institution of a suit pending a reference to arbitration would be an overt act on the plaintiff's part indicative of an intention not to perform the contract entered into by him. 8 *All.* 57, *Expl.*; 23 *Cal.* 956, *Dist.* [P 550 C 1]

(f) Limitation Act (9 of 1908), Art. 120—Death of arbitrator—Suit on matter referred is governed by Art 120.

A suit instituted, after the death of the arbitrator in regard to matters referred to and not disposed of by him is governed by the residuary Art. 120. [P 551 C 1]

R. Kuppusami Aiyar—for Appellants.

S. Muthiah Mudaliar—for Respondents.

Wallis, C. J.—The answer to the Full Bench reference being against him, Mr. Kuppusami Aiyar for the appellants has relied on another of the grounds taken here and in the lower appellate Court, that time did not run between 8th March 1906, the date of the reference to arbitration, and 31st October 1910, when it is alleged the arbitration proceedings came to an end by the death of the arbitrator. S. 21, Specific Relief Act provided that

"if any person who has made such a contract (to refer to arbitration) and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such a contract shall bar the suit".

As to this, I agree with Richards, J., one of the referring Judges in *Ram Kumar Singh* v. *Jagan Mohan Singh* (1), that the institution of a suit after the contract to refer is a sufficient refusal to perform such contract to bar the suit under the section. The result of this provision, while it was in force, was, it seems to me, to bar the plaintiff's right to sue for dissolution of partnership so long as the arbitration had not broken down or the other side had not refused to go on with it. If the arbitration had become impossible as by the death of the arbitrator, or the other side had refused to go on with it, S. 21 would have ceased to operate as a bar to the plaintiff. The question then is what is the effect to be attributed to the removal of this statutory bar by the repeal of this provision of S. 21 by S. 22, Sch. 2, Civil P. C., 1908.

The effect of the provision, while it was in force, was to confer upon the other parties to the contract a right to have the question decided by arbitration and, not by suit and this was a substantive right of an important character. This being so, the repeal of this provision of S. 21, Civil P. C., 1908 did not affect the right of the other parties to the contract which had accrued under it (General Clauses Act, 1897 S. 6 (c)) and consequently if the plaintiff had brought the present suit immediately on the coming into force of the Code, he would still have been liable to be met by a plea founded on the repealed provision, and it was only when by the death of the arbitrator in 1910 further proceedings in the arbitration became impossible that the plaintiff's right to sue was restored to him. It is, I think, clear that the special provision in S. 21 prevented time running against the plaintiffs under the Limitation Act while it was in force, and whether the effect of this provision was merely to suspend the running of time under the Limitation Act, or to take the case out of the article and bring it under Art. 120, in either case, the suit would be within time. I may say however that I do not think that the Judicial Committee should be considered in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (2) to have departed from the view clearly expressed in *Somi Ram* v. *Kanhaiya Lal* (3). We allow the appeal, reverse the decree of the lower Courts, and remand the case for disposal according to law. Costs incurred hitherto to abide.

Seshagiri Aiyar, J. — The points raised by Mr. Kuppusami Aiyar on this second occasion are by no means easy of solution. Upon one point my mind is clear. The parties referred the matters in dispute to arbitration before the new Code of Civil Procedure came into force. At that time the rights of the parties were regulated by S. 21, Specific Act. That section says that the existence of a contract to refer "shall bar the suit." Mr. Muthiah Mudaliar's ingenious argument that the bar affects only the agreement to refer and not a pending reference is obviously untenable. As I read the section, a right is conferred on one of the parties to a contract to prevent the other from enforcing his rights otherwise than through the tribunal chosen by the parties. Such a right cannot be said to be a mere incident of processual law. It is well established that a right of appeal granted under a repealed Act is not af-

1. (1911) 33 All 315=9 I C 80.

2. A I R 1916 P C 96=33 I C 452=43 Cal 660 (P C).

3. (1913) 35 All 227=19 I C 291=40 I A 74 (P C).

fected by the new Act. *Colonial Sugar Refining Company* v. *Irving* (4), *Sadasiva Pillai* v. *Kalappa Mudaliar* (5) and *Nana* v. *Sheku* (6). A vested right is not ordinarily taken away by a new Act *Gopeshwar Pal* v. *Jiban Chandra* (7). Applying these principles, it seems to me that S. 22, Sch. 2 to the new Civil P. C., did not deprive the defendant of the right which he had of objecting to the suit, the matter in dispute having been referred to arbitration. It follows from this that, so long as the arbitration was operative, the plaintiff was incapable of enforcing his rights in a Court of law.

It is admitted that the proceedings were pending until October 1910 when the arbitrator died. In my opinion, the plaintiff was debarred from seeking the assistance of the Court till then. It was next argued that a hare institution of a suit would not amount to "a refusal to perform" so as to attract the provisions of S. 21, Specific Relief Act, and that as the plaintiff had always expressed his willingness to abide by the decision of the arbitrator, the defendant never had any right to plead the bar of S. 21. In *Ram Kumar Singh* v. *Jagan Mohan Singh* (1) Richards, J. (as he then was) held in the judgment from which a Letters Patent Appeal was preferred, that the filing of a suit would amount to refusal to perform. Tudball, J., who differed from him, expressed no opinion on this question. The learned Judges who heard the Letters Patent Appeal did not question this dictum of Richards, J. In my opinion, the institution of a suit by the plaintiff would be an overt act indicative of an intention not to perform the contract entered into by him. The headnote to the decision in *Tahal* v. *Bisheshar* (8) is somewhat too broadly expressed. The learnad Judges based their decision upon the view

"that the contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract and not a contract broken up by the conduct of all the parties to it."

If there was no enforceable contract the question of refusal to perform could not have arisen. *Crisp* v. *Adlard* (9), relied on by the learned vakil for the respondent, has no application to the present case. I am, therefore of opinion that if the plaintiff had brought a suit before the arbitrator died, he could have been prevented from enforcing his rights in the suit by virtue of the last clause of S. 21, Specific Relief Act. The further point, whether the period during which the bar operated should be regarded as having been merely suspended or whether the cause of action for the suit itself should be regarded as not having accrued until the death of the arbitrator, is one on which there is room for considerable difference of opinion. The suspension of the period is provided for by Ss. 14 and 15, Limitation Act. I do not think that the present case is covered by either of the sections. Ordinarily that would be a sufficient answer. But the Judicial Committee have recently [*Nrityamoni Dassi* v. *Lakhan Chunder Sen* (2)] given their general adherence to the conclusion expressed in *Lakhan Chunder Sen* v. *Madhsudan Sen* (10). That decision seems to lay down that apart from the statute, a party who is prevented from enforcing his claim has a general right that the period of his disability should not count against him, although the difficulties in his way may not be of the nature contemplated by Ss. 14 and 15, Limitation Act. An examination of the authorities relied on in *Lakhan Chunder Sen* v. *Madhusudan Sen* (10) does not support the general propositions laid down therein, but the question must be taken to have been set at rest by the Privy Council by their pronouncement in *Nrityamoni Dassi* v. *Lakhun Chunder Sen* (2). Ayling J. and myself recently followed *Lakhan Chunder Sen* v. *Madhusudan Sen* (10) in *Appeal against O.* 354 *of* 1915.

We had not then to consider whether there was only a suspension of the period and not of the cause of action itself as, in any event, the plaintiff would have been in time. There is an earlier decision of the Privy Council which seems to throw some doubt on this theory of the suspension of the cause of action. In *Soni Ram* v. *Kanhaiya Lal* (3) it was argued that the period during which there was a fusion of the interests of the mortgagor and of the mortgagee should be excluded in calculating the period al-

4. (1905) A C 369.
5. (1901) 24 Mad 39.
6. (1906) 32 Bom 337.
7. A I R 1914 Cal 806=24 I C 37=41 Cal 1125.
8. (1886) 8 All 57.
9. (1896) 23 Cal 956.
10. (1908) 35 Cal 209.

lowed by Art. 148. Their Lordships expressed the opinion that S. 9, Limitation Act was against the plea. It is inferable from the judgment that the fusion created either an inability or disability to sue and that as S. 9 expressly enacted that time which had once commenced to run should not be stopped by such a subsequent inability or disability, the period of fusion of the rights should not be excluded. It may be possible to distinguish *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (2) from the earlier case on the ground that no question of inability or disability arose in the latter. But the extension of the principle contained in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (2) must be made with great caution. I think it would be more logical to hold that as a result of the interposition of the bar, Art. 91 is not applicable to the present case. In another case which was, argued subsequently, I have stated my reasons for invoking the aid of the residuary Articles whenever a specific Article in all its bearings is not applicable. Acting on that view, I am prepared to say that the residuary Art. 120 applies to this case and that as the cause of action arose for the suit only on the death of the arbitrator in 1910, for as pointed out by the learned Chief Justice, under S. 6, Cl. C, General Clauses Act, the bar continued till then, the suit is within time. The decree of the Court below must be reversed and the suit must be remanded for disposal on the merits. Costs to abide the result.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 551

SADASIVA AIYAR AND SPENCER, JJ.

Rangiah Chetty — Defendant—Appellant.

v.

V. M. Vajravelu Mudaliar—Plaintiff—Respondent.

Second Appeal No. 1431 of 1915, Decided on 22nd February 1917, against decree of Sub. Judge, North Arcot, in Appeal Suit No. 142 of 1914.

(a) Provincial Small Cause Courts Act (1887), Sch. 2, Art. 7—Apportionment consequent to transfer of interest of lessor in portion of demised premises—Suit for arrears of rent after apportionment does not come under Art. 7.

Per *Sadasiva Aiyar, J.*—A suit for arrears of rent due under lease after an apportionment has been made, in consequence of the interest of the lessor having been transferred in portions of the demised permises, either by simultaneous agreement between the parties or by one party with the consent of the other, is not a suit for apportionment coming under Cl. 7, Sch. 2 Provincial Small Cause Courts Act. [P 553 C 1, 2]

(b) Provincial Small Cause Courts Art (1887), Sch. 2, Art. 7—Suit for recovery of definite sum cannot be called suit for apportionment of rent.

Even if the apportionment was made only by the plaintiff and he alleges it to be an equitable apportionment binding on the defendant, a suit which prayes for the recovery of definits sum cannot be called a suit for an apportionment of rent. [P 553 C 2]

(c) Provincial Small Cause Courts Act (1887), Sch. 2, Art 7—Nature of suit is to be determined from relief claimed—Suit for apportionment of rent.

The nature of the plaintiff's suit has to be found from the relief claimed by him and the fact that the Court may have to give findings as to the proper apportionment of rent does not alter its character. [P 553 C 2]

(d) Civil P. C. (1908), S. 102—Apportioned rent claimed, below 500—No second appeal lies.

Where the apportioned rent claimed is below Rs. 500 there is no right of second appeal. [P 553 C 2]

(e) Provincial Small Cause Courts Act. (1887), Sch. 2, Art. 7—Small Cause Court cannot adjudicate upon question of fair and equitable rent to be paid by tenant—Question is within province of Revenue Court.

Per *Spencer, J.* (dissenting)—Art. 7, Sch. 2 Provincial Small Cause Courts Act takes it out of the power of a Small Cause Court to adjudicate upon a question of what is a fair and equitable rent to be paid by a tenant to his landlord, having regard to the yield, fertility and extent of a holding and similar considerations, which is rather within the province of a Revenue Court for estates or a Court of original jurisdiction in other cases. [P 552 C 1]

(f) Provincial Small Cause Courts Act (1887), Sch. 2, Art. 7—Lessor ceasing to have interest in portion of premises—Decision as to proportion out of whole rent to fraction of demised premises is not cognizable by Court of Small Cause.

A decision on what would be a fair and proper proportion out of a whole rent to a fraction of demised premises in consequence of the lessor ceasing to have an interest in the remainder is beyond the cognizance of the Small Cause Court. [P 552 C 2]

(g) Landlord and Tenant — Rent—Transfer of interest of lessor—Effect on rent.

All rents are, upon the transfer of the interest of the lessor, to be deemed to accrue due from day to day. [P 552 C 2]

(h) Landlord and Tenant—Rent—Lessor ceasing to have interest before date on which rent becomes payable—He cannot claim rent subsequent to the date.

Where, before the date on which the rent becomes payable, the lessor ceases to have an interest in the land leased, he has no claim for rent subsequent to that date as there is no privity of interest between himself and the tenant. [P 552 C 2]

T. V. Muthukrishna Aiyar—for Appellant.

K. Y. Adiga for *K. P Lakshmana Rao*—for Respondent.

Spencer, J.—This suit was brought to recover the lease amount of fruit trees in certain forests. A preliminary objection has been raised that no second appeal lies, as the suit is of a small cause nature. The appellant's vakil answers this objection by a reference to Art. 7, Sch. 2, Provincial Small Cause Courts Act, which exempts suits for the assessment, enhancement, abatement, or apportionment of the rent of immovable property. From the definition of "rent" in S. 105, T. P. Act and from the definition of "immovable property" in the General Clause Act, and from the use of the word "apportionment" in S. 36 of the former Act, I have little hesitation in thinking that the article in question covers a suit of this nature. Where, as here, there has been a transfer of a part of the lessor's interest through a decree of Court, the application of S. 36 is excluded by S. 2 (d) of the same Act vide *Mathewson* v. *Shyam Sunder Sinha* (1). But in order to determine what legal significance should be given to the word "apportionment," we may look to the section and see in what sense the word is used where it occurs in other enactments.

Where a definite extent of land is leased for a certain term upon a rent for a fixed sum and the lessor brings a suit upon his contract, I do not think that the jurisdiction of the Small Cause Court would be taken away by Art. 7 merely because the liabilities of more parties than one would have to be adjusted by an arithmetical calculation before the Court could arrive at a decision in the suit. But from the whole tenor of Art. 7 I think it was intended to take it out of the power of a Small Cause Court to adjudicate upon a question of what is a fair and equitable rent to be paid by a tenant to his landlord, having regard to the yield, fertility and extent of a holding and similar considerations, as that is rather within the province of a Revenue Court for Estates or a Court of Original Jurisdiction in other cases: vide *Gopi Nath Ghose* v. *Kedar Nath Chuckerbutty* (2). Now in the present case, the original lease covered the forest produce of two villages, Maharajapuram and Nissangadurgam. By a decree in another suit the plaintiff lost his title to Nissangadurgam, and therefore in this suit the District Munsif had to decide under issue 1 what would be a fair and proper proportion out of the whole rent to be allotted for the produce of the Maharajapuram forests when the relative value of the produce of the trees in each village had not been ascertained. He decided that the plaintiff's demand for one-third of the whole rent was not excessive under the circumstances. In doing so he went further than a Small Cause Court having pecuniary jurisdiction over the suit could have gone. I would therefore disallow the respondent's objection. I proceed then to the merits of this appeal.

On the admissions and findings of fact it appears that the lease was for ten years from 1901, that the year began on 27th February and ran till 26th February of the next calendar year, that rent was payable in three instalments each year, viz., on 15th, May 15th November and 15th, February and that the plaintiff's title to the village of Maharajapuram was determined by the confirmation in December 1907 of the sale in Court auction in execution of a decree. I consider that the Subordinate Judge was right in his view that all rents are upon the transfer of the interest of the lessor, to be deemed to accrue due from day to day. Vide *Lakshminaranappa* v. *Melothraman Nair* (3) and *Randipurazil Kunhisow* v. *Alukandiyil Parkum Mulloli Chathu* (4). No doubt in a suit between the lessor and the assignee of his interest, the lessor would be entitled to have the rent apportioned between them according to the duration of their respective titles, irrespective of the dates when the rent became payable by the tenant. But the lessee was under his contract not liable to pay the instalments before the dates appointed for the payment thereof.

Therefore the plaintiff was by his contract entitled to collect the instalments which fell due on 15th May and 15th November 1907. But as his ownership ceased in December, there was no privity of estate between him and the lessee thereafter. Accordingly he was not entitled to recover from the lessee

1. (1906) 33 Cal 786.
2. (1875) 23 W R 426.
3. (1903) 26 Mad 540.
4. (1915) 38 Mad 86=17 I C 933.

the amount which fell due on 15th February 1908, and the lessee, who produced a receipt (Ex. 1) for the rent of Fasli 1317 paid to the purchaser at the Court sale, could claim that he had a good discharge for the third instalment of the year 1907 and 1908. I need not discuss the other contentions of the appellant as they must fail on the findings of fact of the lower Courts. In the result I hold that instead of the plaintiff getting a decree for 10/12ths of the rent for 1907 and 1908, which amounts to 10/12ths of Rs. 116-10-6 or Rs. 97-3-0, and interest thereon, he should for that year be given a decree for the first two instalments that is twice Rs. 38-14-2 or Rs. 77-2-4 and interest at the rate allowed in the lower Court.

Sadasiva Aiyar, J.—I regret that on the question of the nature of the suit as one of a small cause nature, I find myself unable to agree with the judgment just now pronounced by my learned brother. I shall quote portions of the plaint to establish what I consider to be the nature of the suit:

"5. It was decided in Original Suit No. 131 of 1901 on the file of the District Munsif's Court of Sholinghur that the plaintiff has no right to Nisangadurgam village and forest included in the aforesaid properties. By virtue of the said decision, the plaintiff claims only a rateable amount, viz., one-third of the lease amount, i.e., Rs. 116-10-8 for Damodara Maharajapuram village enjoyed by the defendant's father.

7. Ramaswami Chetty, the defendant's father settled the lease amounts up to 1904 (at the above rate of Rs. 116-10-8 per year) in respect of Damodara Maharajapuram village enjoyed by him. Therefore the plaintiff prays that the Court may be pleased to pass a decree for the amount of Rs. 319-4-3"

made up of the instalments of rent due in 1906, 1907 and 1908 with interest. Now it seems to me clear from the plaint that the plaintiff's contention was that the proper apportionment of rent of the Damodara Maharajapuram village was Rs. 116-10-8 per year, that the defendant's father accepted that as the proper apportionment and that he paid rent for Damodara Maharajapuram village and forest at the rate of Rs. 116-10-8 from 1901 (the date of the rent deed Ex. A) till 1904. I am therefore unable to hold that this is a suit for apportionment coming under Cl. 7, Sch. 2, Prov. Sm. C. C. Act. It is really a suit for arrears of rent due after the apportionment had been made either by simultaneous agreement between both parties or by one party with the consent of the other. Even if it was an apportionment which was made only by the plaintiff, but which the plaintiff alleges to be an equitable apportionment binding on the defendant, still the suit is only a suit for recovery of the arrears of such apportioned rent and not for apportionment. Apportionment may be (a) as regards rents of different periods of time or (b) as regards rents due by portions or fractions of the demises. But whatever be the share of the original rent which would be due by the defendant on an equitable apportionment, a suit which prays for the relief of the recovery of a definite sum as the share of arrears of such rent due to the plaintiff cannot be called a suit for an apportionment of the rent. In *Vira Pillai* v. *Rangasami Pillai* (5), suit for the recovery of rent at an enhanced rate from a tenant holding over (the enhanced rate having been fixed by the plaintiff himself as damages for use and occupation) was held not to be a suit for assessment or enhancement of rent falling under Cl. 7.

The nature of the plaintiff's suit has to be found from the relief prayed for by him, and the only relief prayed for in the present suit is the recovery of a sum of money claimed to be due as rent to the plaintiff. Even if the Court has to give findings as to the proper apportionment of rent to be paid for the plaint land, still it is a suit for the recovery of such a rent. As pointed out in *Chilukuri Sitaramayya* v. *Venkata Rangayya Appa Rao* (6), a suit for enhancement of rent seems to mean a suit for a

"declaration by the Court as to what the proper rent is payable by the tenant in all years to come."

In that case, it was held that a suit for enhanced katubadi was not a suit for enhanced rent under Cl. 7, Sch. 2, Prov. Sm. C. C. Act, and that hence no second appeal lay when the claim was below Rs. 500. I think the above decision is a direct authority on the present question. The Court's duty to pronounce incidental findings on questions which a Small Cause Court cannot finally determine has never been held to change the character of the suit, if the substantial relief prayed for makes the suit one of a small cause nature. In the result I

5. (1899) 22 Mad 149.
6. (1915) 31 I C 871.

would hold that no second appeal lay and I would accordingly dismiss the second appeal. Even if we allow the second appeal to be amended as a revision petition under S. 115, Civil P. C., such revision petition would also have to be dismissed with costs, no question of jurisdiction or acting illegally or with material irregularity being involved. I shall not express any final opinion on the difficult question whether plaintiff is legally entitled to 10/12ths or only 2/3rds share of the rent claimed.

By the Court.—Under S. 98, Civil P. C., the second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 554 (1)

SPENCER AND SRINIVASA AIYANGAR, JJ.

(Majjiga) Venkatasubba Reddi—Defendant—Appellant.

v.

Chundi Linga Reddi—Plaintiff—Respondent.

Civil Misc. Appeal No. 355 of 1916, Decided on 19th March 1917, against order of Dist. Judge, Nellore, in Appeal Suit No. 64 of 1915.

Limitation Act (9 of 1908), Art. 11-A—Application under Civil P. C., O. 21, R. 100, dismissed without investigation—Person dispossessed is not bound to bring suit within one year—Art. 11-A does not apply—Civil P. C. (5 of 1908), O. 21, R. 100.

If an application made under O. 21, R. 100, Civil P. C., is dismissed without investigation, the person dispossessed is not bound to bring a suit to establish his right to possession within one year under Art. 11-A, Limitation Act: 27 *I C* 944 and 38 *I C* 937, *Dist.* [P 554 C 1]

A. Krishnaswami Aiyar and *B. Somayya*—for Appellant.

Varadachariar—for Respondent.

Judgment.—We agree with the District Judge in thinking that if an application made under O. 21, R. 100, Civil P. C, is dismissed without investigation, the person dispossessed is not bound to bring a suit to establish his right to possession within one year under Art. 11-A, Limitation Aat.

The decisions in *Narasimha Chetty* v. *Vijiapala Nainar* (1) and *Ponnusami Pillai* v. *Samu Ammal* (2) related to orders made upon claims under O. 21, R. 63. There is no such change of language in the rules that relate to claims made after sales in execution as there is in those portions of the Code which relate to claims against attachment. Under these circumstances the decisions under the old Code upon this point apply, and the appeal must be dismissed with costs. The District Court should have given a refund of the value of the stamp on the appeal memo, to the appellant instead of including it among the costs to be paid by respondent in the decree.

S.N./R.K. *Appeal dismissed.*

1. (1915) 27 I C 944.
2. (1917) 38 I C 937.

A. I. R. 1918 Madras 554 (2)

ABDUR RAHIM AND KUMARASWAMI SASTRI, JJ.

(Lagadapati) Venkatanagabhushanam—Petitioner.

v.

Ovilapati Mahalaxmi and *others*—Opposite Parties.

Civil Misc. Petn. No. 349 of 1917, Decided on 1st August 1917.

(a) Godavari District Agency Rules, R. 6—Decree in R. 6 means as under Civil P. C.

The Agency Rules for the Godavari District do not contain any definition of "decree" and, therefore, the term "decree" in R. 6 must be taken to mean the same thing as a decree under the Code of Civil Procedure. [P 555 C 1]

(b) Godavari District Agency Rules, R. 6—Order restoring suit dismissed for default is not decree.

An order directing the restoration of a suit dismissed for default is not a "decree" within the meaning of R. 6, Agency Rules. [P 555 C 1]

(c) Godavari District Agency Rules, R. 16—Petition against order of Agent does not lie direct to High Court.

Rule 16 of the Agency Rules provides that all petitions against the proceedings of the Government Agent must, in the first instance, be submitted to the Government, and then it is open to the Government to refer the matter to the High Court or to the Board of Revenue as the case may be. [P 555 C 1]

P. Narayanamurihi—for Petitioner.

P. Somasundaram—for Opposite Parties.

Judgment.—Respondent 1 brought a suit against the petitioner in the Court of the Assistant Agent in the Godavari District for dissolution of partnership and other reliefs. The suit was dismissed for default. Then the plaintiff appealed to the Agent, who without hearing the defendant in the suit set aside the order dismissing the suit for default and directed that the suit be restored to the file of the Assistant Agent to be heard and disposed of according to law. Against this order of the Agent, the present civil miscellaneous petition has been preferred

asking us to direct the Agent to review his order according to R. 8 of the Agency Rules. But that rule applies only to decrees passed by the Goverument Agent and to judgments leading to decrees.

A preliminary objection is taken that the order of the Agent directing that the suit be restored to file is not a decree within the meaning of the Agency Rule. We think that this contention is sound. The point has been decided in *Pedda Vikrama Deo Garu* v. *Maharaja of Jeypore* (1) following a number of other decisions of this Court. There a decree is understood as meaning the same thing as a decree under the Civil Procedure Code, for the Agency Rules themselves do not contain any definition of "decree." We see no reason for differing from that interpretation. What however was argued by the learned vakil for the petitioner was that though the order of the Assistant Agent dismissing the suit for default is not a decree, yet the order of the Agent setting aside that order and directing the restoration of the suit is an adjudication of the rights of the parties within the meaning of the definition of "decree" as given in the old Civil Procedure Code. But it is difficult to accept this contention. The right contemplated by that definition is not a right to the benefit of certain rules of procedure, that is, to have an order of Court set aside by which the plaintiff's suit has been disposed of in his absence. We may observe that R. 16 of the Agency Rules provides that all petitions against the proceeding of the Government Agent must in the first instance be submitted to the Government, and then it is open to the Government to refer the matter to the High Court or to the Board of Revenue as the case may be. There can be no doubt that the Government Agent in this case was not justified in setting aside the order dismissing the suit for default without giving an opportunity to the defendant to be heard. The proper remedy of the petitioner is to submit a petition to the Government and it is for the Government, if it so chooses, to refer the petition to the High Court for disposal. The present petition must be dismissed with costs.

S.N./R.K. *Petition dismissed.*

1. (1916) 36 I. C. 801.

A. I. R. 1918 Madras 555

ABDUR RAHIM AND NAPIER, JJ.

Nagireddy Kondareddy and *others*—Accused—Petitioners, In re.

Criminal Revn. No. 759 of 1916 and Criminal Revn. Petn. No. 614 of 1916, Decided on 30th April 1917, against order of Dy. Magistrate, First Class, Nellore, in Misc. Case No. 20 of 1916.

(a) Criminal P. C. (5 of 1898), S. 107—Facts forming subject of previous inquiry resulting in discharge cannot be ground for fresh inquiry under S. 107—Fresh material is necessary.

In initiating proceedings under S. 107, Criminal P. C., a Magistrate should not rely upon facts and information which formed the subject of a previous inquiry and in which the accused were discharged. There must be fresh materials available on which it can be said that a fresh apprehension has arisen of a breach of the peace being committed by the accused. The same facts cannot form the subject of repeated proceedings either under the Penal Code or under the Criminal Procedure Code. [P 556 C 1]

(b) Criminal P. C. (5 of 1898), Ss. 107 and 192—Transfer of case under S. 107 by District Magistrate to Magistrate within whose jurisdiction parties do not reside—Order of transfer held bad—District Magistrate is not empowered to transfer under S. 192.

The police reported to the District Magistrate of Nellore that they apprehended breach of the peace from certain parties and requested him to take proceedings under S. 107, Criminal P. C. The District Magistrate without recording any opinion as to the apprehended disturbance of the peace, transferred the case to the file of the Head Quarters Deputy Magistrate, Nellore, within whose jurisdiction neither of the parties resided. The Head Quarters Deputy Magistrate then issued a notice under S. 107, Criminal P. C., to the petitioners:

Held: (1) that the order of transfer was bad; (2) that the District Magistrate could not be said to have taken cognizance under S. 192, Criminal P. C., of a case falling under S. 107 of the Code within the meaning of the Code so as to enable him to transfer it to a Subordinate Magistrate. [P 557 C 1]

(c) Criminal P. C. (5 of 1898), Ss. 107, 177 and 528—District Magistrate is not competent to transfer under S. 528 proceedings under S. 107 to Magistrate with no jurisdiction—S. 177 does not apply.

The provisions of S. 107, Criminal P. C., do not fall within the scope of S. 528, so as to enable a District Magistrate to transfer proceedings under that section to a Magistrate who has no jurisdiction over the matter. S. 177, Criminal P. C., has no application to such proceedings and the use of the word "ordinarily" in that section excludes trial of cases specifically provided for in S. 107, Criminal P. C.: 1 *I. C.* 78; 31 *Cal.* 350 and 24 *All.* 151, *Foll.* [P 557 C 1, 2]

S. Swaminadhan—for Petitioners.

P. R. Narayanswami Aiyar for *E. R. Osborne*—for the Crown.

Order.—In this case notice has been issued by the Head Quarters Deputy

Magistrate of Nellore, calling on the petitioners to show cause why they should not give security under S. 107, Criminal P. C. The matter has a long history. It appears that in the village of Kaluvoy there are two factions, one headed by petitioner 1 Nagireddi Kondareddi who has under his protection a number of Mahomedans, some of whom are also petitioners in this matter, and on the other side are the rest of the influential Hindus of that locality. For some time there has been a dispute as regards the right to play music during the mohurram before the Hindu temples. On the other hand the Hindus claim the right to play music during their festivals before the local mosque. There seems to be also a private quarrel between petitioner 1 on the one side and some of the other leading Hindu residents of that village on the other. There have been a number of cases and proceedings going on since 1914 between the parties and, strange to say, in all these cases the persons accused of the offences were either acquitted or discharged and the proceedings taken under S. 107, fell through. The proceedings now in question are the last of the series. Two objections are taken to them. The first is that the facts and the information upon which the proceedings were had, had already been the subject of inquiry in previous proceedings under S. 107 and also in certain criminal charges, and that in those proceedings and charges the present petitioners were discharged.

This is undoubtedly so, and further it is clear that there are no fresh materials of any importance available on which it could be said that fresh apprehension arose of a breach of the peace being committed by the petitioners. It is also a fact that since at least September 1916, when the police applied for proceedings to be taken under S. 107, there has been no breach of the peace. We are quite clear that the Magistrate was not entitled to initiate proceedings upon facts and information which had already been the subject of inquiry under S. 107, or in connexion with charges under the Penal Code brought against the petitioners. The same facts cannot form the subject of repeated proceedings either under the Penal Code or the Criminal Procedure Code. If fresh facts had occurred upon which the police and the Magistrate were apprehensive that there was a likelihood of a breach of the peace, then there would have been justification for the initiation of proceedings under S. 107. If there had been any such information forthcoming, it was the duty of the Magistrate to set out the substance of such information in the proceedings, but on looking at the preliminary order, we find that the information therein referred to is only what had already been before other Magistrates in connexion with other proceedings and had been the subject of orders which must be taken to be final so far as those matters are concerned. The wording of the notice, we may also point out in passing, is vague to a degree. All that is stated there is that :

"seven persons headed by Nagireddi Kondareddi the first accused, a rich and influential resident of Kaluvoy, are addicted to crimes of violence and others involving a breach of the peace and threatened injury to the lives and property of several persons and there is an imminent danger of a breach of the peace."

It does not at all state when these threats were uttered, who are the persons who were threatened and when this apprehension of a breach of the peace arose. We think that this above objection is good in law and the proceedings must be quashed on that ground. But there is also another valid objection to these proceedings. Under S. 107, Criminal P. C., it is the District Magistrate or Sub-Divisional Magistrate or any Magistrate of the first class, who is informed that a person ia likely to commit a breach of the peace, that may require such person to show cause why he should not be bound down. Sub-S. (2) says that :

"proceedings shall not be taken under this section unless the person informed against and the place where the breach of the peace is likely to occur, are within the local limits of the Magistrate's jurisdiction."

From the operation of this provision the District Magistrate is excepted in so far that he can take cognizance of a matter like this, if either the person informed against or the place where the breach of the peace is likely to occur is within the local limits of his jurisdiction. Then sub-S. (3) empowers a Magistrate who is not authorised to act under sub-S. (1) to order the arrest of a person who is likely to commit a breach of the peace, and send him to the Magistrate who is empowered to institute proceedings under the section. These provisions

of S. 107 seem to us to be very specific and clear in laying down this imperative prohibition with regard to Magistrates, other than a District Magistrate. Now a Magistrate cannot be said to have taken proceedings under S. 107 until he issues notice to the person charged to show cause why he should not be proceeded against under that section. In this case it is clear that the police reported the matter to the Distaict Magistrate who ordered, without stating that in his opinion as head of the district there was a likelihood of a breach of the peace, the case to be transferred to the file of the Head Quarters Deputy Magistrate within whose jurisdiction neither the accused resided, nor was the place where there was a likelihood of the breach of the peace occurring situate. It was the Head Quarters Deputy Magistrate of Nellore, that issued notice to the accused under S. 107 and he must, therefore be taken to have initiated proceedings under that section. It was suggested that under S. 192, the District Magistrate could make over the case to the Head Quarters Deputy Magistrate before any notice was issued. S. 192, Criminal P.C., is a general section which empowers a District Magistrate to transfer any case of which he has taken cognizance, for inquiry or trial to any Magistrate subordinate to him.

In the matter of proceedings under S. 107, it could not be said that a District Magistrate, to whom the Police reported certain facts, had taken cognizance of a case against the accused by reason of that fact alone. Nor do we think that S. 528, Criminal P. C., empowers the District Magistrate in a case under S. 107 to make over the initiation of proceedings to a Magistrate who has no local jurisdiction over the matter. That is a general section which empowers a District Magistrate to withdraw any case or recall any case on the file of a Subordinate Magistrate and make it over to any such Subordinate Magistrate. But S. 107 is a specific provision dealing with certain preventive proceedings and its sub-S. (2) expressly prohibits proceedings being instituted except by certain Magistrates. It is the District Magistrate or Sub-Divisional Magistrate or any other First Class Magistrate who is in executive charge of a certain area that is the best person to judge whether there is a likelihood of a breach of the peace within the local limits of his jurisdiction and whether it is necessary or desirable that preventive proceedings should be taken under S. 107. It appears to us that the legislature purposely left it to the discretion of such a Magistrate to say whether proceedings ought to be taken or not, and in this respect the provision of S. 107 stands on a very different footing from the provision of S. 177. S. 177 says :

"Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed."

Here the legislature has, advisedly, used the word 'ordinarily' which does not occur in S. 107. This view of the law finds support from a number of rulings, see *Nirbikar Chandra Mukherjee* v. *Emperor* (1), *Surjya Kanta Roy Chowdhry* v. *Emperor* (2) and *King-Emperor* v. *Munna* (3). The proceedings, therefore, in this case were without jurisdiction. On these as well as the other grounds already mentioned, the proceedings must be set aside.

S.N./R.K. *Petition allowed.*

1. (1909) 1 I C 78.
2. (1904) 31 Cal 350.
3. (1902) 24 All 151.

A. I. R. 1918 Madras 557

WALLIS, C.J., BAKEWELL AND KUMARASWAMI SASTRI, JJ.

(*Vema*) *Rangiah Chetty*— Defendant—Appellant.

v.

V. M. Vajravelu Mudaliar— Plaintiff Respondent.

Letters Patent Appeal No 57 of 1917, Decided on 12th September 1917, against judgment of Sadasiva Aiyar, J., in Second Appeal No. 1431 of 1915, reported in *A. I. R.* 1918 *Mad.* 551.

(a) Transfer of Property Act (1882), S. 36 —Rule in S. 36 should be applied to execution sales.

Section 36 embodies a rule of justice, equity and good conscience which should be applied to execution sales: 38 *Mad.* 86 and 26 *Mad.* 540, *Foll.*; 33 *Cal.* 786, *not Foll.*; 21 *Cal.* 383, *Dist.* [P 558 C 1]

(b) Provincial Small Cause Courts Act (1887), Art. 7—Suit for rateable portion of stipulated rent by reason of fraction of demised premises not having been delivered to lessee is not suit of Small Cause nature — Civil P. C., S. 102.

A suit for a rateable portion only of stipulated rent by reason of a fraction of the demised premises not having been delivered to the lessee involves a question of apportionment in the ab-

sence of any adjustment by the parties and is therefore not a suit of a small cause naturs, A second appeal would therefore lie from a decree in such a suit. [P 558 C 1]

T. V. Muthukrishna Ayyar— for Appellant.

K. P. Lakshmana Rao—for Respondent.

Judgment.—The learned Judges have differed on the question whether a second appeal lies to this Court, and that depends upon the question whether the present suit is one of a small cause nature, and if it be a suit for the apportionment of rent it is not of a small cause nature: see Art. 7, Sch. 2, Provincial Small Cause Courts Act. The plaint in this case recites that the lessee failed to get possession of a portion of the demised premies by reason of a decree against the lessor. The plaintiff who sues for rent claims only a rateable amount, namely, one-third of the stipulated rent or Rupees 116-10-8 a year. He does not allege that the rent had been apportioned at this figure by consent of the parties, but only that the defendant had settled the claim for rent up to 1904, on what terms he does not say. The finding is that there was no agreement about it, and, therefore, it is is quite clear that the suit did involve an apportionment of rent and could not have been decided without it, that, therefore, it was not a suit of a small cause nature and that a second appeal lies. The Letters Patent appeal must be allowed with costs and we must proceed to dispose of the second appeal.

The only ground taken is that the lower Courts were wrong in apportioning the rent between the original lessor and purchaser of his interest in execution at Court sale. S. 36, T. P. Act, provides for such apportionment, and although it is no doubt true, under S. 2 (d) of the Act, that it does not apply to sales in execution, yet the section embodies a rule of justice, equity and good conscience which we think should be applied. That appears to be the view taken by this Court in *Randipurazil Kunhisow* v. *Alukandiyil Parkum Mulloli Chathu* (1), following *Lakshminaranappa* v. *Melothraman Nair* (2). The case reported as *Satyendra Nath Thakur* v. *Nilkantha Singh* (3) was a case of a transfer of the lessee's interest and it is unnecessary for us to consider it. With great rspect we are unable to follow the decision in *Mathewson* v. *Shyam Sunder Sinha* (4). In this case the question may depend upon the terms of the contract of sale, and neither the sale proclamation nor the sale certificate have been produced and in the absence of any evidence we must presume that what was sold was simply the land. The second appeal therefore fails and is dismissed with coats.

S.N./R.K. *Appeal dismissed.*

1. (1912) 38 Mad 86=17 I C 933.
2. (1903) 26 Mad 540.
3. (1894) 21 Cal 383.
4. (1906) 33 Cal 786.

A. I. R. 1918 Madras 558

SADASIVA AIYAR AND SPENCER, JJ.

Samandan Karakat Etathil Karnavan Ryrappan Nambiar—Defendant—Appellant.

v.

Manikoth Velluva Vettil Raman Nambiar and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1490 of 1914, Decided on 8th February 1917, against decree of Sub-Judge, North Malabar, in Appeal Suit No. 418 of 1912.

(a) Malabar Law—Panayam—Meaning of, stated.

The word 'panayam' when used in documents executed in Malabar means a mortgage, if the property governed by the panayam deeds is immovable property. [P 559 C 1]

(b) Mortgage—Simple—Transfer of interest need not be expressed in mortgage deed.

A formal transfer of interest is an element of a mortgage which need not be expressed in the mortgage document. [P 560 C 2]

(c) Interest—Mortgage decree—Rate of interest should be as contracted between parties—Mortgage.

Where a mortgage document stipulates for the repayment of a certain amount to the mortgagee within a specified time, there is a personal covenant to pay implied therein and the document constitutes a simple mortgage, and not merely a charge under the Transfer of Property Act: 10 *Mad* 509; and 29 *I.C.* 605, *Dist.*

A mortgage decree should provide for interest at the contract rate between the parties till the date fixed therein for repayment of the mortgage amount and not 6 perent interest.

[P 559 C 2; P 560 C 1]

D. Chamier and *K. Govinda Marar*—for Appellant.

J. L. Rozario and *A. Sivarama Menon*—for Respondents.

Sadasiva Aiyar, J.—Defendant 20 is the appellant in this second appeal. The suit is brought upon a panayam deed of 1883 to recover, by sale of the property mentioned in the deed, the sum of Rs. 400, principal and interest at 18 per cent, per annum, from the date of the

bond till date of repayment. The lower appellate Court decided against the contentions of the defendants and gave the plaintiff a mortgage decree for sale for the sum of Rs. 400 and interest thereon at 18 per cent. per annum till 5th January 1896 and for interest thereafter at 6 per cent per annum. In second appeal Mr. Chamier, the learned counsel for the appellant, raised several contentions which might be shortly formulated thus: (1) Ex. A is not a simple mortgage document but only created a charge and hence the plaintiff is not entitled to take advantage of the provisions of S. 31 of the new Limitation Act of 1908 and his claim had become barred long before the filing of this suit; (2) the lower appellate Court was wrong in its finding that the debt is binding upon the tarwad of defendants, 1 to 19, as in arriving at this wrong decision, it has misconstrued Ex. B (3); the lower appellate Court's decision that the plaintiff was not the benamidar of Kalliat tarwad is erroneous; (4) the plaint debt has been extinguished and the lower appellate Court's finding that it was not so extinguished is due to its misconstruction of Ex. 2; and (5). the lower appellate Court ought not to have allowed any interest after the expiry of the one year's period mentioned in Ex. A for the repayment of the debt.

The last point is not taken in the memorandum of second appeal and there is nothing in it. As regards the first point, namely, the question of limitation, the document is a panayam deed and the word 'panayam' when used in documents executed in Malabar means a mortgage, if the property governed by the panayam deed is immovable property. Further the provision in Ex. A that "the sum of Rs. 400 with interest will be paid to the mortgagee within one year" clearly implies a personal convenant by the mortgagors to pay the amount and when there is such a personal covenant, it has been held by a long course of decisions [of which I need only mention those in *Balasubramania Nadar* v. *Sivaguru Asari* (1), *Rama Brahmam* v. *Venkatanarasu Puntulu* (2), *Rangappa* v. *Thammayappa* (3) and *Venkatarama Aiyar* v. *Suppa Nadan* (4) that a document of this character is a document of simple mortgage under the Transfer of Property Act.

Next I shall deal with the contention that Ex. D was misconstrued by the lower appellate Court when it arrived at its finding that the debt is binding upon the tarwad of defendants 1 to 19. Ex. D clearly refers to a debt of Rs. 1,350 as due by the whole tarwad on kanom and panayam deeds mortgaging (among others) the plaint properties, and I think that the lower appellate Court was entitled to infer from that recital (as explained by the evidence of P. W. 5's) and to arrive at the conclusion that the plaint debt was also admitted in Ex. D as a debt binding upon the tarwad of defendants 1 to 19. Then as regards the question whether the plaintiff was the benamidar of defendant 20's rival jenmi, the judgment of the Subordinate Judge is no doubt very unsatisfactory. But I am unable to see how in second appeal we can interfere with his finding of fact on that question. The really important question however is whether the debt was extinguished by the razi arrangement arrived at in July 1908 under Ex. 2 between defendant 20 and the rival jenmi, whose benamidar the plaintiff is alleged to be. Having heard Ex. 2 read and commented upon by the learned counsel for the appellant, I cannot hold that there is anything in it which can be construed as an acknowledgment by defendant 20's opponent that defendant 20 was entitled to the plaint lands free from any encumbrances even in the shape of a simple mortgage. The question whether the debt has been extinguished, apart from the construction of Ex. 2 depends upon the appreciation of evidence, and we cannot interfere in second appeal with the lower appellate Court's finding of fact on that evidence that the debt has not been extinguished.

One other question (not raised in the original memorandum of second appeal but) sought to be argued under an additional memorandum filed recently by the appellant is that the plaintiff is not entitled to a decree for the sale of the entire properties mortgaged under Ex. A, as the mortgagors (defendants 1 to 19) were entitled only to a moiety of the suit properties. Exs. A and B do establish that defendants 1 to 19 owned only one half of the plaint properties. There is an observation in the judgment of the District

1. (1911) 11 I C 629.
2. (1912) 16 I C 209.
3. A I R 1914 Mad. 114=24 I C 372.
4. A I R 1914 Mad 333=24 I C 24.

Munsif that it was admitted before him that the mortgagors were not justified in mortgaging more than their rights in the plaint properties, namely, their right to one-half share. The decree of the lower appellate Court will be modified by giving a mortgage decree for the sale of only a moiety of the plaint properties. In other respects, the second appeal must be dismissed with costs.

As regards the memorandum of objections, the lower appellate Court has given no legal reasons for allowing only 6 per cent. interest on the principal amount of the mortgage after 1896. The plaintiff is entitled to get interest at the original rate of 18 per cent. till the date fixed in the decree for repayment of the mortgage amount, interest and costs according to the usual provisions in a mortgage decree for sale. The memorandum of objections must therefore be allowed with costs. Time extended till the expiry of four months from this date for redemption.

Spencer, J.—I entirely agree and I have only to add that as it has been argued that the Subordinate Judge was not justified in his findings of fact on the questions of (1) tarwad necessity and (2) the extinguishment of the plaint debt and (3) the benami nature of Ex. A, it is to be regretted that when reversing the District Munsif's judgment on these points he did not entirely meet the reasoning given in the first Court's judgment for the conclusions then arrived at. At the same time the Subordinate Judge does give reasons of his own for the conclusions at which he arrives and his findings of fact cannot be upset in second appeal so long as there is some evidence to support them. On the point of law it has been argued that there must be some transfer of interest in property to constitute a simple mortgage, and that the suit document created only a charge over the property for which the limitation period is 12 years. I am of opinion that it is too late now to ask us to hark back to the decision in *Rangasami* v. *Muttukumarappa* (5). The decisions in *Balasubramania Nadar* v. *Sivaguru Asari* (1) *Rama Brahmam* v. *Venkatanarasu Puntulu* (2) and *Venkatarama Aiyar* v. *Suppa Nadan* (4) decided that a formal transfer of interest was an element of mortgage which need not be expressed in the document of mortgage. In the last two decisions the case of *Rangasami* v. *Muttukumarappa* (5) was considered and distinguished. Moreover *Rangasami* v. *Muttukumarappa* (5) dealt with a mortgage prior to the Transfer of Property Act. Here the panayam deed in suit is one of 1883 subsequent to the Transfer of Property Act. I am not prepared to say that this document, which describes itself as panayam or mortgage, created only a charge upon the property. The case of *Ramachariar* v. *Dorasami Pillai* (6) was one in which it was merely stated that the property in question was made a security for the debt.

There are no such words in the document now in suit. I therefore consider that the second appeal must fail on all points and the memorandum of objections must be allowed.

S.N./R.K. *Appeal dismissed.*

5. (1887) 10 Mad 509.
6. (1915) 29 I C 605.

A. I. R. 1918 Madas 560

AYLING AND SADASIVA AIYAR, JJ.

(*P. L. A.*) *Alagappa Chettiar* and *others*—Plaintiffs—Appellants.

v.

(*R. M. P. C.*) *Muthiah Chettiar*—Defendant—Respondent.

Appeal Suit No. 44 of 1916, Decided on 25th April 1917, against decree of Dist. Judge, Ramnad, in Original Suit No. 22 of 1913.

(a) Religious Endowments Act (20 of 1863), Ss. 14, 18—Suit under S. 14—Leave granted under S. 18 to several persons—Death of one—Suit does not abate.

A suit once instituted under S. 14, Religious Endowments Act, by the persons to whom leave is granted under S. 18 of the Act does not abate merely on account of the subsequent death of one of the persons to whom leave was originally granted. 31 *I. C.* 236; 40 *Mad.* 110 and 13 *I. C.* 232, *Dist.*; 37 *All.* 296, *Diss. from* [P 562 C 1]

(b) Religious Endowments Act (20 of 1863), S. 18—Civil P. C. (5 of 1908), S. 92—Criminal P. C. (5 of 1898), S. 195—Grant of sanction, under different sections—Distinction explained.

Per *Ayling, J.*—The language of S. 18, Religious Endowments Act, is very similar to S. 195, Criminal P. C., and differs from S. 92, Civil P. C. Under the former, a sanction granted by one person may be utilised by another, but under S. 92, Civil P. C., the persons who institute the suit must be identical with those who obtained the sanction. But S. 18, Religious Endowments Act, merely interposes an independent condition, that the suit shall not be entertained unless leave has been previously granted on application, and does not indicate by whom the application should be made. That clearly indicates an inten-

tion that the suit need not be by the same person to whom leave was granted. 12 *Mad.* 47, *Foll*; 38 *Mad.* 1102, *Dist.* [P 561 C 2 P 562 C 1]

(c) Religious Endowments Act (1868), S. 14—Suit under S. 14 is representative suit—Death of any party does not cause abatement of suit—Civil P. C. (5 of 1908), S. 92 and O. 1, R. 8.

Per *Sadasiva Aiyar, J.*—A suit under S. 14, Act 20 of 1863, is as much a representative suit as one brought under S. 92, Civil P. C., or some of the suits under O. 1, R. 8 of that Code, as it is equally brought in the name and as it affects the rights of all those interested in the religious endowment. All such interested persons become, in the eye of the law, parties to such a suit and the death of one or more of them cannot cause the suit to abate, nor would it prevent the suit from being heard till "its finish" after it has been once properly and legally instituted.

[P 562 C 1,2]

S. T. Srinivasagopalachariar and *G. S. Ramachandra Aiyar*—for Applts.

A. Krishnaswami Aiyar and *M. Patanjali Sastri*—for Respondent.

Ayling, J.—The suit from which this appeal arises was instituted under S. 14, Religious Endowments Act 20 of 1863, by four persons, who had obtained leave of the Court under S. 18 of the same. Subsequent to its institution, one of these persons died; and the District Judge has dismissed the suit on the single ground that it is not competent to the three survivors to maintain it,

" it being essential that all the donees of the power (to institute a suit) conferred by the Court should jointly exercise that power right up to the finish of the suit."

The surviving plaintiffs appeal. The chief authority relied on by the District Judge is that of *Venkatesha Mallia* v. *Bammampalli Ramayya Hegade* (1), in which it was held that where sanction was given under S. 18, Religious Endowments Act, to two men, it was not open to one of them alone to institute the suit under that section. It may be pointed out at once that this ruling does not necessarily cover the present case, in which the suit was validly instituted by all the persons who obtained leave to sue, but one of them subsequently died. It does not necessarily follow that a validly instituted suit abates for this reason. Another judgment of this Court quoted in support of the lower Court's decree, *Maddala Bagavannarayana* v. *Vadapalli Perumallacharyulu* (2), also deals with a case in which the institution was itself defective (in the above sense): and the only authority brought to our notice in support of the abatement is *Chhabila Ram* v. *Durga Prasad* (3), which was expressly dissented from in a recent case of this Court, *Parameswaram Munpu* v. *Narayan Namboodri* (4). All the last there cases were of suits instituted under S. 92, Civil P. C., but as I shall endeavour to show presently the difference between the two sections is in the present appellant's favour.

Section 18, Religious Endowments Act is very similar to S. 195, Criminal P. C. In each, the Courts are expressly forbidden to entertain a complaint or suit, unless express sanction or leave for its institution has been previously obtained. The grant of the sanction or leave in each case removes the bar to the Court taking cognizance of the matter and once that bar is removed, it is not easy to see how either of the two sections can have further effect. In the case of S. 195, Criminal P. C., the complaint may be filed by a different person altogether from the person who applied for the sanction, vide *Tathayya, In re* (5), and though it is not necessary for us to go so far in the present case, I do not see why the same should not hold good in the case of leave granted under S. 18, Religious Endowments Act. With all respect to the learned Judges who decided *Venkatesha Mallia* v. *Bammampalli Ramayya Hegade* (1), the wording of S. 18, Religious Endowments Act seems to afford no warrant for the consideration by the Court of the personality of the applicant. The duty of the Court is specifically defined as the determination of whether there are sufficient prima facie grounds for the institution of the suit. In dealing with applications under S. 195, Criminal P. C., Courts do not uncommonly bear in mind the personality of the applicant and his probable motives, although S. 195 is, in this respect, quite general in its terms, and does not attempt to define the matters for the Court's determination. Nevertheless, as already stated, a sanction granted to one person may be utilised by another. S. 92, Civil P. C., is different. It expressly authorises the institution of a suit by

" two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General."

1. A I R 1915 Mad 127=38 Mad 1192=26 I C 202.
2. (1915) 31 I C 236.
3. A I R 1915 All 59=37 All 296=28 I C 681.
4. (1917) 40 Mad 110=34 I C 384.
5. (1889) 12 Mad 47.

This wording certainly supports the view that the persons who institute the suit must be identical with whose who obtained the sanction. Under S. 14, Religious Endowments Act, on the contrary, any person or persons interest- may sue; and S. 18 merely interposes an independent condition, that the suit shall not be entertained unless leave has been previously granted on application, but without indicating in any way by whom the application should be made. There seems to me, therefore, no need to adopt the District Judge's very narrow view of the section: and where the District Court has, on due consideration, decided that there are sufficient prima facie grounds for the institution of a suit against trustees of religious endowments, it is undesirable in the public interest that unnecessary obstacles should be thrown in the way of its prosecution. I would set aside the decree of the District Court and remand the suit for disposal on its merits. Costs in this Court should be costs in the cause.

Sadasiva Aiyar, J.—I should like to reserve my opinion on the question whether when leave is granted to *A* under S. 18, Act 20 of 1863, to institute a suit, *B* could institute that suit under S. 14. But I entirely agree with my learned brother that there is nothing in S. 18 which can be construed as putting an end to the suit after it is once legally instituted, simply because one of several persons who obtained the leave under S. 18 died during the pendency of the suit. I think that the general provisions of the Civil Procedure Code become applicable as much to a suit brought in the Special Court mentioned in S. 14, Religious Endowments Act, after the first step, namely, the institution of the suit, has taken place, as to a suit brought under S. 92, Civil P. C., except that a certain special or rather supplemental provision regarding reference to arbitration (see S. 16, Religious Endowments Act) is also applicable to the former case and the Court is given express powers to award certain named reliefs in its decree to a suit under S. 92, Civil P. C.: see *Parameswaram Munpu* v. *Nyarayanan Namboodri* (4) and *Varadayya Chetty* v. *Munusami Chetty* (6).

A suit under S. 14, Act 20 of 1863, is, in my opinion, as much a representative suit as one brought under S. 92, Civil P. C., or some of the suits under O. 1, R. 8, of that Code, as it is equally brought in the name and as it affects the rights of all those interested in the Religious Endowment. All such interested persons become, in the eye of the law, parties to such a suit and the death of one or more of them cannot cause the suit to abate, nor would it prevent the suit from being heard till "its finish" after it has been once properly and legally instituted, unless perhaps in the almost impossible contingency of all the persons interested ceasing to exist in this world by death or by wholesale apostacy. I agree in the order proposed by my learned brother.

S.N./R.K. *Case remanded.*

6. (1912) 13 I C 232.

A. I. R. 1918 Madras 562

AYLING AND NAPIER, JJ.

Public Prosecutor—Appellant.

v.

Kayaniyil Kunhamad and *others*—Accused—Respondents.

Criminal Appeal No. 694 of 1916, Decided on 26th February 1917, against order of Sub Divl. Magistrate, Palghat, in Cr. A. No. 71 of 1916.

Madras Revenue Recovery Act S. 8—"Produced" in S. 8 means that destrainer should have warrant in possesson at time of distraint and show it as authority when party asks for it.

The word "produced" in S. 8, only means that the distrainer should have the warrant in his possession at the time of distraint and should show it as his authority to any one interested in the attached property who may be present and disposed to question the legality of his action. It is not necessary that the warrant should be shown, unless the party whose property is distrained asks for it: 30 *I. C.* 159, *Foll.*

[P 562 C 2]

Public Prosecutor—for Appellant.

C. Madhavan Nair—for Accused.

Judgment.—The Joint Magistrate has misapprehended the meaning of S. 8 of Act 2 of 1864. This does not require that the "demand in writing" (referred to by the joint Magistrate as the "warrant,") should be shown to the defaulter before or at the time of distraint: but merely that it should be "produced." This simply means that the distrainer should have it in his possession at the time of distraint, and should show it as his authority to any one interested in the attached property who may be present and disposed to question the legality of his action. In

the present case there is evidence that the adhigari had the demand in writing in his possession at the time of distraint: and no question has been asked of the prosecution witnesses (so far as respondent's counsel can show) even tending to suggest that any of the respondents asked him to produce it. The view we have taken above is in accordance with that of the learned Judges in *Marakkar, In re* (1). The convictions of the respondents by the Stationary Sub-Magistrate, Ponnani, has been set aside by the Joint Magistrate solely on the ground above indicated. We must therefore set aside his order of acquittal and direct him to restore the appeal to file and dispose of it according to law.

S.N./R K. *Appeal allowed.*

1. (1915) 30 I C 159.

A. I. R. 1918 Madras 563

SESHAGIRI AIYAR AND KUMARASWAMI SASTRI, JJ.

Battina Appanna — Defendant — Appellant.

v.

Yarlagadda Venkataramalinganna — Plaintiff—Respondent.

Second Appeals Nos. 961 to 966 of 1916, Decided on 3rd April 1917, against decree of Dist. Judge, Kistna, in Appeal Suits Nos. 154, 155, 158 to 161 of 1914.

(a) Madras Estates Land Act (1908), S. 3 (11) — Payment for water supplied is rent.

A payment for water supplied by or taken from the zamindar is rent. [P 563 C 2]

(b) Madras Estates Land Act (1908), Ss. 27 and 28 — Extra payment for additional advantage is not enhancement.

An extra payment due for additional advantage is not necessarily an enhancement. Where new circumstances have come into existence which require new adjustment there is no question of enhancement: 38 *Mad.* 524, *Rel. on.* [P 563 C 2; P 564 C 1]

(c) Madras Estates Land Act (1908), S. 30 — Government retiring from field and leaving zamindar free to make arrangements — Zamindar is entitled to rent for water supplied.

Defendants brought certain dry land under cultivation, for which they took water from one of the Kistna Canals and paid Government Rs. 5 as water rate. Subsequently Government agreed to localise the lands to which it was bound to supply water free of assessment. Thereafter the defendants as usual took the usual quantity of water but refused to pay the water tax to the zamindar:

Held : that the Government having retired from the field and having left the zamindar free to make his own arrangements with his tenants, the latter were bound to pay to the zamindar the water tax which they used to pay to Government. [P 563 C 2]

T. M. Krishnaswami Aiyar for *T. Ramachandra Raw*—for Appellants.

P. Nagabhushanam—for Respondent.

Judgment.—The land in respect of which the rent is claimed was originally dry land. For some time, until Fasli 1318 the defendant took water from one of the Kistna Canals and paid the Government Rs. 5 as water tax and Rs. 1-8-0 to the zamindar as rent. In Fasli 1318, the Government agreed to localise the lands to which Government was bound to supply water free of assessment. After this agreement, the water allowed by the Government became the zamindar's. The defendants as usual has taken his usual quantity from that water and the zamindar has asked that the water rate of Rs. 5 paid to the Government should be paid to him. Both the lower Courts decreed the plaintiff's claim and the tenant has appealed. Mr. T. M. Krishnaswami Aiyar in his able argument contended before us that unless the Government assigned their right to collect the water tax, the zamindar is not entitled to it. But seeing that the Government have retired from the field and left the zamindar free to make his own arrangements with his tenants, there is nothing in this contention. The learned vakil next argued that this additional payment for water is not rent. Whatever may have been the view under the old Act, S. 3 Cl. (11), Estates Land Act, makes it clear that a payment for water supplied or taken from the zamindar is rent. The suggestion that the term "rent" in this clause means rent upon the whole holding of the raiyat is plausible, but we do not think there is any substance in it. Ss. 27 and 28 to which our attention was drawn contemplate the continuance of the status quo ante in a succeeding fasli, but where under an express or implied contract there is a promise to pay for the water taken, we fail to see how the payment due therefor is not rent.

The last contention was that as the sanction of the Collector was not obtained for the increased rent, the suit was misconceived. We do not think that an extra payment due for additional advantage is necessarily an enhancement. Where new circumstances have come in

to existence which require new adjustments, there is no question of enhancement. The principle of *Sivganga Zamindari* v. *Chidambaram Chetty* (1) is applicable to this case. We do not think that Cls. 2, 3 and 4, S. 30, have any application. They contemplate the continuance of the old state of affairs and yet the claim is made for increased rent without offering any fresh advantage. In such cases, there would be enhancement. In the view we have taken the tenant has been given new facilities for which he is bound to pay. The tax on his holding is the same. What he paid the Government for the water, he is asked to pay the landlord. Under these circumstances, there is no question of enhancement. The decision of the Courts below is right. The second appeals are dismissed with costs. Vakils fee is Rs. 10 in each of the second appeals.

S.N./R.K *Appeals dismissed.*

1. (1915) 38 Mad 524=21 I C 556.

A. I. R. 1918 Madras 564 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Vadla Nagiah — Defendant— Appellant.

v.

Valuru Divakara Mudaliar—Plaintiff —Respondent.

Second Appeal No. 2602 of 1914, Decided on 12th February 1917, against decree of Dist. Judge, Kurnool, in Appeal Suit No. 21 of 1914.

Transfer of Property Act (4 of 1882), S. 59—Mortgage—Admission by mortgagor —Proof of attestation is necessary, if attestation denied—Evidence Act, S. 68.

Even where the defendant admits execution of what purports to be a mortgage-deed, the transaction does not amount to a valid mortgage if the defendant does not admit that it was attested by two witnesses who saw him execute it or if it is not proved that it was attested by two such witnesses: *A. I. R.* 1916 *P.C.* 162 and 35 *Mad.* 607, *Foll.* [P 564 C 1, 2]

V. C. Seshachariar—for Appellant.

S. Ranganadha Aiyar—for Respondent.

Judgment.—We are bound by the Privy Council decisions in *Ram Narayan Singh* v. *Adhindra Nath Mukhurji* (1) and *Shamu Patter* v. *Abdul Kadir Rowthan* (2) to hold that even where the defendant admits execution of what purports to be a mortgage-deed, the transaction would not be a valid mortgage, if the defendant does not admit that it was attested by two witnesses who saw him execute it or if it is not proved that it was attested by two such witnesses (S. 59, Act 4 of 1882). We therefore set aside the District Judge's judgment and restore that of the Munsif. The parties will bear their respective costs throughout.

S.N./R.K. *Appeal allowed.*

1. A I R 1916 P C 169=34 I C 900 (P C).
2. (1912) 35 Mad 607=16 I C 250=39 I A 218 (P C).

A. I. R. 1918 Madras 564 (2)

OLDFIELD AND PHILLIPS, JJ.

Manjeshwara Krishnaya— Defendant —Appellant.

v.

Vasudeva Mallaya and *others* —Plaintiffs and Defendants—Respondents.

Second Appeal No. 1736 of 1914, Decided on 28th November 1916, against decree of Dist. Judge, South Canara, in Appeal Suit No. 45 of 1913.

(a) Civil P. C. (5 of 1908), S. 11—Co-defendants—Finding on issue not in active controversy between defendants inter se does not operate as res judicata—Transfer pending suit does not affect validly acquired rights—Transfer of Property Act (4 of 1882), S. 52.

M sold certain properties to defendant 1 who mortgaged them to plaintiff's father after purchase. *M* brought a suit against defendant 1 and plaintiff for a declaration that both the said sale and mortgage were colourable transactions. The Court held that they were both valid. During the pendency of that litigation defendant 1 sold the property to defendant 2, who, in turn, transferred it to defendant 3. In a suit by the plaintiff to enforce the mortgage security:

Held: (*per Curiam*), that the previous decree in favour of *M*, wherein the validity of the mortgage was admitted by both defendant 1 and the plaintiff's predecessor and which was not in active controversy between them, did not operate as res judicata in the present suit. [P 568 C 1]

Held, by *Phillips, J.*—(Whose opinion prevailed under S. 98, Civil P. C.), *Oldfield, J.*, dissenting, that under S. 52, T. P. Act, the transfer to defendant 2 could not affect the plaintiff's right to a valid mortgage over the property, a right which he obtained as the result of the suit during which the property was transferred. [P 568 C 1]

(b) Transfer of Property Act (4 of 1882), S. 52—S. 52 is not restricted in application to protection of parties in active controversy with transferor only.

Per *Oldfield, J.*,—The wording of S. 52, T. P. Act, no doubt is general and is not restricted explicitly to the protection of those parties only who have been in active controversy with the transferor. But it cannot be read as a general prohibition against the subsequent agitation of every question, which arose in the litiga-

tion, between whomsoever it was decided. That reading would refuse full effect to the words "the rights of any other party," for the right protected cannot be treated as existing, like an obligation running with the property, independently of the party in whose favour it was decreed. [P 566 C 1, 2]

(c) Transfer of Property Act (4 of 1882), S. 52 — Doctrine of lis pendens operates only in favour of plaintiff.

Per *Oldfield, J.*—The doctrine of lis pendens operates only in favour of a plaintiff and cannot be invoked by a defendant. [P 567 C 1]

(d) Transfer of Property Act (4 of 1882), S. 52—Doctrine of lis pendens is not limited to transferors only.

Per *Phillips, J.*—There is no authority for the proposition that the scope of the doctrine of lis pendens must be limited to cases in which the doctrine of res judicata would appiy to the transferor. [P 568 C 1]

B. Sitarama Rao—for Appellant.

V. V. Srinivasa Aiyangar—for Respondent.

Oldfield, J.—Plaintiffs sue to recover on a mortgage on the suit property, admittedly executed by defendant 1 in favour of their predecessor-in-interest. Defendant 3, the appellant, is a transferee of the property from defendant 2, who is a transferee from defendant 1 in virtue of transactions to be detailed later. Defendant 3's contention is that the mortgage is invalid, because it was entirely without consideration. The lower appellate Court decided against this on the ground that defendant 3 was concluded by the decision in Second Appeal No. 323 of 1902; it modified the decree of the Subordinate Judge only on another point, regarding which there is no dispute before us.

For the understanding of the effect of the decree in Second Appeal No. 323 of 1902 the necessary facts are that defendant 1 bought the property from one Manjunatha, leaving rupees one thousand and five hundred of the consideration outstanding, rupees one thousand on a promissory note and rupees five hundred, which had not been paid, when it should have been, at registration. This rupees one thousand five hundred and another sum of rupees five hundred, which does not affect the present argument, were raised by defendant 1 by the suit hypothecation of the property to plaintiffs' predecessor; defendant 2, holding a decree against Manjunatha, attached the debt due to him by defendant 1 and, proceeding against the latter, obtained a decree and bought in the property, thus becoming the mortgagee of plaintiffs' predecessor. Manjunatha, apparently apprehensive of competition between his right to a charge for unpaid purchase money and the mortgage, brought Original Suit No. 114 of 1898 to have the mortgage and also the previous sale to defendant 1 declared invalid on the grounds that they were colourable and without consideration. The High Court in Second Appeal No. 323 of 1902 held that the sale was valid and that the mortgage was valid subject to Manjunatha's claim to his unpaid purchase money, the principal of which it found to be rupees one thousand and the amount above referred to as due on a promissory note. This judgment is the basis of the lower appellate Court's decision against defendant 2 and defendant 3. The parties to it were Manjuntha as plaintiff and defendant 1, his wife and plaintiffs' predecessor as defendants. In the second appeal, the last mentioned was appellant and the legal representatives of Manjunatha, defendant 1 and his wife were respondents. Throughout the proceedings plaintiffs' predecessor and defendant 1 upheld the validity of the mortgage.

Contrary to defendant 1's previous pleading his successors, defendants 2 and 3, have contended in the present suit that the mortgage was without consideration and is not binding on them or the property in the latter's hands. And accordingly the case has been argued first on the ground that they are estopped by defendant 1's conduct in Seoond Appeal No. 323 of 1902. That can be dismissed shortly, because no such plea of estoppel was advanced, put in issue or considered in the lower Courts. Next it is said that the decree in the second appeal is res judicata between plaintiffs and defendant 3; and to this two answers have been given. It is argued firstly that, although the decree declared the validity of the mortgage subject only to Manjunatha's prior right to rupees one thousand, the judgment, which modified the decision in first appeal by adding to it a reference to that right, statedly made that reference only as between Manjunatha and plaintiffs' predecessor, thus leaving the question of the validity of the mortgage and the amount recoverable on it open as between the latter and defendant 1. This restriction of the effect of the decision regarding the rupees one thousand is intelligible, because (as the records show)

the original judgment had recognized Manjunatha's object as not so much to have the mortgage

"set aside as to have it rendered of no effect, so far as it affected his property; it was not his interest whether defendant 1 owed any money or not to defendant 3;"

and the main ground of second appeal against the decisions declaring the mortgage invalid was that Manjunatha had no right to ask for that relief. But whatever the reason for it, the making of the restriction in the judgment cannot assist defendant 3, because it was not mentioned in the decree, to which defendant 1 submitted and which must be looked to, rather than the judgment, as determining the parties' rights. The second argument relied on however affords a clear reason for holding that the decree in Second Appeal No. 323 of 1902 is not res judicata. Plaintiffs' predecessor and defendant 1 were co-defendants and were so far from being in active contest that their pleas as to the validity of the mortgage and Manjunatha's right to dispute it were substantially the same; and in these circumstances there is no res judicata between them. *Ramchandra Narayan* v. *Narayan Mahadev* (1), *Venkayya* v. *Narasamma* (2). It is therefore necessary to consider the ground 3 of decision proposed by plaintiffs, that adopted by the lower appellate Court and based on the principle of lis pendens. The difficulty in the way of its application is not due to any doubt as to the contentious character of Second Appeal No. 323 of 1902 or the fact that the transfer to defendant 2 was made during the litigation. It is that the principle, as contended for, involves that the decision relied on shall be binding on the transferee, not only as it would have been on the transferor, but also to the extent to which there was an adjudication on the rights of any other party, whether that adjudication affected those of the transferor or not; in short that in the present case although there was no binding decision between defendant 1 and plaintiff's predecessor as to the invalidity of the mortgage, defendant 3 is to be affected by one between Manjunatha and each of them separately.

To test this contention with reference to S. 52, T. P. Act, the wording no doubt is general and is not restricted explicitly to the protection of those parties only, who have been in active controversy with the transferor. But it cannot in my opinion be read, as plaintiffs claim as a general prohibition against the subsequent agitation of every question which arose in the litigation, between whomsoever it was decided. That reading would refuse full effect to the words "the rights of any other party." For it would involve the fallacy of treating the right protected as existing, like an obligation running with the property, independently of the party in whose favour it was decreed; and so much conceded it would, as is pointed out in the first case to be referred to be hard to permit other parties to the litigation to profit by its recognition, though (as in the present case) they had obtained no binding adjudication regarding it, and at the same time to refuse permission to strangers to do so. Authority supports this view and though it is mostly English it does not appear inapplicable in this country owing to the English procedure of registration of lis pendens or on other grounds. *Bellamy* v. *Sabine* (3) contains a general statement of the doctrine, which has often been approved by Indian Courts. It is also directly in point because it dealt with the competition between one of two co-defendants and the other's transferee, the former claiming unpaid purchase money and the latter under a mortgage made during the litigation. The decision was in favour of the transferee, the matter being put most clearly in the judgment of Turner, L. J.,

"Leaving out of consideration the cases (which are rare), in which decrees can be made between co defendants,"

(and also presumably those in which there is an adjudication between them after active contest)

"upon what ground is the case of a co-defendant to stand in a different position from that of a stranger ? and, if the doctrine of lis pendens is to be carried so far as to affect a purchaser with notice in favour of a stranger, I hardly know what title would be safe, independently of the late Acts requiring registration."

In the next case, *Tyler* v. *Thomas* (4) the doctrine was applied but the decisive factor in favour of its application was that though there was no adjudication between the co-defendants concerned, an issue was raised between them and reserved for subsequent trial, *Bellamy* v. *Sabine* (3) being

1. (1887) 11 Bom 216.
2. (1888) 11 Mad 204.
3. (1857) 1 De G & J 566.
4. (1858) 25 Beav 47.

distinguished on that ground. In *Bull* v. *Hutchens* (5), it was held that

"a lis pendens is merely notice of some claim, made in respect of the property which is the subject of the suit but that it does not of itself create an incumbrance, apart from the equity on which the litigation is founded."

Only one Indian case need be mentioned. In *Shivlal Bhagvan* v. *Shambhuprasad* (6), a Full Bench decision, the Court though it based its conclusion on another ground, referred to *Bellamy* v. *Sabine* (3), apparently with approval, as deciding that the doctrine of lis pendens operated only in favour of a plaintiff and could not be invoked by defendants. Plaintiff's construction of the section failing on its merits and with reference to authority, I would allow the second appeal, set aside the lower appellate Court's decision and remand the case for disposal on the other points raised in the appeal memorandum before it.

Phillips, J.—Tha properties mortgaged to the father of plaintiffs 1 and 2 by defendant 1 had been sold to defendant 1 by one Manjunatha Bhandari who brought a suit in 1898 (Original Suit No. 114 of 1898, Sub Court, Mangalore) for a declaration that the sale deed to defendant 1 and the hypothecation deed executed by him to the father of plaintiffs 1 and 2 (defendant 3 in that suit) were invalid. In Second Appeal No. 323 of 1902 it was held that the sale deed and mortgage were both valid. During the pendency of the litigation defendant 2 purchased the property from defendant 1 and defendant 3 is defendant 2's transferee, and it has been held by the lower appellate Court that the doctrine of lis pendens ie applicable and that therefore defendant 3 cannot now question the validity of the mortgage to plaintiffs' 1 and 2's father.

As between Manjunatha Bhandari and plaintiffs the validity of the mortgage is undoubtedly res judicata, and also as between Manjunatha Bhandari and defendant 1. But it is contended now that as defendant 1 and plaintiffs' father were co-defendants in the suit of 1898 the validity of the mortgage is not res judicata as between them, for no question of res judicata can arise between co-defendants when there was no matter actively in contest between them, the decision of which was necessary for the determination of the suit. This would appear to be the case, and I am not prepared to say that the prior decision in Second Appeal No. 323 of 1902 would operate as res judicata between defendant 1 and plaintiffs, although the former might be estopped from questioning the validity of a mortgage, the validity of which he had himself set up in that litigation. It is then contended for respondents that even though the doctrine of res judicata may not apply to defendant 3, he is precluded from disputing the validity of the mortgage by reason of S. 52, T. P. Act, under which during the active prosecution of a contentious suit the property concerned cannot be transferred by any party to the suit so as to affect the rights of any other party thereto under any decree made therein. This contention, if upheld, would in this case possibly have the effect of disabling a purchaser even more effectively than his transferor to whom the doctrine of res judicata would apply, but cannot be rejected on this ground alone. S. 52, T. P. Act embodies the English doctrine of lis pendens as applicable in Courts in India, and the principle on which that doctrine rests is that no alienation by either party to a pending litigation is to be allowed to prejudice the interests of the parties thereto. In the word of the Lord Chancellor in *Bellamy* v. *Sabine* (3):

"The law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

We have not been referred to any cases in which the question now in issue has been specifically decided, and consequently, I think that the provisions of S. 52 must be relied upon for the answer. The decree in Second Appeal No. 323 of 1902 held that the mortgage to plaintiffs' father was valid, subject to a claim for unpaid purchase money, and that decree was binding on defendant 1 who was a party to it. No doubt it is remarked in the judgment that the decree of the lower Courts will be modified as between the plaintiff and defendant 3 (plaintiffs' father), but that remark appears to be due to the fact that defendant 3 alone appealed to this Court, and defendant 1 was ex parte and it is clear from the decree itself that the mortgage was held to be valid and not merely as between plaintiff and defendant 3. The effect of the decree therefore was to establish the

5. (1863) 32 Beav 615.
6. (1905) 29 Bom 435.

right of plaintiffs' father to a valid mortgage on the suit property, and under S. 52 no transfer effected during the suit can affect that right. Defendant 1 as a party is bound by that decree and does not now seek to impeach its validity. To allow defendant 3 in this suit to contend and possibly to prove that that right does not exist would certainly affect plaintiffs' right, established by the decree, and although the declaration as to the right might not be conclusive as between defendant 1 and plaintiffs as res judicata, yet it is a declaration binding on defendant 1 until he seeks to impeach it.

He does not impeach it now, and consequently its impeachment by his alienee does seriously affect plaintiffs' rights and therefore in my opinion cannot be allowed. I can find no authority for the proposition that the scope of the doctrine of lis pendens must be limited to cases in which the doctrine of res judicata would apply to the transferor, and if the legislature had meant to enunciate that proposition, it could have done so in terms instead of enacting S. 52 in its present form. According to the language of S. 52, the transfer to defendant 2 cannot affect plaintiffs' right to a valid mortgage over the property, a right which he obtained as the result of the suit during which the property was transferred. The transfer to defendant 2 must therefore be deemed to have been made subject to that right and defendant 3 cannot now impeach the validity of the mortgage. In this view it is unnecessary to discuss the question of estoppel. The question was not raised in the lower Courts and cannot be raised for the first time in second appeal, although it is quite possible that, if defendant 1 had in this suit impeached the validity of plaintiff's mortgage, the plea of estoppel would have been raised and proved successfully.

By the Court.—The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 568

ABDUR RAHIM AND NAPIER, JJ.

Kota Chinna Lakshmiah—Appellant.

v.

Nalam Viswanatham — Respondent.

Second Appeal No. 1885 of 1915, Decided on 17th April 1917, against decree of Temporary Sub-Judge, Masulipatam, in Appeal Suit No. 211 of 1914.

(a) Contract Act (1872), S. 236—Applicability of.

Section 236 is meant to apply to cases when a person enters into a contract with another on the basis that that other person is acting as agent for somebody else: 34 *Bom* 292, *Rel on*; 34 *Cal* 628 and 39 *Cal* 802, *Dist.* [P 568 C 2]

(b) Contract Act (1872), S. 215—Agent dealing on his own account in business of agency—Principal may repudiate if disadvantageous to time.

If an agent deals on his own account in the business of the agency the principal may, unedr S. 215, repudiate the transaction if it appears that the dealings of the agent have been disadvantageous to him. [P 569 C 1]

Defendant asked plaintiff to buy 1,000 bags of paddy for him, and was informed by the latter that the paddy had been bought. It was found that the plaintiff did not buy the paddy from a third person but purported to buy from himself. He was subsequently asked by the defendant to sell the paddy, but did not do so till the price had fallen;

Held: that the defendant was at liberty to repudiate the transaction. [P 569 C 1]

J. L. Rosario, K. P. Shanmugam Pillai and *A. Venkatarayaliah*—for Appellant.

A. Ramachandra Rao—for Respondent.

Judgment.—The defendant asked the plaintiff who is a merchant at Masulipatam to buy for him 1,000 bags of paddy. This was in February 1909. He asked him to buy at the rate of Rs. 4-15-0 per bag or as much less as he could get it for, and he was informed that the paddy had been bought. Then it appears that the plaintiff sold 500 bags of paddy at the rate of Rs. 4-8-0 to a third party, and the remaining 500 bags he bought for himself at the same rate. It appears that the plaintiff did not buy 1,000 bags from a third person, but purported to buy from himself. The defendant did not know of this fact at all, nor did he know that the plaintiff bought 500 bags of paddy for himself. It was apparently contended in both the lower Courts on behalf of the defendant that S. 236, Contract Act, applied and, therefore, the plaintiff was not entitled to any relief. That section says:

"A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account."

The language of the section would seem to indicate that it was meant to apply to cases where a person enters into a contract with another on the basis that that other person is acting as agent for somebody else. That is the opinion of the learned Judges in *Joachimson* and *Co.* v. *Meghji*

Valji (1). The District Munsif as well as the Subordinate Judge, however, seemed to think that S. 236 covered a case like the present and relied on two rulings of the Calcutta High Court one in *Sewdutt Roy Maskara* v. *Nahapiet* (2) and the other in *Ramji Das* v. *Janki Das* (3). In both these cases, the plaintiff purported to act as a broker, that is to say he offered to sell to the other party certain goods on behalf of some third person and it would appear from the judgment of Jenkins, C. J., in *Ramji Das* v. *Janki Das* (3), that it was upon that ground that S. 236 was held to apply. He points out that the group comprising Ss. 211 to 221, Contract Act, deals with the agent's duty to the principal and that the group of sections which includes Ss. 226 to 238 deals with the effect of agency on contracts with third persons. We think that this is not a case governed by S. 236. But there can be no doubt that S. 215, Contract Act, applies. Under that section if an agent deals on his own account in the business of the agency, the principal may repudiate the transaction, it appears that the dealings of the agent have been disadvantageous to him. Here the defendant did not know that the plaintiff purported to sell his own paddy or that he purported to buy 500 bags out of 1,000 bags sold by the plaintiff to the defendant.

Both the District Munsif and the Subordinate Judge found, as a matter of fact, that the plaintiff wanted to dispose of his own paddy when the price was high and waited till the market had gone down to dispose of the defendant's paddy. Mr. Rosario argues that there is no evidence in support of this finding. This objection is not taken in the grounds of appeal. On the other hand we think that there is evidence to support the finding; for instance there is Ex. A (3) in which the defendant informed the plaintiff that Rs. 5-2-0 was the price for a bag for August delivery and asked him to get the best price available. The plaintiff, instead of selling the paddy then, did not send any reply and did not sell until the price had gone down to Rs. 4-8-0. If he had acted promptly on the information supplied by the defendant, no loss would have been caused. On these grounds we confirm the decree of the lower Courts and dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

1. (1910) 34 Bom 292=3 I C 801.
2. (1907) 34 Cal 628.
3. (1912) 39 Cal 802=17 I C 973.

A. I. R. 1918 Madras 569

SADASIVA AIYAR AND SPENCER, JJ.

Mogadasu Venkatadasu and *others*—Defendants—Appellants.

v.

Vankamamidi Udayanarayana and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 512 to 522 and 544 of 1916, Decided on 6th March 1917, against decrees of Addl. Temporary Sub-Judge, Guntur, in Appeal Suits Nos. 1 to 14 of 1915.

(a) Madras Estates Land Act (1 of 1908), S. 3 (2) (d)—Grant of inam—Grant of melvaram should be presumed unless kudivaram rights conferred.

The presumption in all cases of grants of inams is that only the melvaram was granted as inam. [P 570 C 1]

Courts should always start with that presumption, unless the grant deed expressly confers kudivaram rights also. [P 570 C 1]

(b) Madras Estates Land Act (1 of 1908), S. 3 (2) (d) — Grant with ashtabogam does not include grant of kudivaram.

A grant with ashtabogam does not necessarily import the grant of the kudivaram also in the same manner that it does not clearly imply the grant of temple and other communal sites, [P 570 C 1 2]

(c) Madras Estates Land Act (1908), S. 3 (2) —Pre-settlement inam grants — Presumption—Melvaram.

Pre-settlement inam grants must be presumed to be of land revenue only, what the grantor was entitled, in those days, to obtain from the lands as feudal landlord being connoted by the words "land revenue", though now it would be called melvaram. [P 570 C 1]

(d) Madras Estates Land Act (1908), S. 3 (2) (d) — Suit for ejectment—Jurisdiction of civil Court contested — Burden of proof is on defendant.

Where the defendants in a suit for ejectment contest the jurisdiction of the civil Courts to entertain the suit under S. 3 (2) (d), it is for them to prove that the plaintiff was not the owner of the kudivaram right at the time of the grant of the inam to him. But this is not necessary when, by setting up that the grant was of both varams, the plaintiffs admit that they were not the owners of the kudivaram at the time of the grant. [P 571 C 2]

It cannot be laid down as a broad proposition of law that the inamdar must have the occupancy right when the tenants have no occupancy rights in themselves, though it is open to the Court, from such a state of facts to infer that, at the time of the grant, the grntee had the kudivaram right. Inamdars might well be asked to establish that, by transfer or succession, etc., they got the kudivaram right subsequently where it is admitted or proved that they had not got the kudivaram right at the time of the grant: 38 *Mad* 843, *Diss. from.* [P 572 C 1]

(e) **Madras Estates Land Act (1908), S. 8 —Suit for ejectment —Jurisdiction of Revenue Courts questioned — Proof of acquisition of kudivaram rights necessary.**

Per *Spencer*, *J.* — In a suit for ejectment, where plaintiffs rely on the exception to S. 8, Estates Land Act, for ousting the jurisdiction of the Revenue Courts, the plaint should specifically show by what acts the plaintiff acquired the kudivaram interest of his ryots and became entitled to both varams. [P 527 C 1]

P. Narayanamurthi and *B. Somayya* —for Appellants.

V. Ramadoss—for Respondents.

Sadasiva Aiyar, J.— The defendants are the appellants in these second appeals. The plaintiffs are agraharamdars who claim a right to eject the defendants (tenants) on the ground that they (the plaintiffs) are the owners of both the kudivaram and melvaram rights in the lands in the occupation of the defendants. Though the plaint does not definitely set out how the plaintiffs own both the varams, it is clear from para. 13 of the District Munsif's judgment that they claimed both varams as conferred upon their ancestor Dakshinamurthy Sastrulu by the gift deed, Ex. A of 1796, executed by the then zamindar, who called himself Raja Manyakya Row Bhavanarayana Rao Sir Desa Mukhi Mannevaru Sirkar Mrithujangan. I think, therefore, the only question in this case is whether the plaintiffs obtained both the varams under this grant Ex. A or the melvaram alone. If they obtained the melvaram alone, the kudivaram not being granted to them and they not having claimed the kudivaram as having belonged to them at the time of the grant, the village is prima facie an estate under S. 3 (2) (d), Estates Land Act, and the civil Court has no jurisdiction over these suits. The presumption in all cases of grants of inam is that only the melvaram was granted as such inam. I think that Courts should always start with that presumption in these cases, unless the grant deed clearly confers kudivaram rights also. In this case, the grant deed, Ex. A, itself indicates that ther were inhabitants residing in the village at the time of the grant and it excludes savaram or home-farm lands from the gift, and, though it is a grant with all the ashtabogam, it has been held in *Parankusa Zatindra Mahadesikaswami* v. *Subramania Pillai* (1) that a grant with ashtabogam does not necessarily import the grant of the kudivaram also in the same manner that it clearly does not imply the grant of temple and other communal sites.

I am, therefore, clear that the plaintiffs' case that the grant of 1796 included the kudivaram rights also cannot be supported. In coming to this conclusion, I do not rely upon Ex. 1 in respect of which the District Munsif seems to have fallen into two inaccuracies in his judgment, namely, (1) that it must have been prepared about 1786; and (2) that the reference to seri in Ex. 1 also indicated that there were already tenants occupying these lands. It appears from the Kistna Manual that the Collector, Mr. Ram, in whose time the Register, Ex. 1, was prepared became such Collector only in 1794, and it further appears that the word "seri" might have been used to describe the village in his time owing to its having been attached about the year 1800 or 1801 for recovery of arrears of Government peshcush and cowles for the inam lands were granted to the inamdars then: see Ex. N series. Also Kistna Manual, p. 320. Mr. Rama Doss then argued that even if the grant was only of the melvaram, it was not a grant of "land revenue" and therefore the inam did not fall within the definition of an estate found in S. 3, Cl. 2, sub-Cl. (d), Madras Estates Land Act, because the said subclause speaks of a "village of which the land revenue alone has been granted in inam", and not a village of which the melvaram alone has been granted in inam. This contention seems to have found favour with both the lower Courts.

If it be held that no inam village granted by a zamindar before the Permanent Settlement would come under Cl. (d) S. 3 (2), the result would be that as most of the pre-settlement inams would come under this head (very few having been granted directly by the Sovereign power under whose nominal suzerainty the zamindars held their estates), almost all such inam villages would be excluded from the purview of the Act. I am not at all prepared to accept this contention. Zamindars were supposed to have come in as only receivers of land revenue; they considered themselves to possess royal authority and the pre-settlement inams granted by them might, therefore, be well considered by the legislature as merely grants prima facie of land revenue. When the inams were afterwards confirmed or

1. (1915) 26 I C 117.

recognized by the British Government, they were so recognized and confirmed as grants of mere land revenue made by the zamindars. It is also significant that in Cl. (d) the kudivaram right is referred to in a subsequent portion of the same sentence in contradistinction to "the land revenue alone" mentioned in the first portion, showing that what the grantor was, in those days, entitled to obtain from the lands as feudal landlord, was connoted by the word "land revenue", though now it would be called "melvaram."

Next it was argued that, as the jurisdiction of the civil Courts would be ousted by treating the inam village as an estate under S. 3 (2) (d), it lay upon the defendants to prove that it was an estate. I think that the several cases quoted by Mr. Rama Doss and which are reported as *Indety China* v. *Potu Konchi* (2); *Upadrasta Venkata* v. *Devi Sitaramudu* (3), *Srimath Kidambi* v. *Pidipiti Kutumbarayadu* (4) and in *Kari Narasayya* v. *Thavala Nageswara Rao* (5) proceed only to this extent: that it lay upon the defendants in such cases to prove that the grantee was not the owner of the kudivaram at the time of the grant. I do not think that these cases afford any help to the decision of these suits as the plaintiffs do not claim that they were owners of the kudivaram interests in these lands at the time of the grant, but set up that the grant itself to them was of both kudivaram and melvaram, thus admitting that they were not the owners of the kudivaram at the time of the grant.

The next contention of Mr. Rama Doss is, that it must be presumed that he has acquired the kudivaram interest subsequent to the time of the grant somehow, and that under the exception to S. 8, Madras Estates Land Act, these lands had ceased to be part of the inam estate. It has been held in *Upadrasta Venkata* v. *Debi Sitaramudu* (3) that that exception applies only to acquisitions of kudivaram by means of transfer, succession or other modes ejusdem generis and not by means of relinquishment of his holding by the tenant. Mr. Rama Doss, however, argued that we can presume acquisition even by the former modes on the finding of the lower Courts that nobody else was allowed by the inamdars to acquire occupancy rights in these lands and that they have been claiming occupancy rights for several years past. He relied especially upon the cases of *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* (6) and *Ponnuswamy Padayachi* v. *Karuppudayan* (7). As regards the case of *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* (6) Benson and Sundara Aiyar, JJ., expressed the opinion that on the facts found in that case the agraharamdars "must be taken to have been entitled to the kudivaram at the time of the inam grant," and not that they can be presumed to have subsequently acquired it. Thus the inamdars preventing their tenants from acquiring kudivaram and claiming kudivaram in themselves for several years can be used by the lower Courts only to infer that the agraharamdars were entitled to kudivaram at the time of the grant, but (as I said already) on the pleadings in these cases, the question of the inamdars being entitled to the kudivaram at the time of the inam grant does not arise.

As regards the case of *Ponnuswamy Padayachi* v. *Karuppudayan* (7), the opinion of one alone of the learned Judges (Miller, J.) can be relied on by the plaintiffs as laying down the broad proposition that the inamdar must have the occupancy right when the tenants have no occupancy rights in themselves. I must respectfully differ from such a broad proposition. As I said, it is open to the lower Courts to infer from such a state of facts only this: that at the time of the grant the grantees had the kudivaram right. But even as regards such a presumption, speaking for myself, I would not draw such an inference from that fact alone if I was the Court of first instance, knowing how inamdars and zamindars in the northern districts have always tried to deny occupancy rights to their tenants and to prevent their tenants from claiming such rights. Inamdars might very well be asked to establish that by transfer or succession, etc., they got the kudivaram right subsequently, where it was admitted or proved that they had not got the kudivaram right at the time of the grant. In the result, I am of opinion that the village is an estate under S. 3,

2. (1910) 8 I C 365.
3. A I R 1915 Mad 727=24 I C 224=38 Mad 891.
4. A I R 1915 Mad 738=39 Mad 21=25 I C 891.
5. (1915) 31 I C 209.
6. (1913) 20 I C 217.
7. A I R 1915 Mad 705=24 I C 217=38 Mad 843.

Cl. 2 (d); and reversing the decision of the lower appellate Court, I would order the return of the plaints in all these suits for presentation to the proper Revenue Court. The plaintiffs must pay the defendants' costs throughout.

Spencer, J.—I agree. I desire only to say a few words on the last question, viz. whether agraharamdarscan be regarded as having acquired by relinquishment any kudivaram right which they had not at the time of the grant. The first question to be decided here is whether these suits are cognizable by a civil Court or by a Revenue Court. For the purpose of deciding that point, it is necessary to see whether at the time of the grant the inam was given to a person not owning the kudivaram. If the plaintiffs intended to rely on the exception to S. 8, Madras Estates Land Act, for ousting the jurisdiction of the Revenue Court, it was necessary that they should have advanced a specific case to show by what acts they acquired the kudivaram interest of their raiyats and became entitled to both varams. But it was not the plaintiffs' case in their plaints that they had a grant only of the melvaram and that they subsequently acquired the kudivaram right as regards all the lands comprised in these suits. It was their case that they got both the melvaram and the kudivaram rights under the grant. I, therefore, agree that the civil Courts had no jurisdiction to entertain these suits and the plaints must be returned for presentation to the Court having jurisdiction.

S.N. R.K. *Plaint returned.*

A. I. R. 1918 Madras 572

SESHAGIRI AIYAR AND KUMARASWAMI SASTRI, JJ.

Pandiyan Pillai—Defendant—Appellant.

v.

K. V. Vellayappa Rowther and *another*—Plaintiffs and Defts.—Respondents.

Second Appeal No. 1224 of 1916, Decided on 4th April 1917, against decree of Dist. Judge, Madura, in A. S. No. 191 of 1915.

(a) Transfer of Property Act (1882), S. 60—Provision in mortgage that in case principal is not paid within certain time property be sold and mortgagee to become absolute owner is clog on equity of redemption and must be relieved against.

A provision in a mortgage-deed that the mortgagee should enjoy the mortgaged properties for a certain period and that after that date, if the principal is not paid, the property should become absolutely his, does not convert the mortgage into a usufructuary one, nor does the sale become absolute after the stipulated period. Such a provision is a clog on the equity of redemption and must be relieved against. It is introduced not as a term of the mortgage but only as limiting the term of enjoyment in lieu of interest: *A. I. R.* 1914 *Mad* 42, *Foll.* [P 573 C 1]

(b) Adverse Possession—Mortgagee in different capacity continuing possession is sufficient.

Possession continued by a mortgagee in a different capacity will suffice to start adverse possession, although the original possession is not given up. *A. I. R.* 1915 *Mad.* 573, *Foll.* [P 573 C 1]

(c) Transfer of Property Act (1882), S. 51—Mortgagee effecting improvements under bona fide belief that he is owner is entitled to value of improvements.

Where a mortgagee effects improvements on the mortgaged property under the bona fide belief that in accordance with the terms of the mortgage-deed he has become absolute owner of the property, he is entitled to the value of the improvements effected by him under S. 51. [P 574 C 1]

(d) Civil P. C. (1908), O. 21, R. 63,—Suit to contes, order in claim proceedings places parties in status quo ante.

A decision in a regular suit instituted to contest an order made in claim proceedings places the parties in status quo ante either by vacating the order made in the said proceedings or by confirming it. [P 573 C 2]

Where a party in possession of property, whose title to the property is still inchoate, chooses to invoke the aid of the Court to protect the property from attachment, and as a result of the summary proceedings started by him the intervention of the Court is sought in a regular suit to adjudicate upon his title, he is bound by the decision given against him, and the right restored to the parties is the right which they asked the Court to give a decision upon as on the date of the attachment. [P 573 C 2]

M. D. Devadoss—for Appellant.

A. Krishnaswami Aiyar—for Respondents.

Judgment.—This is a suit for a declaration that the property in suit in liable to be attached in execution of the decree obtained by the plaintiff against defendant 2. He mortgaged the property in 1894 to defendant 1. In 1901 defendant 2 transferred the patta to defendant 1. In October 1912 the plaintiff attached the property in execution of his decree. Defendant 1 preferred a claim which was allowed. Thereupon this suit was instituted. The District Judge, differing from the Subordinate Judge, held that the property is liable to be sold in execution subject to defendant 1's mortgage. In the second appeal Mr. Devadoss's first contention was that the mortgage was an anomalous one, that the condition for converting it into an absolute sale after four years worked itself out, and that de-

fendant 1 became the absolute owner. We are unable to agree. The period of four years is fixed, not as a term of the mortgage, but only as limiting the period of enjoyment in lieu of interest. The document is not capable of being construed as a usufructuary mortgage for a term as contended for by the learned counsel. We think that it is a combination of a usufructuary and of a simple mortgage and as such is covered by the exeception mentioned in S. 98, T. P. Act. In this view the condition for converting the mortgage into a sale is a clog on the equity of redemption which should be relieved against. We hold, following *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (1), that the mortgage was not converted into an absolute conveyance, but was liable to be redeemed.

The next contention was that the mortgagee acquired a title by prescription to the property. It is true that there was a transfer of patta in January 1901. We do not agree with the learned District Judge that the fact that the mortgagee's possession was not interrupted would make any difference. We held in *Muthukaruppan Samban* v. *Muthu Samban* (2) that possession continued in a different capacity would suffice to start adverse possession, although the original possession was not given up; and we dissented from the Calcutta view to the contrary. We adhere to that view. But the further question is that, as admittedly on the date of the attachment by the plaintiff defendant 1 had not perfected his prescriptive title, whether he is entitled to say, that, on the date of the suit, he had acquired that title and that consequently the plaintiff is not entitled to any relief in the suit. An old decision of this Court, not reported in the authorized reports, namely, *Seetharami Reddi* v. *Venku Reddi* (3), supports Mr. Devadoss. On the other hand in *Krishnappa Chetty* v. *Abdul Khader Saheb* (4), it was held by a Bench of this Court that from the date of the claim to the date of the final disposal of the suit, the property is subject to lis pendens. In the present case it is not necessary to take up this extreme position. We understand that this view has recently been questioned by another Bench of this Court, *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite* (5) holds that if the title to the property was not perfected on the date of the attachment the decree-holder can get a decree for attaching it. In our opinion, the proper view to take of the proceedings is this: on the date when the title of the party in possession was still inchoate, the plaintiff chose to invoke the aid of the Court to protect the property from attachment. He got no relief in the summary proceedings. He thereupon sought the intervention of the Court to establish his title. Consequently he is bound by the decision given against him.

It is well established that a decision in a regular suit instituted to contest the order in the claim proceedings places the parties in status quo ante either by vacating the order made in the said proceedings or by confirming it The result is, the plaintiff is directed not to interpose obstacles in carrying out the further steps necessary to reap the fruits of the attachment. Both the parties are bound by that pronouncement. Consequently, no question of interruption of possession or of its continuance despite the attachment arises. This conclusion is in consonance with the view taken by the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* (6), as regards the nature of the right litigated after the order on the claim petition. In our opinion, the right restored to the parties is the right which they asked the Court to give a decision upon as on the date of the attachment. It is not necessary to say what might have been the result, in case the person in possession had not sought the aid of the Court and if execution proceedings went on without his intervention. We think the plaintiff has a right to attach the property. The last question relates to improvements. We are not determining their value. But as the decree of the District Judge says that the plaintiff should sell the property subject only to the mortgage, it is necessary to point out that the sale should be subject to the value of the improvements, if any, as well. No doubt, it is only when defendant 1 is evicted that he can claim to be paid their value; but nonetheless the decree should make it clear that the sale

1. A I R 1914 Mad 42=38 Mad 667=22 I C 54.
2. A I R 1915 Mad 573=38 Mad 1158=25 I C 772.
3. (1901) 11 M L J 344.
4. A I R 1915 Mad 495=38 Mad 535=25 I C 11.
5. (1911) 35 Bom 79=8 I C 639.
6. (1908) 35 Cal 202=35 I A 22 (P C).

is subject to the value of improvements and that defendant 1 is entitled to be paid their value before eviction.

We feel no doubt that defendant 1 was a bona fide transferee. We think that all that the Courts should require of him is proof that he made the improvements honestly believing that he was the owner of the property. See *Nanjappa Gounden* v. *Peruma Gounden* (7), *Narayana Aiyar* v. *Sankaranarayana Aiyar* (8), *Municipal Corporation of Bombay* v. *Secy of State* (9) and *Mathunsa Rowthan* v. *Apsa Bin* (10). The principle of S. 51, T. P. Act is applicable to this case. See also *Henderson* v. *Astwood* (11). Mr. Krishnaswami Aiyar, vakil for the respondents contended that as the document is incapable of conferring title as owner, there can be no question of bona fides in making improvements. If the transferee acted recklessly and in utter disregard of obvious facts, he could not be said to be acting bona fide. That was all that was laid down in *Muddusami Siddappa* v. *Bhaskara Lakshmi Narasappa* (12). In the present case, the form of the document and the conduct of the mortgagor and of the mortgagee show that defendant 1 honestly believed himself to be the owner of the property. The decree of the District Judge must be modified so as to include the declarations we have indicated. The appeal fails in other respects. Each party will bear his own costs in this Court. The order as to the costs of the lower Courts will stand.

S.N /R.K. *Appeal partly allowed.*

7. (1909) 32 Mad 530=4 I C 18.
8. A I R 1914 Mad 107=24 I C 940.
9. (1905) 29 Bom 580.
10. (1913) 36 Mad 194=12 I C 444.
11. (1894) A C 150.
12. (1915) 30 I C 853.

A. I. R. 1918 Madras 574 (1)

SADASIVA AIYAR, J.

Mantripragada Venkatarama Rao and *others*—Accused—Petitioners, In re.

Criminal Revn. No 765 of 1916, and Criminal Revn. Petn. No. 617 of 1916, Decided on 2nd February 1917, against judgment of Joint Magistrate, Bhadrachalam, in Criminal Appeal No. 6 of 1916.

Penal Code (45 of 1860), S. 447—Criminal trespass—Possession of property is essential.

In a prosecution for criminal trespass it is necessary to determine in whose possession the property was at the date of the alleged trespass. [P 574 C 2]

G. Venkataramiah and *P. Somasundaram*—for Petitioners.

E. R. Osborne—for the Crown.

Order.—It appears from the documentary evidence that accused 1 obtained a mortgage with possession from one of two undivided brothers in May 1915 (Ex. J.), accused 1 having been already a mortgagee without possession from both the brothers. The other brother gave a cowle to the complainant more than a year afterwards in June 1916 (Ex. A.)

Prima facie, the complainant was the aggressor in trying to take possession of a land which had been mortgaged with possession to accused 1 a year before the complainant's cowle. The appellate Magistrate refused to go into the question

"who was in possession of the land in the year preceding the date of offence and up to and on the date of offence: see *Veerappa Naick, In re* (1).

I set aside the decision of the appellate Magistrate and direct that the appeal be re-heard and a fresh decision pronounced after considering the question of possession; and if accused 1 is found to have been in possession prior to and up to the date of occurrences, whether more force than was legally permissible was used by the accused or any of them in maintaining that possession in the exercise of the right of self-defence against the complainant and his party. The accused will continue released on the same bail till disposal of the appeal.

S.N./R.K. *Petition allowed.*

1. (1917) 40 I C. 752.

A. I. R. 1918 Madras 574 (2)

SPENCER AND SRINIVASA AIYANGAR, JJ.

Ponnuswami Naicken—Petitioner.

v.

Nadimuthu Chetti—Opposite Party.

Civil Revn. Petn. No. 805 of 1916, Decided on 4th May 1917, from decree of Sub-Judge, Tanjore, in Small Cause Suit No. 343 of 1916.

(a) Contract Act (1872), S. 16—Hard and unconscionable bargain is not sufficient ground for relief unless attended by other circumstances.

The fact that a bargain appears to the Court hard or unconscionable, is not by itself sufficient ground for equitable relief, but there must be some disparity in the position of the parties, actual or presumed, or some circumstance, such as surprise, ignorance, distress or even poverty which prevented the parties to the transaction from meeting on equal terms. [P 575 C 2]

(b) Contract Act (1872), S. 16—Relief—Person in position to dominate another's will should not be allowed to retain undue advantage obtained.

Where one person is in a position to dominate the will of another either on account of antecedent relationship or because of the circumstances attending a particular transaction so as to prevent that other from giving an intelligent or free consent to the bargain, the person who obtains an undue advantage by using his position should not in justice be allowed to retain it. [P 575 C 2]

(c) Contract Act (1872), S. 16—Grossly extravagant rate of interest is evidence of undue influence coupled with inequality between parties.

A grossly extravagant rate of interest may itself be evidence of undue influence, and slight circumstances of inequality between the parties may be enough to bring the case under S. 16, Contract Act. [P 577 C 1]

(d) Equity—Indian Courts cannot invent new heads of equity.

Courts of justice in India however are not entitled to travel outside the provisions of the Contract Act and invent a new head of equity: *Case-law discussed*. [P 577 C 2]

(e) Contract Act (1872), S. 74—Penalty—It does not exist without another antecedent promise.

There cannot be a stipulation by way of penalty unless there is another antecedent promise. For a sum to be treated as a penalty it must be an amount to be paid in case of a breach of an antecedent promise. [P 577 C 2]

(f) Contract Act (1872), S. 74—Relief—Heavy rate of interest in itself is no stipulation by way of penalty and cannot be relieved against.

A contract to pay a heavy rate of interest is not by itself a stipulation by way of penalty and cannot be relieved against under S. 74, Contract Act: 44 *Cal*, 162 *Diss. from*; *Case law reviewed*.; [P 577 C 2]

V. Purushothama Aiyar—for Petitioner.

C. Krishnamachariar for *G. S. Ramachandra Aiyar*—for Opposite Party.

Judgment.—The defendant borrowed Rs. 30 from the plaintiff and executed a promissory note promising to pay on demand the principal with interest at one rupee per week, i. e. at about Rupees 172 per cent. per annum. In a suit on the note the Subordinate Judge reduced the rate of interest to 24 per cent, on the ground that the contract rate was extortionate. He took no evidence and does not find that the contract was procured by undue influence as defined and explained in S. 16, Contract Act. The question is whether the Judge had power to re-open the contract and reduce the rate of interest.

The argument in support of such a power is rested on two grounds. It was argued that there is a head of equity apart and distinct from "undue influence" which would enable a Court of equity in England to re-open a contract which the Court thought "hard or unconscionable" and that the British Indian Courts which are also Courts of equity can exercise the same jurisdiction apart from and outside the provisions of the Contract Act. This argument appears to proceed on a misapprehension of the English doctrine as to harsh and unconscionable bargains and is further opposed to authority. As we understand the law, the fact that a bargain appears to the Court hard or unconscionable is not by itself sufficient ground for equitable relief, but there must be some disparity in the position of the parties, actual or presumed, or some circumstance, such as surprise ignorance, distress or even poverty, which prevented the parties to the transaction from meeting on equal terms. A theory of constructive fraud was developed which included cases of undue influence strictly so called of which *Huguenin* v. *Baseley* (1) was the type, and cases of unconscionable bargains, of which *Chesterfield (Earld of)* v. *Janssen* (2) was the type. Both these classes were based on the common principle that where one person is in a position to dominate the will of another either on account of antecedent relationship or because of the circumstances attending a particular transaction so as to prevent that other from giving an intelligent or free consent to the bargain, the person who obtained an undue advantage by using his position should not in justice be allowed to retain it. What those circumstances were the Courts declined to define. To the substantive doctrine, there were added certain rules of evidence or presumptions which in some cases subsequently crystallised into rigid rules of law, as in the case of sales of reversions and certain other dealings with expectant heirs necessitating the interference of the legislature. The Indian legislature has included all these matters in a comprehensive definition or explanation under the head of undue influence, in S. 16, Contract Act.

The section as originally enacted was found inadequate to meet all cases and

1. (1807) 14 Ves. Jun. 273.
2. (1750) 2 Ves. Sen 125.

has therefore been amended and re enacted in 1899. Cl. 3, S. 16 is in substantial accord with the English Equity doctrine as to unconscionable bargains, though in its application the different circumstances of this country will have to be taken into account, for instance as the English Courts invented the class "expectant heirs" we have developed the class of pardanashin women. At the same time inasmuch as Courts of equity in England, and following them the Courts here, did not,in this class of cases, wholly set aside the transaction, but gave relief only on terms, a new S. 19 (a) was added to give effect to this rule. In *Dhanipal Das* v. *Maneshar Bakhsh Singh* (3) Lord Davey said:

"Apart from a recent Statute (Money-lenders Act) an English Court of equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud . . . In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case."

The same case is also authority for the position that we are not entitled to travel outside the provisions of the Contract Act, and invent a new head of equity; and the same principle has been acted upon in several recent cases in this Court: *Annapurni Nachiar* v. *Swaminathan Chetty* (4) and *Kesavulu Naidu* v. *Arithulai Ammal* (5). The decisions of the Judicial Committee in *Kamini Sundari Chaodrani* v. *Kali Prossunno Ghose* (6) and *Raja Mohkam Singh* v. *Raja Rup Singh* (7),which were strongly relied on by the respondents, are not authorities to the contrary. The first of these cases falls within Cl. 3, S. 16. Though that clause had not been enacted when the decision was passed it must be remembered that the rule embodied in it has always been acted upon as a rule of evidence and the burden of proof laid on the party supporting the transaction. Their Lordships carefully point out the circumstances which showed that the parties were not meeting on equal terms. It was the case of a pardanashin and her mukhtar, and their Lordships cited the decision of the Master of the Rolls in *Beynon* v. *Cook* (8) as correctly laying down the law. The transaction in *Beynon* v. *Cook* (8) was with a person who came under the class of "expectant heirs." The Master of the Rolls in the opening sentences of his judgment determines first that the party seeking relief came within that class and then considers whether the bargain was unconscionable. Their Lordships no doubt say in a previous portion of the judgment that the finding of the lower Court against fraud and undue influence must be accepted; that apparently means that there was no proof of actual imposition in the case. In *Raja Mohkam Singh* v. *Raja Rup Singh* (7) the transaction was with a person in a position analogous to that of an expectant heir. Even in cases of specific performance the mere fact that the bargain was harsh or onerous is no defence: see *G. W. Davis* v. *Maung Shwe Go* (9). It may also be pointed out that the words "harsh and unconscionable bargain" are oftentimes used so as to include the element of inequality in the position of the parties. We are therefore unable to accept the argument.

It was then contended that the contract to pay a heavy rate of interest is by itself a stipulation by way of "penalty" and should be relieved against under S. 74, Contract Act. Though the distinction between "penalty" and "liquidated damages" was abolished by the Contract Act, and however wide the powers of a Court may be to relieve against all stipulations which it considers penal irrespective of the language of the contract, it is quite clear that there cannot be a stipulation by way of penalty unless there is another antecedent promise; for the section says that for the sum named to be treated as a penalty, it must be an amount to be paid in case of a breach of the contract, i. e. breach of an antecedent promise; a promise for consideration is a contract. "Any other stipulation by way of penalty" similarly means a provision intended to secure the performance of the main contract. As stated in Bouvier's Law Dictionary "a penalty always includes two distinct engagements." If Courts have power to relieve parties from their main contracts

3. (1906) 28 All 570=33 I A 118 (P. C.).
4. (1911) 34 Mad 7=6 I C 439.
5. A I R 1914 Mad 131=36 Mad 533.
6. (1896) 12 Cal 225=12 I A 215 (P C).
7. (1893) 15 All 352=10 I A 127 (P C).
8. (1875) 10 Ch. Ap. 389.
9. (1911) 38 Cal 805=11 I C 801=38 I A 155 (P C).

as stipulations in the nature of penalty whenever they think the bargain was harsh or unconscionable there would in many cases be no need for any investigation as to whether undue influence was exercised or fraud practised in the obtaining of the contract. Several cases were cited by the respondent, but there is no case in this Court which in any way lends support to his argument; on the other hand in *Annamalai Chetty* v. *Veerabadram Chetty* (10) and in *Venkataramiah Pillai* v. *Subramania Pillai* (11) decided very recently (both of them cases of loans), the distinction between the primary obligation to repay the loan with interest as agreed to and a penalty stipulated to be paid on its breach was kept up.

The learned Judges, while relieving against the penalty, felt themselves bound to give some compensation for the breach of the contract beyond enforcing it. In *Suryadevara Seetaramayya* v. *Suryadevara Kotayya* (12), Ayling, J., clearly explained the difference between the primary obligation and the subsidiary proviso intended to secure the due performance of the primary obligation or to fix the compensation payable on its breach. The other learned Judge, Abdur Rahim, J., though he differed from him on another point not material now, did not express any dissent on this question; on the other hand he was a party to the decision in *Venkataramiah Pillai* v. *Subramania Pillai* (11) already referred to. Neither the decision of the Full Bench of this Court in *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (13) nor the judgment of Sadasiva Aiyar, J., in the order of reference lends any support to the respondent; on the other hand the definition of "penalty" given by Sadasiva Aiyar, J., at p. 238 of the report is against the contention. Though references to the Moneylenders Act and to the decisions of the House of Lords, especially *Samuel* v. *Newbold* (14), decided on the statute are made, it is nowhere stated that the Indian Courts have, under S. 74, Contract Act, the powers conferred on the English Court by the Moneylenders Act. There are however some cases recently decided by the Calcutta High Court which appear to lend support to the argument of the respondent. The first of these cases is *Bouang Raja Challaphroo Chowdhury* v. *Bangaw Behary Sen* (15), in which a person borrowed Rs. 400 and agreed to pay it with interest at 4 per cent per mensem with six-monthly rests.

When the suit was brought nearly sixteen years after, the amount due under the bond came to over Rs. 3,75,000, though the plaintiff claimed only Rs. 3,000 as there was no means of recovering the balance. The learned Judges re-opened the contract and reduced the rate of interest. No particular section of the Contract Act is referred to and it may be that they set aside the contract as being induced by undue influence within the meaning of S. 16, for, as pointed out in *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (13), a grossly extravagant rate of interest may itself be evidence of undue influence and slight circumstances of inequality between the parties may be enough to bring the case under S. 16 of the Act. It must however be conceded that Mookerjee, J., who delivered the judgment of the Court, referred to the rate of interest as penal and cited cases where relief was given on the ground of undue influence and also cases in which relief was given on the ground of penalty. The same remarks apply to *Gopeswar Saha* v. *Jadab Chandra* (16). In the latest case in that Court, *Krishna Charan Barman* v. *Sanat Kumar Das* (17), the learned Chief Justice of Bengal and Mookerjee, J., expressly lay down that a primary stipulation to pay interest may be a penalty, and that learned Judge, Mookerjee, J., states that the previous decisions above referred to were also decided on the ground that the stipulations for interest were in the nature of penalty. With all respect to the learned Judges we are unable to accept the position as sound. It must be remembered that S. 74 does not deal exclusively or primarily with moneylending contracts.

If this decision is sound, Courts would have power as already said to relieve a person from the performance of his contract, whenever the Court thinks the contract harsh in the circumstances of the

10. (1903) 26 Mad 111.
11. (1917) 37 I C 799.
12. (1916) 35 I C 111.
13. (1913) 36 Mad 229=18 I C 417.
14. (1906) A C 461.
15. (1915) 31 I C 394.
16. (1916) 43 Cal 632=32 I C 537.
17. (1917) 44 Cal 162=34 I C 609.

case. No authority is cited, except the two cases already referred to in support of such a proposition. Even the Money-lenders Act in England does not appear to give the English Courts such a power in money-lending contracts and we know of no authority which supports such a definition of penalty as regards other species of contracts. Mr. Krishnamachariar argued that in a contract of loan, the promise to pay interest must be deemed to be compensation for breach of the promise to repay the principal and an excessive rate of interest must therefore be viewed as a penalty, and contended that the Calcutta decision was based on the same principle. This argument ignores the distinction between compensation for the loan and compensation for breach of the promise to re-pay the amount of the loan with interest. The loan made by the lender is the consideration for the promise of the borrower to repay the amount of loan with the addition of another sum as interest for allowing the debtor to have the use of the money, i e., compensation for the money lent; but the interest is not compensation for the breach of the promise; for the promise is to pay the principal and interest.

If the promise is to pay a certain sum on a particular day and in default of payment on that day to pay interest, then the agreement to pay interest may be a stipulation by way of penalty; that was the decision of the Full Bench of this Court in *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (13). This last decision of the Calcutta High Court appears to us to be not only contrary to the decisions of this Court, but would also appear to be contrary to the observation of Lord Davey already referred to. It was then argued that as the promissory note in this case was payable on demand, the contract was broken immediately the note was made and the interest claimed may be treated as penalty for non-performance of the contract. This is ingenious but unsound; for the contract or promise is to pay the principal with interest at a specified rate so long as the loan is not re-paid, and it would be introducing a fiction contrary to fact to split this single promise into two separate engagements. We think that the Subordinate Judge was wrong in giving relief merely on the ground that the interest appears excessive. We have however read that statement filed by the defendant and it is possible to read it as raising a plea of undue influence and it may be that no evidence was let in to prove those allegations, because the learned Judge in the Court below was prepared to give relief without such proof.

We therefore reverse his decree and remand the suit for a fresh trial. Costs to abide and follow the result.

S.N./R K. *Appeal allowed.*

** A. I. R. 1918 Madras 578

WALLIS, C. J., BAKEWELL AND KUMARASWAMI SASTRI, JJ.

Manjeshwara Krishnaya—Defendant—Appellant.

v.

Vasudeva Mallaya and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 283 of 1916, Decided on 21st September 1917, against judgment of Phillips, J., in Second Appeal No. 1736 of 1914, reported in *A.I.R.* 1918 *Mad.* 564.

****(a) Transfer of Property Act (4 of 1882), S. 52—Doctrine applies only between parties ranged on opposite side and between whom issue is to be decided — "Any other party" means not parties ranged on same side but on opposite sides.**

The doctrine of lis pendens contained in S. 52, T. P. Act, is applicable only as between opponents with regard to alienations made by any one of them during suit, and it cannot be extended to parties to the suit who are ranged on the same side and between whom there is no issue for adjudication. The section does not bar a transferee from one of the parties pending suit from raising an issue which his transferor and transferees from his transferor after decree are at liberty to raise. [P 579 C 2]

The expression "any other party" in the section means any other party who can be said to be arrayed on the opposite side to the party alienating owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit, which may thus be regarded as a contentions suit between them in which each of them requires the protection of the doctrine against alienation by the other. [P 579 C 2]

***(b) Transfer of Property Act (4 of 1882), S. 52—Doctrine is extension of res judicata and makes decisions binding on transferees from parties.**

The doctrine of lis pendens is an extension of the doctrine of res judicata and makes the adjudication in the suit binding on alienees from the parties pending the suit, just as the law of res judicata makes the adjudication binding on parties to the suit and on alienees from them after decree. [P 580 C 1]

***(c) Transfer of Property Act (1882), S. 52—S. 52 applies to auction sales well as.**

The doctrine of lis pendens applies to purchases at auction sales in execution of decrees against

parties to the suit as well as to private alienations by the parties. [P 579 C 1]

B. Sitarama Rao—for Appellant.

A. Narasimhachari for *V. V. Srinivasa Aiyangar*—for Respondents.

Wallis, C. J.—Manguntha Bhandari filed a suit, Original Suit No. 114 of 1898, for a declaration that the sale deed of the suit properties which he hed executed in favour of defendant 1 in that suit and this was not binding on him, and for a further declaration that the mortgage for Rs. 2,000 executed by defendant 1 in favour of defendant 3 in that suit, the father of the present plaintiffs, was not valid and binding on him. The real question was the validity of the sale under Ex. D as, if that was upheld, the plaintiff had no concern with the subsequent mortgage by the vendee, defendant 1, to defendant 3, the father of the present plaintiffs. Defendants 1 and 3 in that suit made common cause and succeeded in upholding the validity of the sale under Ex. D, subject to the plaintiff's lien for unpaid purchase-money. Defendant 1 in his written statement admitted his mortgage to defendant 3, and as there was no contest about the mortgage, what the High Court apparently decided was that the plaintiff was entitled to a charge on the property for his unpaid purchase-money in priority to defendant 3's mortgage. While this suit, Original Suit No. 114 of 1898, was pending, the present defendant 2, by Ex. H dated 18th December 1899, acquired defendant 1's interest in the suit properties at a sale in execution. It is well settled that the doctrine of lis pendens applies to purchases at auction sales in execution of decrees against parties to the suit as well as to private alienation by the parties, and the question before us is whether defendant 2's purchase from defendant 1 pending the suit was subject to the result of the suit and whether the result of the suit was to preclude the present defendant 2 as alienee from defendant 1 from disputing the validity of the mortgage executed by defendant 1 to defendant 3, the father of the present plaintiffs, in the present suit which they have brought to enforce it. That again raises the question whether the alienation by defendant 1 to defendant 2 pending suit is affected by the doctrine of lis pendens as embodied in S. 52, T. P. Act. As there was absolutely no contest on the point between defendants 1 and 3 in that suit, it seems clear that the present case is not within the English doctrine as to lis pendens which is intended to protect the parties to litigation against alienations by their opponents pending suit. This is clearly explained by Lord Cranworth in *Bellami Sabine* (1), where he observes, that lis pendens affects a purchaser,

"not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

Later on he observes:

"pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent,"

and in *Faiyaz Husain Khan* v. *Prag Narain* (2) Lord Macnaghten, delivering the judgment of the Judicial Committee in a case governed by S. 52, T. P. Act, referred to this as the "correct mode of stating the doctrine." If then the English doctrine and the principle on which it rests is only applicable as between opponents with regard to alienations made by any one of them durins suit, does the language of S. 52, T. P. Act compel us to apply the doctrine as between parties to the suit who were ranged on the same side and between whom there was no issue for adjudication? The section provides that

"during the active prosecution of a contentious suit or proceeding in which any right to immovable propery is directly and specifically in question, the property cannot be transferred by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein."

It is not, I think, putting an unduly restrictive construction on the section to say that "any other party" whose rights are not to be affected means any other party who can be said to be arrayed on the opposite side to the party alienating owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit, which may thus be regarded as a contentious suit between them in which each of them requires the protection of the doctrine against alienations by the other. In other words, "any other party" in this section means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation. To hold otherwise would have strange and incongruous results

1. (1857) 1 De G & J 566.
2. (1907) 29 All 339=34 I A 102=10 O C 314

which cannot have been contemplated by the legislature. The law of lis pendens is an extension of the law of res judicata and makes the adjudication in the suit binding on alienees from the parties pending suit, just as the law of res judicata makes the adjudication binding on the parties to the suit and on alienees from them after decree. Now it is well settled that the bar of res judicata does not arise between defendants in a suit unless there is an active contest between them. Consequently the issue as to the validity of of the mortgage would not be res judicata as between the present plaintiffs, the representatives of defendant 3 in the former suit, and defendant 1 in that suit and this, or between them and defendant 2 if the alienation by defendant 1 to defendant 2 had been made after the decree instead of during the pendency of the suit. It would be indeed incongruous if the effect of S. 52 were to bar a transferee from one of the parties pending suit from raising an issue which his transferor and transferees from his transferor after decree are at liberty to raise. In these circumstances I think we are justified in placing a restrictive construction on the language of S. 52 so as to avoid this incongruity and to bring the section into line with the English law, more especially as the observations of Lord Macnaghten already referred to seem to support this interpretation. This is the construction put on the section by Oldfield, J., with whom I agree.

This is sufficient to dispose of the appeal but, as some reliance has been placed on the fact that the decree of the High Court in Second Appeal No. 323 of 1902, on appeal from the decree of the District Judge in Appeal Suit No. 299 of 1920 affirming the decree of the District Munsif in Original Suit No. 114 of 1898, contains a declaration of the validity of the mortgage Ex. 1 by the defendant to defendant 3 subject to the plaintiff's claim for Rs. 1,000 for unpaid purchase-money which it is said amounts to an adjudication on the question, I may state that this declaration is not, in my opinion an adjudication by defendants 1 and 3 in that suit. In their judgment, Ex. E, the High Court expressly directed the decree of the lower Court to be modified by the insertion of this declaration, "as between the plaintiff and defendant 3," and accepted the findings of the lower Court, one of which was that the mortgage by defendant 1 to defendant 3 was fraudulent and without consideration (para. 5). It is not easy to reconcile their acceptance of this finding with the declaration they granted of the validity of the mortgage as between the plaintiff and defendant 3. But as already pointed out in the result of the suit the plaintiff was not concerned with the validity of the mortgage seeing that it was postponed to his claim for unpaid purchase money and that he had failed to set aside his sale to defendant 1; and probably all that was meant was that the mortgage, which defendant 1, the mcrtgagor, did not dispute, was to be subject to the plaintiff's lien for Rs. 1,000 for unpaid purchase-money. In the result I agree with Oldfield, J., and would allow the Letters Patent appeal with costs and make tho order proposed by him.

Bakewell, J.—I agree.

Kumaraswami Sastri, J.—I agree.

S.N./R K. *Appeal allowed.*

** A. I R. 1918 Madras 580

Full Bench

WALLIS, C. J., OLDFIELD AND KUMARASWAMI SASTRI, JJ.

Peirce Leslie & Co , Ltd. Cochin—Appellants.

v.

E. J. Perumal—Respondent.

Appeal No. 343 of 1915, Decided on 3rd May 1917, against order of Sub-Judge, Cochin, in Misc. Petition No. 251 of 1915, D/- 20th August 1915.

**** (a) Civil P. C. (1908), S. 39—British Indian Court cannot tranafer its decree for execution to Native State Court but should send necessary documents to enable that Court to execute decree.**

Courts in British India have no power under the Civil Procedure Code to send their decrees for execution to Courts in Native States, but they may and should send to these Courts the documents required by the latter to enable them to execute these decrees under the powers conferred upon them by the legislative authority in their respective States. [P584 C 1]

**** (b) Limitation Act (1908), Art. 182—Application to foreign Court to execute British Court decree is no application "in accordance with law."**

An application to a foreign Court to execute the decree of a Britsh Court under powers conferred upon it by the legislative authority of its own State is not an application "in accordance with law to the proper Court for execution" within the meaning of Art. 182, Lim.Act, so as to create a fresh starting point for the execution of the decree by the executing Court in British India. [P 584 C 1, 2]

*** (c) Limitation Act (1908), Art. 182 (5)—Step-in-aid—Application to British Court to take step-in-aid of execution by foreign Court of decree of British Court is no application within Art. 182 (5).**

Similarly an application to a British Court to take a step-in-aid of the execution by a foreign Court of a decree of a Court in British India is not an application to take some step-in-aid of the execution of the decree within the meaning of Art. 182 (5). [P584 C 2]

*** (d) Limitation Act (1908), Art. 182 (6)—Notice to judgment-debtor to show cause why decree should not be transmitted to Native State for execution not being contemplated by Civil P. C. does not fall under Art. 182 (6).**

A notice to a judgment-debtor to show cause why the decree should not be transmitted to a Court in a Native State for execution is not a notice contemplated by the Civil Procedure Code, and does not, therefore, fall within the scope of Art. 182 (6), Lim. Act. [P 584 C 2]

D. Chamier with *King* and *Partridge*—for Appellants.

M. D. Devadas and *K. U. Luke*—for Respondent.

Order of Reference

Oldfield, J.—I do not dissent from the considerations based on the provisions of the Code, which my learned brother specifies in the Order of Reference he is about to deliver. But I wish to state clearly why I think that the decision in the recent case, *Chidambaram Chetty* v. *Ramanathan Chetty* (1), to which he refers, is not conclusive in this. That decision relates to the transmission of a decree for execution in the Native State of Pudukotah; and it does not appear to have been suggested that any such provision has been made by the Sovereign Authority of that State for execution of British decrees as is shown in the case before us to have been made by the Sovereign Authority of Travancore, the State with which we are concerned. This seems to me of considerable importance, because, reciprocity established, an important step will have been taken towards establishing that the Government of British India has committed itself of adoption of both the methods, by which foreign judgments can receive effect, not only to the procedure by suit on them, but also to direct execution of them: vide Bar: Private International Law, Edn. 2, p. 943; Westlake: Private International Law, Edn. 5, p. 397. The fact that only the first of these methods of enforcing foreign judgments is recognised in England cannot be conclusive, when the conditions in India are essentially different.

And it is, as my learned brother points out, a strong reason for the contrary view that the Government of Inia has entered into agreements with Travancore and other States, which would be one-sided, if our own Courts could not take the action necessary to secure the benefit of them by transmitting decrees. It is of course a question whether such transmission is authorized by the wording of the Code or must be based on the Courts' inherent powers. In any case the application of the latter would, in my opinion, involve no unduly liberal construction of them. I add that the cases dealt with in the judgment above referred to do not deal with transmission to a State, with which arrangements of the kind now in question have been made.

Bakewell, J.—Two questions have been argued in this case, first, whether the Courts in British India have power to send their decrees to the Courts of the State of Travancore for execution, and secondly, if they have this power, whether proceedings thereunder fall within Art. 182, Lim. Act, so as to give a fresh period of limitation for further proceedings in execution. There is a difference of opinion amongst jurists as to the principle upon which the Courts of one State recognize and enforce the decrees of another: see Piggott's Foreign Judgments and Jurisdiction, Part 1, Ch. 2, but in India it can scarcely be doubted that it is the comity which should exist between the Courts of States united under the same suzerain Under statutory authority this comity has been recognised by the Governments of India and Travancore for a long time: see Notification of the Government of India of 10th December 1885, and Notification of the Maharajah of Travancore of 1st July 1886, set out in the orders of the Madras Government of 30th December 1885, and 29th March 1887. The procedure adopted to enforce the foreign decree in both States is simpler than that prescribed in England and other European States: see Piggott, Part 1, pp. 8, 9, and consists in one Court transmitting a copy of its records to the other and thereupon the latter Court proceeds as if the decree had been passed by itself.

An application must, of course, be made by the creditor to the former Court,

1. (1917) 41 I C 41.

which must be satisfied that its decree is subsisting and is executable in the latter, but otherwise the Court exercises no judicial functions but only performs the ministerial acts of preparing and transmitting the copy of its record. It has been argued that though provision has been made for the enforcement of the decrees of Native States in British India (Civil P.C., S 44), no authority has been given by the Indian Legislature to its own Courts to entertain such an application or perform these acts, and since the hearing of this case this view has been adopted by two learned Judges of this Court. With all respect I am of opinion that when the legislature and the Government have recognised the existence of this comity, it is the duty of the Courts to take the necessary steps to carry it into effect and for this purpose to follow the procedure which has been prescribed as regards other Courts. I have arrived at the same conclusion from an examination of the provisions of the Code of Civil Procedure, 1908. The Code does not define the word "Court" but only the expression "foreign Court" [S. 2 (5)], and S. 39 enacts generally that a Court may send its decree for execution to another Court.

The Rules of Practice annexed to the Code do not provide any special form of application for transmission of a decree, but merely prescribe the records to be sent (O. 21, R. 6); rules framed by this Court, however direct that applications shall be in the same form as an ordinary application for execution and that notice to the debtor shall be given in similar circumstances (C. R. P., R. 161). I do not think that there is any ground for limiting the expression "another Court," in S. 39 to a Court situate in British India, and construe it as meaning "a Court in which the decree is executably." I may point out that a Court could not refuse to supply a party with a properly authenticated copy of its decree for the purpose of filing a suit thereon in the Court of another State when that is the procedure adopted in that Court for the enforcement of foreign decrees, and that the transmission of such a copy by the Court itself cannot be said to involve the exercise of jurisdiction. With regard to the second question para. 5, Art. 182, Lim. Act, 1908, speaks generally of applications "to take some step-in-aid of execution," and I think that it is not limited to execution in the Court to which the application is made but includes execution in a Court authorised to execute the decree. Having regard to the difference of opinion already mentioned we refer the two questions set out above to a Full Bench for decision.

This appeal coming on for hearing on 19th and 20th April, 1917, in pursuance of the above order of reference upon perusing the petition of appeal and the said order of reference and upon hearing the arguments of counsel on both sides, and the case having stood over for consideration till this day, the Court expressed the following

Opinion.

Wallis, C. J.—This reference raises questions of novelty and importance as to the execution by the Courts of Native States of decrees passed by Courts in British India. The further investigation which the subject has now received has confirmed me in the opinion expressed in the recent case in *Chidambaram Chetty* v, *Ramanathan Chetty* (1), in accordance with the decisions of the Bombay and Calcutta Courts in *Kasturchand Gujar* v. *Parsha Mahar* (2) and *Ratan Mahanti* v. *Khatoo Sahoo* (3), that S. 42 and the following sections of the Civil Procedure Code do not authorize us to send or transfer our decrees for execution to the Courts of Native State, but has also satisfied me that this consideration by no means disposes of the question. Those sections have a twofold effect. In the first place they empower the Court to which a decree is sent for execution to execute it when the Court to which it is sent is subject to the authority of the Indian legislature, an effect they cannot have as regards a Court in a Native State which is not subject to this legislative authority. In the second place, they have the effect of depriving the Court sending the decree of authority to execute it itself and of making the Court to which the decree is sent the executing Court to all intents and purposes. They in fact effect a transfer of the decree for purposes of execution: *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (4) and *Chutterput Singh* v. *Sait Sumari Mal* (5).

2. (1888) 12 Bom 230.
3. (1902) 29 Cal 400.
4. (1916) 39 Mad 640=36 I C 682 (P C).
5. (1916) 43 Cal 903=36 I C 602.

Where the Courts of Native States have been empowered by the legislative authority to which they are subject to execute the decrees of British Courts, there is nothing to prevent the Indian legislature from providing that the decrees of British Courts may be sent to them for execution and that such sending should have the same effect as if the decrees had been sent for execution to Courts in British India. This is exactly what the Indian legislature has done as regards certain Courts in Natives States by Act 7 of 1888, whereby it inserted in the Code of 1882 a new S. 229A, now S. 45, of the present Code. With regard to Courts which have been established or continued in Native States by the authority of the Governor-General in Council (in the exercise of foreign jurisdiction) and to which S. 45 has been declared to apply by notification issued by the same authority, that section provides that so much of the foregoing Ss. 38 to 44 as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send decrees for execution to such Courts. Its effect is to authorize our Courts to transfer their decree for execu- to those Courts, when the legislative authority to which they are subject, the Governor-General in Council, has empowered them to execute them. It is important to observe that neither in 1888 nor when the present Code was enacted was any such provision introduced as regards other Courts in Native States, and the inference seems irresistible that Courts in British India are not authorized to send or transfer their decrees for execution to Courts in Native States in the same way as to Courts to which they are authorized to send them by the Code.

The omission is the more remarkable with regard to Courts in Native States not established or continued by the authority of the Governor-General in Council, because S. 44 provides for the issue of notifications declaring that the decrees of that these very Courts may be executed in British India as if they had been passed by the Courts of British India. Such a notification was issued with regard to the Travancore Courts and also the Cochin Courts in 1887 as part of a reciprocal arrangement by which those Courts were to execute the decrees of our Courts, and a Government Order, dated 29th March 1887, No. 671 (Judicial), directed the regulations made by the Travancore and Cochin Governments to be communicated to this Court and to be published in the Fort St. George Gazette. Similar notifications have been issued with regard to the Courts of numerous other Native States based on similar undertakings as to execution of our decrees in their Courts; and a Notification No. 2053 II B., dated 22nd September 1911, and printed in British Enactments in force in Native States, Volume 6, p. 158 notifies for general information the Native states which have consented that the decrees passed by civil Courts in British India may be executed in their territories by the Court therein mentioned. It also appears that the decrees of our Courts have been executed by the Travancore Courts and the Courts of other Native States for many years, and it wouid be very unfortunate if we were obliged to hold that there was any legal impediment in the way of the satisfactory working of the system. There is no such necessity. It is I think clear from an examination of the provisions of the Code of Civil Procedure to which I have referred that the policy of the Indian Legislature has been to leave such decrees to be executed in the Courts of Native States pursuant to the legislative authority of such States, but not to provide, as they have in S. 45 as regards certain other Courts in Native States, for the transfer to them of the decrees of our Courts for execution, so as to make them the executing Court as regards such decrees for all purposes with authority to decide all questions arising in the course of execution. The Indian Legislature has so far refrained from making provision for the transfer of these important powers with regard to the decrees of Courts in British India to Courts in Native States other than those specified in S. 45 of the Code.

Coming now to the powers conferred on the Travancore Courts and other Courts in Native States by their own legislative authorities to execute the decrees of Courts in British India, such execution might be authorized upon production by the decree-holder of a certified copy of the decree and an affidavit of non-satisfaction without any communication with the Court in British India which passed the decree. This would appear

to be the system at home under the Judgments Extension Acts of 1868 and 1882. Where the procedure is for the decree-holder to get a certificate of the judgment from the officer of the Court which passed it and to register that certificate in the other Court, upon which it becomes executable there is a decree. The regulations made by the Travancore State, and set out in the Government Order already referred to, provide for the execution of the decree upon receipt of a copy of the decree, a certificate of non-satisfaction, and a copy of any orders for execution, or a certificate that no such order has been made, and appear to contemplate that those documents should be received from the British Court direct. If this be so I can see no reason why a British Court should not act in aid of the Travancore Court and furnish them as matter of comity, and I think it its duty to furnish them and that it has inherent powers to do so. But an order that these documents should be sent to the Travancore Court is not an order sending the decree for execution to the Travancore Court, and should no longer be described, as in the petition in the present case, as a transfer of the decree to the Travancore Court for execution. My answer to the first question in the reference is that Courts in British India have no power to send the decrees for execution to the Travancore Courts, but may and should send to those Courts the documents they require to enable them to execute these decrees under the powers conferred upon them by the legislative authority in Travancore.

On this view the word "proceeding thereunder" in the second part of the reference must be read as referring to an application to one of our Courts to send the Travancore Court the documents required by it to enable it to execute our decree under the authority of the Travancore legislature; and the question then is whether such an application affords a fresh starting point as regards execution of the decree by our own Courts under Art. 182, Lim. Act. First with regard to Cl. 5, in Col. 3, an application to the Travancore Court to execute the decree of a British Court under powers conferred upon it by the legislative authority in Travancore would not, in my opinion, be an application " in accordance with law to the proper Court for execution " within the meaning of the article so as to create a fresh starting point for the execution of the decree by the Executing Court in British India. The proper Court in my opinion, for such an application is the Executing Court under the law of British India which, as already shown, is not the Travancore Court. The Limitation Act extends only to British India and has no operation proprio vigore in Travancore. It prescribes periods of limitation as to the filing of suits and the execution of decrees in British India, and when it makes an application in accordance with law to a proper Court a fresh starting point, it must be taken to mean an application in accordance with the provisions of the law in British India to be found in the Code of Civil Procedure to wich the article refers or elsewhere. It cannot have been the intention of the legislature to make an application for execution to a Court in a Foreign State, under the law of that State and governed by the law of limitation there in force a fresh starting point under our Limitation Act for the execution of our own decrees in our own Courts. If this be so, I am equally of opinion that an application to a British Court to take a step-in-aid of the execution by a Travancore Court of the decree of a Court in British India would not be an application to take some step-in-aid of the execution of the decree within the meaning of Cl. 5 of the Article. Treating the application to the Court in this case as an application to send the necessary documents to the Travancore Court, I think it did not make a fresh starting point under the Article.

With regard to Cl. 6, notice to show cause why the decree should not be executed was, no doubt, issued in the present case by the Court in British India prior to the so-called transmission of the decree to the Travancore Court. That however was not in my opinion a notice required by the Code of Civil Procedure, 1908, so as to bring the case within the Article. In the first place, the Civil Procedure Code only extends to British India and does not require any notice to be sent as a preliminary to the execution of a decree by a Court in Travancore. Secondly, it has recently been held by a Full Bench of the Calcutta Court in *Chutterput Singh* v. *Sait Sumari Mal* (5), that

where the tranfer of the decree for execution is authorized by the Code, the Code requires the notice to be sent by the Court to which the decree has been transferred for execution. My answer to the second question is in the negative.

Oldfield, J, — I respectfully agree with the conclusion that our Courts are entitled, in the exercise of the inherent powers recognized in S 151, Civil P. C., to send the requisite documents to Courts in Foreign States, with which the necessary arrangements have been made, and therefore to entertain applications asking them to do so. But as the powers invoked are inherent, it follows that they cannot be identified with any specifically conferred by the Code to do what it authorizes or to produce any result, for which it provides. There can therefore, be no question of the issue of any notice being required by the Code in connexion with their exercise or of such issue as the starting point for a fresh period of limitation under Art. 182 (6), Sch. 1, Lim Act ; and this is not affected by the act that the Court executing the decree may properly exercise its discretion with regard to the issue of notice to the judgment-debtor before deciding to use the powers in question.

The remaining contention is that the decree-holder's application for the sending of the necessary documents to the foreign Court affords a fresh starting point for limitation under Art. 182 (5), because it is for the taking of a step-in-aid of execution. It may be conceded that the application is, as the article requires, made in accordance with law to the proper Court. But as was decided in *Bhagwan Jethiram* v. *Dhondi* (6) the execution, which is contemplated, must also be in accordance with law ; and I do not think that this requirement is satisfied by the fact, relied on before us, that it will be in accordance with the foreign law administered by the Court, where proceedings are to be taken. The point is not, so far as we have been shown, covered by direct authority. But a ground of decision can be found in the principle that " the law of limitation is a law relating to procedure having reference only to the lex fori " and that " no Court is obliged to depart from its own notions of judicial order from mere comity to any foreign nation :" *Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund* (7) and Story's Conflict of Laws, 576-580. It is the British Court, which has to decide whether the conditions postulated by the article are fulfilled and on this principle it will do so in accordance with its own law and without reference to other Codes which may include provisions regarding the executability and methods of execution of decrees different from those in our own. It may be argued that the existence of such provisions in the foreign Code in question does not entail that they will in fact be employed or that any execution will take place, which the British Court could not approve and adopt. But that is beside the point, which is that the validity of a step-in-aid need not be tested when or if any execution has taken place, but must be determinable, whether any takes place or not, with reference to the legality of the execution which the step taken is contemplated as aiding. In the case of transmission by one British Court to another that legality could not be doubtful since the recipient Court could execute only in accordance with British Law. It will be otherwise when (as in the present case) the recipient Court is foreign and it is uncertain whether its proceedings in execution will conform to that law, the only one which our Courts dealing with the question of limitation can consider. In the absence of grounds for any presumption that the foreign Court's proceedings in execution will be in accordance with the law applicable, an application to take a step-in-aid of them will not be one contemplated in Art. 182 (5).

For these reasons I would respectfully concur in the answers to the questions referred, which his Lordship the Chief Justice proposes.

Kumaraswami Sastri, J.—I have had the advantage of reading the judgment of the Chief Justice and Oldfield, J., who agrees with the conclusion arrived at by my Lord. I entirely agree with the judgments and as they deal fully with all the points raised, I have nothing useful to add.

S.N./R.K. *Answer accordingly.*

6. (1898) 22 Bom 83.

7. (1851-54) 5 M I A 234 (P C).

A. I. R. 1918 Madras 586

ABDUR RAHIM AND NAPIER, JJ.

S. Swaminatha Iyer — Accused — Petitioner, In re

Criminal Revn. No. 887 of 1916, and Criminal Revn. Petn. No. 722 of 1916, Decided on 4th April 1917, against the judgment of Addl. Sessions Judge., Bellary, in Cr. A. No. 47 of 1916.

(a) Petroleum Act (1899), Ss. 11 and 15 (a) —"Possession" in S. 15 (a) must be understood with reference to S. 11—"Possession" must amount to keeping within meaning of S. 11.

The word "possession," as used in S. 15 (a), Petroleum Act, must be understood with reference to the terms of S. 11 of the Act, which defines what is the quantity of petroleum in excess of which the keeping by one person or on the same premises would be an offence. The "possession" must be such as to amount to "keeping" within the meaning of S. 11. [P 586 C 2]

(b) Petroleum Act (8 of 1899), S. 15 (a) —"Keeping"—Railway company delivering petroleum to person on Railway premises and latter delivering same in course of business to intended persons—To amount to "keeping" it must be found as fact whether company allowed accused use of premises for reasonable time or he himself used it as storehouse.

Where a Railway Company delivered petroleum to a person on the Railway premises and the latter distributed it to persons for whom it was intended, within a reasonable time in the ordinary course of business:

Held: that in order to make such act amount to "keeping" within the meaning of S. 15 (a), it must be found as a fact whether the Railway Company allowed the accused the use of the premises for a reasonable time or he himself used it as a godown or a storehouse for purpose of sale. [P 586 C 2; P 587 C 1]

S Swaminathan—for Petitioner.

Public Prosecutor—for the Crown.

Order—The prosecution in this case was under S. 15 (a), Petroleum Act 8 of 1899, which says:

"whoever, in contravention of this Act or any of the rules thereunder, imports, possesses, or transports any petroleum"

shall be liable to certain penalties. S. 11 of the Act says:

"no quantity of petroleum exceeding 500 gallons shall be kept by any one person or on the same premises or shall be transported, except under, and in accordance with the conditions of, a license granted under this Act."

The accused is the agent of the Asiatic Petroleum Co., at Bellary and he received a consignment of 800 tins, each tin consisting of 4 gallons, from his principal company. The consignment arrived on 12th December 1915 and the accused's clerk presented the railway receipt on 14th and an entry to that effect was duly made according to the usual mode of business in the books of the Ry. Co. Then he began sending the tins to different customers, to most of whom he had already sold or entered into a contract of sale. There is also evidence that he actually sold a number of tins to customers who had not booked their orders with him beforehand. The Deputy Magistrate found that this was a case of possession within the meaning of S. 15 (a), Petroleum Act, whereas the Additional Sessions Judge was of opinion that it was not only a case of possession but also of transportation. So far as the latter offence is concerned, the learned Public Prosecutor did not press the point. Apparently, transportation was by the Asiatic Petroleum Co., which had license to transport an unlimited quantity within British India, and in receiving the consignment the accused was acting merely as the agent of the company. But the Sessions Judge, in arriving at his conclusion that the accused was in possession within the meaning of the law, of more than 500 gallons, seems to have proceeded on a wrong basis.

He appears to be of opinion that the time taken in removing the goods from the Ry. Station was not an element to be taken into consideration, and with reference to the argument that was advanced before him, he dealt mainly with the question whether the accused could be said to have acted as agent for each customer at Bellary in importing a specific quantity of oil, which would be covered by his license. (His license covered 500 gallons.) The meaning of the word "possession" as used in S. 15 (a) must, in our opinion, be understood with reference to the terms of S. 11, which defines what is the quantity of petroleum in excess of which the "keeping" by one person or on the same premises would be an offence. The "possession," therefore, must be such as to amount to "keeping" within the meaning of S. 11, and that certainly suggests that a person could not be said to 'keep' petroleum if the petroleum was delivered to him by the Railway Company on the railway premises and within a reasonable time, in the ordinary course of business, distributed to persons for whom it was intended. What has to be found in this case is whether upon the facts the accused could be said to have 'kept' more than 500 gallons of petroleum on the premises of the Railway Company or whether the Railway Company allowed them to remain there for such reasonable

time as would be occupied in the ordinary course of business in removing the tins for the purpose of delivering them to the different customers of the agent or of the company.

There is some evidence, and it was accepted by the Deputy Magistrate, that as a matter of fact the accused, who has no godown or storehouse of his own for storing petroleum, uses the railway premises for the purpose of selling some tins. That, if true, would be evidence which would require consideration in arriving at the conclusion whether the accused kept the consignment or a portion of it exceeding 500 gallons at the station for purposes of sale. We do not mean to suggest that even if the entire quantity had been sold beforehand by the agent to the different customers at Bellary and he had induced the Railway authorities to allow him to keep the consignment exceeding 500 gallons on the premises for a length of time which would not be required in the ordinary course of business for purposes of distribution, it would not be 'keeping' or 'possession' within the meaning of Ss. 11 and 15 (a) of the Act. The Additional Sessions Judge, however, as we have pointed out, has proceeded on a wrong view of the law. It has to be found whether upon the evidence as produced at the trial, there was 'possession' or 'keeping,' within the meaning of Ss. 11 and 15 (a) on the part of the accused, of more than 500 gallons of petroleum, on the railway premises. We must set aside the judgment of the Additional Sessions Judge and remit the appeal to the Sessions Judge for disposal in accordance with the above observations.

S.N./R.K. *Petition allowed.*

A. I. R. 1918 Madras 587 (1)

SESHAGIRI AIYAR, J.

C. Iyavoo Chetty—Accused—Petitioner.

v.

Jehanghir M. Holmes—Complainant—Opposite Party.

Criminal Revn. No. 83 of 1917 and Criminal Revn. Petn. No. 69 of 1917, Decided on 17th April 1917, from order of Third Presidency Magistrate, Georgetown, Madras.

Criminal P. C. (5 of 1898), S. 96—Issue of search warrant—Mere statement in affidavit is not sufficient to justify issue of search warrant.

The act of issuing a search warrant is a judicial act, and before a Magistrate issues it, it is his duty to weigh the circumstances before making up his mind on the question: 15 *Cal.* 109, *Foll.* [P 587 C 2]

A mere statement in an affidavit that, in the opinion of the deponent, a summons may not have the desired effect, is not sufficient to justify the issue of a search warrant. [P 587 C 2]

C. P. Ramaswami Aiyar—for Petitioner.

E. R. Osborne and *C. Kunhi Raman*—for Opposite Party.

Crown Prosecutor — for the Government.

Order.—I have no hesitation in holding that the Magistrate acted in a very high-handed manner in issuing the search warrant. The affidavit in support of the application is a very meagre one. It does not state when the applicant became aware of the offence complained of: it gives the opinion of the deponent that a summons may not have the desired effect. The Magistrate should under the circumstances, have asked for further proof from the complainant before issuing the warrant. He seems to have ignored the existence of S. 96, Criminal P. C., and the limitations it places upon his powers to issue a search warrant. He has recorded no reasons for taking the unusual step of issuing a search warrant in the first instance. It is desirable to draw his attention to the fact that the act of issuing a search warrant is a judicial act, as pointed out in *Mahomed Jackariah & Co.* v. *Ahmed Mahomed* (1), and that it was his duty to have weighed the circumstances before making up his mind on the question. The materials placed before the Magistrate were wholly insufficient to warrant him in acting as he did. I, therefore, set aside his order in issuing a search warrant. Mr Ramaswami Aiyar on behalf of the petitioner (accused) undertakes that the samples of all the articles asked for in the complaint will be left by him in the Magistrate's Court; he must be permitted to take away the rest.

S.N./R.K. *Petition allowed.*

1. (1888) 15 Cal 109.

A. I. R. 1918 Madras 587 (2)

ABDUR RAHIM AND BAKEWELL, JJ.

Papla Chakrapani Chettiar — Defendant—Appellant.

v.

Ramaswamy Thenkondan and *another* —Plaintiffs—Respondents.

Misc Second Appeal No. 126 of 1916, Decided on 14th August 1917.

(a) Civil P. C. (1908), O. 34, Rr. 7, 8 and 10—Redemption suit — Preliminary decree declares rights of parties—Relationship of mortgagor and mortgagee continues even after preliminary decree as also liability of mortgagee in possession to account for profits.

A preliminary decree in a redemption suit is merely declaratory of the rights of the parties, and the relationship of mortgagor and mortgagee continues to subsist between them even after the preliminary decree is passed. One of the incidents of that relationship is the liability of the mortgagee to account for any rents and profits received by him. [P 588 C 2]

(b) Practice — Subsequent events — Court can consider subsequent events while passing final decree—Mortgage.

In passing a final decree the Court can take into consideration events which have happened subsequent to the date of the preliminary decree, and for certain purposes the suit still remains pending. [P 588 C 2]

(c) Mortgage—Preliminary decree for redemption—Court's power to take fresh account till date of final decree—Court is entitled to embody in final decree value of profits due from mortgagee up to date.

Plaintiff obtained a preliminary decree in a redemption suit which directed that upon payment into Court of the amount declared to be due on or before the appointed day, the defendants should put the plaintiff in possession of the mortgaged property. The plaintiff paid the amount into Court before the appointed day but the defendants retained possession of the property, and the passing of a final decree in the suit was delayed for a considerable period owing to unsuccessful appeals by the defendants:

Held: that notwithstanding the passing of the preliminary decree the liability of the defendants to account continued to subsist, and that the Court had power to adjust the rights of the parties by taking a fresh account and embodying its finding in the final decree. [P 588 C 2]

V. Raghavachari—for Appellant.

A. V. Viswanatha Sastri and *S. Vaithianatha Aiyar*—for Respondents.

Judgment.—The plaintiff obtained a preliminary decree in a redemption suit, which followed the form prescribed by O. 34, R. 7 (b), Civil P. C., and directed that upon payment into Court of the amount declared to be due on or before the appointed day, the defendants should put the plaintiff in possession of specified properties. The plaintiff paid the amount into Court before the appointed day, but the defendants retained possession of the properties, and the passing of a final decree in the suit was delayed for a considerable period owing to unsuccessful appeals by the defendants. The question now argued relates to the claim of the plaintiff that the defendants should account for the profits received by them from the date when they should have delivered possession and that the amount found due should be included in the final decree in the suit. R. 8 (1) of the above-mentioned order prescribes the form of the decree to be passed when payment has been made by the plaintiff, which includes an order that the defendant shall put the plaintiff in possession of the mortgaged property but does not contain any provision as to rents and profits received by the defendaut after the preliminary decree.

It is clear, however, from the wording of that rule that the preliminary decree is merely declaratory of the rights of the parties and that the relationship of mortgagor and mortgagee, therefore, still subsists between them, and an incident of that relationship is the liability of the mortgagee to account for any rents and profits received by him, and this is the relief sought in a suit for redemption against a mortgagee in possession. It also appears from the proviso to sub-R. (4) of that rule and R. 10 that the Court can take into consideration events which have happened subsequent to the date of the preliminary decree and that for certain purposes the suit still remains pending. In England it appears that during the period allowed for payment of the mortgage moneys, the proper course for the mortgagee is to retain possession but to abstain from receiving profits, and if he receives any profits a fresh account may be directed and a new day fixed for redemption: Fisher on Mortgages, Edn. 6, p. 906. We are of opinion that the liability of the mortgagee to account still subsisted notwithstanding the passing of the preliminary decree and that the Court had power to adjust the rights of the parties by taking a fresh account and embodying its finding in the final decree. The appeal is accordingly dismissed with costs, which will be based on a second appeal.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 588

SPENCER AND SRINIVASA AIYANGAR, JJ.

M. Kandaswami Chetti—Appellant.

v.

P. Subramania Chetti — Respondent.

Appeal No. 64 of 1917, Decided on 26th March 1917, against order of City Civil Court, Madras, in Civil Misc. Petn. No. 1652 of 1916.

(a) Civil P. C. (1908), O. 39, R. 2 — Temporary mandatory injunction can be issued.

Courts in India have the power by virtue of O. 39, R. 2, to issue temporary injunctions in a mandatory form: *A I. R.* 1914 *Bom.* 42, *Diss. from.* [P 589 C 1]

(b) Specific Relief Act (1877), S. 53—Temporary injunction may be of mandatory form.

The description of temporary injunctions in S. 53, Specific Relief Act, does not exclude injunctions of a mandatory nature. A temporary injunction may take not only the form of restraining a person from further erection of a building, but may also direct that he should pull down as much of it as he has erected after he became aware of the institution of the suit: *A.I.R.* 1914 *Cal.* 362, *Foll.*; *A.I.R.* 1914 *Bom.* 195 and *Bonner* v. *C.W. Ry. Co.*, (1883) 24 *Ch. D* 1, *Ref.* [P 589 C 1]

T. R. Venkatrama Sastriar, *V. Govindachariar* and *V. S. Kallabhiran Aiyar* — for Appellant.

Short, Bewes & Co.—for Respondent.

Judgment.—Upon the question whether Courts in this country have the power by virtue of O. 39, R. 2, Civil P. C., to issue temporary injunctions in a mandatory form, we are not prepared to adopt the opinion expressed by Beaman, J., in *Rasul Karim* v. *Pirubhai Amirbhai* (1).

The description of temporary injunctions in S. 53, Specific Relief Act, does not exclude injunctions of a mandatory nature, and in *Israil* v. *Shamset Rahman* (2) upon an application for an interim injunction, pending the disposal of a suit, it was ordered that defendant should not only be restrained from further erection of a building but that he should pull down so much of it as he had erected after he became aware of the institution of the plaintiff's suit. We also may observe that Shah, J., did not agree with the opinion of his learned brother in *Rasul Karim* v. *Pirbhai Amirbhai* (1) and that two other Judges of the Bombay High Court took a different view from Beaman, J., in *Champsey Bhimji & Co.* v. *Jumna Flour Mills Co.* (3). On the merits however we are of opinion that the present was not a case of such urgency as to make it necessary for the protection of the plaintiff's rights that the defendant should be made to remove the screen put up by him before the rights of the parties were heard and determined in the regular suit which was filed for this very purpose. The facts of this case resemble those of *Bonner* v. *G. W. R. Co.* (4), in which a temporary injunction was disallowed. The question of what rights the plaintiff possessed to light and air through the window which the defendant blocked by his screen, might very well have been left to be decided in the suit without anticipating the result of it. We allow the appeal. Each party will bear his own costs in this Court.

S.N/R K. *Appeal allowed.*

1. A I R 1914 Bom. 42 = 38 Bom. 381 = 24 I C 625
2. A I R 1914 Cal. 362 = 41 Cal. 436 = 21 I C 861.
3. A I R 1914 Bom. 195 = 28 I C 121.
4. (1883) 24 Ch. D 1.

A. I. R. 1918 Madras 589

WALLIS C. J. AND KUMARASWAMI SASTRI, J.

Papamma Rao Garu and *others*—Claimants—Appellants.

v.

Revenue Divisional Officer, Guntur—Referring Officer —Respondent.

Appeal Suit No. 270 of 1916, Decided on 16th August 1917 against award of Dist. Judge, Guntur in Original Petn. No 595 of 1915.

(a) Land Acquisition Act (1894), Ss. 45 and 12 (2)—Award under S 12 (2)—Notice to unauthorized agent is not valid.

Service of a notice under S. 12 (2) must be made, wherever practicable, on the person named in the notice and, when such person cannot be found, in the manner provided in S. 45 (3). An award was passed under S. 12 (1). Notice required by S. 12 (2) was served on the manager of an estate for which a receiver had been appointed but there was nothing to show that the receiver had authorized the manager to accept such notices on his behalf:

Held: that the service was not valid. [P 590 C 1]

(b) Land Acquisition Act (1894), S. 53 — Civil P. C (1908), O. 5, R. 12 (*Quaere*).

Quaere—Whether the provisions of the Civil Procedure Code relating to the service of summonses apply to the service of notices under the Land Acquisition Act by virtue of S. 53. [P 590 C 1]

T. Prakasam—for Appellants.

Government Pleader—for Respondent.

Judgment.—The question in this appeal is whether the notice under S. 12 (2), Land Acquisition Act, was properly served on the manager of the office of the Receiver of Nidadavole and Medur Estate in the absence of the Receiver. S. 45 (2) of the Act provides that service is to be made, whenever it may be practicable, on the person named therein, and when such person cannot be found, in the manner provided in sub-S. (3). It is not suggested in the present case that service has been effected in conformity to S. 45. If re-

liance is placed on S. 53 of the Act, that section merely provides:

"Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act."

It is open to question whether the provisions of the Code can be taken to apply to the notice in question by virtue of this section. Assuming that they can, we are of opinion that they have not been complied with. O. 5, R. 12, Civil P. C., provides for service in person unless the person to be served has an agent empowered to accept service. That was S. 75 of the old Code. O. 3, R. 6 (1) which was S. 41 of the old Code, provides that, in addition to the recognized agents described in R. 2 of that Order which does not apply, any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process, but under the next sub-rule such appointment must be made by an instrument in writing signed by the principal. There is no such appointment in writing in the present case, and even assuming that the manager had the receiver's authority to accept service of notices or processes, still that would not, in our opinion, make this a good service. We must, therefore, allow the appeal and reverse the decree of the District Judge and remand the case for disposal according to law, with costs payable in three months.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 590

SADASIVA AIYAR AND SPENCER, JJ.

M. Narayani Ammal—Appellant.

v.

Secy. of State and *others* — Respondents.

Second Appeal No. 987 of 1913, Decided on 9th February 1917, against decree of Dist. Judge, Chingleput, D/- 26th August 1912

(a) Court-fees Act (1870), S. 7 (5) (b) (c)—Suit for possession of inam lands wrongly entered as raiyatwari—Valuation is five times revenue payable — Lands classed as inam after institution of suit—Valuation is not affected.

A suit for possession of inam lands wrongly classed by Government as raiyatwari and in respect of which pattas were issued to tenants may be valued by the plaintiff as raiyatwari lands held on patta at five times the revenue payable thereon under Cl. 5 (b), S. 7, Court-fees Act. The fact that, after the institution of the suit, the lands are classed as inam does not affect the question. [P 591 C 1, 2]

(b) Appeal—Objection as to valuation of suit should not be entertained unless undervaluation has prejudicially affected—Duty of appellate Court is not to dismiss but to return for presentation to proper Court—Civil P. C. (1908), O. 7, R. 11, (b).

An appellate Court should not entertain an objection based on undervaluation to the jurisdiction of the trial Court, unless, for reasons to be recorded by it in writing, it is satisfied that the undervaluation has prejudicially affected the disposal of the suit on its merits, and the mere change of forum consequent on the undervaluation cannot of itself be treated as prejudicially affecting it. [P 591 C 1]

In any event the proper course is not to dismiss a suit for undervaluation but to return the plaint to be re-presented in a Court of competent jurisdiction where the proper valuation necessitates a change of forum. [P 591 C 1]

(c) Limitation Act (9 of 1908), Art. 144—Suit for possession of inam lands wrongly entered as raiyatwari decreed—Symbolical delivery against Government—Suit for possession within 12 years of symbolical delivery—Lands registered as inam after institution of suit—Suit is within time and valuation on raiyatwari basis held proper.

Where possession of inam lands wrongly classed as raiyatwari is decreed to the inamdar and symbolical delivery is made in execution of the decree, a suit brought to oust the raiyatwari tenants who acquiesced in such delivery within 12 years thereof is not barred by limitation [P 591 C 2]

In 1885 plaintiff sued Government for recovery of land granted as inam but classed by them as raiyatwari. On 24th February 1891 he obtained a decree for possession. In 1897 he got symbolical delivery, but the tenants continued in possession thereafter paying assessment to Government. In 1909, i. e., within 12 years from the date of the symbolical delivery, he brought a suit for possession against the Government and the tenants. After the institution of the suit, the lands were registered as inam:

Held: (1) that the plaintiff was entitled to value the suit on the basis that the lands sued for were raiyatwari lands; (2) that the suit was in time: 18 *Cal* 520, *Dist.* [P 593 C 1]

(d) Adverse Possession—Raiyatwari tenants—Continuation of possession—Attornment to Government—Title by prescription cannot be acquired.

Per *Spencer, J.*—The raiyatwari tenants, when they attorned to Government could not simultaneously prescribe for any title which could endure after the title of Government was negatived in the suit of a third party, and, so long as they were tenants of the plaintiff or her predecessors-in-interest, their possession was not adverse to that of their landlord. A raiyatwari pattadar does not acquire any rights against Government superior to what he gets at the initial grant of patta. [P 592 C 1]

The rights of a pattadar holding land upon raiyatwari tenure under Government are not the same as those of an occupancy tenant under a landholder of an estate. So it cannot be maintained that the occupant of land under the former tenure can by means of such occupation acquire by prescription a title under the latter tenure. [P 592 C 1]

Per *Phillips, J.*—The original possession of the raiyatwari tenants having been terminated by the delivery in execution, any fresh title by virtue of their subsequently continuing in physical possession would not be perfected until the expiry of 12 years after the symbolical delivery. [P 593 C 2]

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar*—for Appellant.

V. Ramesam and *K. Ramanatha Shenai*—for Respondents.

Spencer, J.—On the preliminary objection taken by the counsel for defendants other than defendant 1 that the suit was insufficiently valued both in respect of court-fees payable on the plaint and for purposes of jurisdiction, the District Munsif decided before commencing the trial that the plaintiff's valuation was correct. This decision was final as between the parties to the suit, subject to the power of a Court of appeal to require an additional fee in a case of loss of revenue being occasioned by a wrong decision on the question of valuation (S. 12, Court-fees Act). The District Judge was of opinion that the suit had been undervalued and that it ought, therefore, to be dismissed. In this he was wrong, firstly, because he applied S. 7, Cl. 5 (a), Court-fees Act, to these lands although the revenue from them is admittedly not permanently settled; secondly, because under S. 11, Suits Valuation Act, he had no power to entertain an objection based on under-valuation to the jurisdiction of the District Munsif's Court, unless for reasons to be recorded by him in writing he was satisfied that the undervaluation had prejudicially affected the disposal of the suit on its merits; and thirdly, because the mere change of forum consequent on the alleged undervaluation could not of itself be treated as prejudicially affecting it: vide *Raghava Chariar* v. *Raghava Chariar* (1); and in any case the proper course would have been not to dismiss the suit but to return the plaint to be represented in a Court of competent jurisdiction.

The lands in suit were not actually registered as inam till after the institution of this suit. I consider, therefore, that the plaintiff when she filed her suit was entitled to treat these lands for purposes of valuation on the same footing that the Government was at the time of her suit treating them for purposes of revenue, namely, as raiyatwari lands held on patta, and to value them at five times the revenue payable thereon under Cl. 5 (b), S. 7, Court fees Act. Neither the Government, who is defendant 1 having classed the lands as fully assessed raiyatwari lands, nor the other defendants, who have been paying such annual revenue to defendant 1, could now be allowed to take the objection that the lands were, as a result of their own act or acts in which they have acquiesced, wrongly classed at the time of suit. I am equally unable to accept the District Judge's finding on issues 1, 5 and 7. On issue 5 the District Judge states in para. 12 of his judgment that it appears clear that the menkaval lands constitute a permanently settled estate within the meaning of Madras Act 1 of 1908, but in para. 10 he says that "the assessment is, of course, subject to revision after 30 years". This being so, the plaintiff's estate is not an estate described as a permanent estate in Regn. 25 of 1802 and as such is not one falling under S. 3, Cl. 2 (a), Estates Land Act. Nor does it fall under sub-Cl. (d) unless the plaintiff is a person "not owning the kudivaram", which raises the very question that had to be decided in issue 3.

The plaintiff could recover possession from Government and those who attorned to Government only by suing in a civil Court. On issue 1 which relates to misjoinder I agree with the District Munsif and I think that O. 1. R. 3, Civil P. C., applies to this case. Common questions of law and fact arise between the plaintiff and the several defendants, the principal being the question whether the grant to plaintiff's predecessor-in-title consisted of the lands, or only the melvaram on them. S. 99, Civil P. C., should have prevented the appellate Court from treating the suit as bad for misjoinder: vide *Rup Narain* v. *Gopal Devi* (2). On the issue as to limitation, the District Judge in para. 10 rightly decided that the plaintiff's claim to be recognized as landlord could not be barred as the present suit was filed within 12 years of her obtaining symbolical possession. But he finds that the defendants other than defendant 1 have been in adverse possession over 12 years since they were granted permanent leases or pattas by defendant 1, and, therefore, he thinks that they are entitled to remain

1. (1910) 8 I C 545.

2. (1909) 36 Cal 780=93 P R 1909=3 I C 382=36 I A 103 (P C).

in possession, although they are bound to attorn to the plaintiff.

The District Judge failed to see that when the tenants attorned to Government, they could not simultaneously prescribe for any title which could endure after the title of Government was negatived in the suit of a third party, and that so long as they were tenants of the plaintiff or her predecessors-in-interest, their possession was not adverse to that of their landlord. The rights of a pattadar holding land upon raiyatwari tenure under Government are not the same as those of an occupancy tenant under a landholder of an estate. So it cannot be maintained that the occupant of land under the former tenure can by means of such occupation acquire by prescription a title under the latter tenure. A raiyatwari pattadar does not acquire any superior rights against the Government by continuing as such pattadar for a term of over 12 years to what he gets at the initial grant of patta. Moreover, both the lower Courts have found that the tenants had notice of the plaintiff's symbolical possession.

The District Munsif held on issue 4 that the grant of the menkaval lands comprised both the kudivaram and the melvaram. In para. 16 he mentioned four facts which, in his opinion, indicated the correctness of this conclusion, and elsewhere in his judgment he thoroughly discussed the evidence on the issue. The District Judge in para. 7 decided differently but he was influenced solely by consideration of the question of the existence of mirasi rights in the landholder. He has practically left the real question of occupancy rights undecided. It is obvious that, apart from any title which a landholder may assert by virtue of his being a mirasidar in a mirasi village, his tenants may or may not have an independent occupancy right. I think that the Judge's failure to consider the other evidence, including Exs. A and L, and his reliance on the evidence in Original Suit No. 10 of 1885, while treating the High Court's judgment in the same case as irrelevant, vitiated his decision. We must remand the appeal for a fresh finding on this issue 4. Finding should be given on the evidence on record within six weeks. Ten days are allowed for objections.

Phillips, J.—I agree generally with the judgment just read by my learned brother, but would like to add a few remarks. The first question for determination in this appeal is whether the suit has been rightly valued for purposes of court-fees and jurisdiction. The plaintiff sues to recover possession of the plaint lands, called the menkaval lands, from defendant 1, the Secretary of State for India, and the other defendants, who are tenants in possession under defendant 1. Government resumed the village in which this inam is situated in 1873, and treating the plaint inam as also resumed registered the land as raiyatwari, fixed an assessment and issued pattas to tenants. In 1885 the plaintiff brought a suit against defendant 1 alone and obtained a decree for possession on 24th February 1891, on the ground that it was her inam and had not been resumed by Government. In 1897 the plaintiff obtained delivery of symbolic possession but Government still retained the lands in the registers as raiyatwari and continued to levy assessment until the date of the suit. The registry has since been altered. The question, therefore, is whether the Court-fee should be calculated under Cl. 5 (b) or under Cl. 5 (c), S. 7, Court-fees Act. The District Judge has held that Cl. 5 (a) applies, but this view is supported by neither party before this Court, and is clearly wrong for the revenue payable to Government has not been permanently settled. As between the plnintiff and defendant 1 it was held in the suit of 1885 that the land is inam land bearing a fixed quit rent and as such the plaint property would come within the definition of Cl. 5 (c), S. 7, Court-fees Act. The registry in the revenue register was not altered by Government and consequently at the date of suit the land was not registered as inam although it had been held to be such, but continued to be registered as raiyatwari and the assessment was levied by Government from the tenants.

The land was, therefore, an estate paying annual revenue to Government, and was recorded in the Collector's register as separately assessed and the revenue was settled but not permanently. Consequently the plaint lands form an estate coming within the definition of Cl. 5 (b), S. 7, Court-fees Act. It seems to me that as between the plaintiff and defendant 1, the plaint land is within the definition of Cl. 5 (c), but so far as the other defendants are concerned, it comes under Cl. 5 (b) and, therefore, the plaintiff can-

value her suit either according to Cl. 5-(b) or according to Cl. 5-(c). She has chosen the former valuation and I think she was justified in doing so, the more especially as her claim to the land as inam was not admitted by the defendants other than defendant 1 and they cannot now be heard to say that her classification is wrong. I would hold, therefore, that the suit has been correctly valued and the District Munsif had jurisdication to try it. Defendants (except the first) have been in possession of the suit lands as raiyats holding on raiyatwari tenure under Government. Some were in possession originally as tenants under the inamdar, plaintiff's predecessor, but others have been let into possession by Government since 1873, when the Government purported to resume the inam. In execution of the decree confirming her right against Government, the plaintiff obtained symbolic delivery in 1897 and the finding of fact, which is binding on us now, is that defendants were present at the delivery and were cognizant of it. It is contended on the defendants' behalf that as they were in possession for over 12 years as raiyatwari tenants under Government they prescribed for such an interest, that is, the right to hold on raiyatwari tenure as against the plaintiff and have perfected their right by prescription, and reliance is placed on *Gossain Dalmar Puri* v. *Bepin Behary Mitter* (3), but that case is only authority for the proposition that where a wrongful owner in possession granted a permanent lease and was subsequently dispossessed by symbolical delivery, the permanent lessee who was not a party to the symbolical delivery was not affected by it nor was his adverse possession disturbed thereby, the ratio decidendi being that the grantor of the lease had no power of resumption, and consequently the possession of the lessee had always been adverse to and not on behalf of the gtantor.

It is unnecessary now to consider whether defendants would have acquired any right if they had been unware of the symbolical delivery of possession to the plaintiff in 1897. They were not unaware of it, and acquiesced in it, thereby recognising that the possession of their landlord had ceased, and consequently that there was a cessation of their possession also in so far as they claimed possession under Government: vide *Kocherlakota Venkatakristna Row* v. *Vadrevu Venkappa* (4). No doubt they subsequently continued to be in physical possession and paid revenue to Government, but their original possession having been terminated by the delivery in execution, any fresh title would not be perfected until the expiry of twelve years after the symbolical delivery, and this suit has been brought within twelve years of that date, and is therefore, within time. A further objection is taken that some of the defendants were not impleaded in the suit originally, but were added as parties more than twelve years after the date of delivery. The plea does not appear to have been taken before, nor can it be gathered from the record before us which defendants were impleaded more than twelve years after the date of delivery. I do not think this plea can be allowed to be taken for the first time in second appeal.

I agree that the District Judge's finding on issue 4 cannot be upheld. He appears to have considered the question from one standpoint alone, that is, whether as a mirasidar the plaintiff is entitled to the kudivaram, but the question that has to be decided in this suit is whether the inam granted to the plaintiff's predecessor consisted of the land, including both varams, or of the melvaram only and the District Judge has not considered the evidence on this point. I agree, therefore, in the order proposed. (In compliance with the order contained in the above judgment, the District Judge of Chingleput submitted the following)

Finding.—The High Court has called for a finding on issue, 4 viz., whether the inam granted to the plaintiff's predecessor consisted of the lands including both the melvaram and kudivaram or of the melvaram only.

The evidence on either side is meagre. On a consideration of the above circumstances, I find that the inam granted to the plaintiff's predecessor consiste of the lands including both the melvaram and kudivaram. (This second apeal coming on for final hearing after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following)

3. (1891) 18 Cal 520.

4. (1904) 27 Mad 262.

Judgment.— We accept the finding (the respondents other than the firstnot appearing). The lower appellate Court's decree is set aside and the District Munsif's decree is restored with costs on the respondents (other than the first respondents) in this and in the lower appellate Court payable to plaintiff. First defendant will bear his own costs throughout.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 594 (1)

SADASIVA AIYAR, J.

Vemireddy Babu Reddy—Accused—Petitioner, In re.

Criminal Revn. No. 77 of 1917, and Criminal Revn. Petn. No. 64 of 1917, Decided on 1st February 1917. against order of Sess. Judge, Nellore, in Criminal Revn. Case No. 11 of 1916.

Criminal P. C. (1898), S 517—Order under S 517 sthould be passed at time of judgment —Magisrate having before him evidence given by prosecution in inquiry—Order need not follow fresh enquiry.

An order under S. 517, ought te be made at the time of passing judgment in the criminal case itself and where the Magistrate has before him the evidence given for the prosecution in the inquiry, it is not necessary that the order should follow a fresh inquiry, after giving opportunity to the party to produce new or further evidence. 19 *W. R.* 3 *Cr. Ref.* [P 594 C 1]

J. C. Adam—for Petitioner.

Order.—The Sub-Magistrate probably acted under a wrong section (S. 523,) Criminal P. C. instead of under the proper section which seems to be applicable, namely, S. 517. But I do not think that that is a sufficient ground for interference in revision if the order can be supported under the latter section. The Magistrate had before him the evidence given for the prosecution in the inquiry and there is nothing in the Code which requires that the passing of the summary order under S. 517, [which order ought to be made at the time of the passing of the judgment in the criminal case itself: *Rash Mohun Goshamy* v. *Kali Nath Raha* (1)] should follow a fresh inquiry after giving opportunity to the party to produce new or further evidence. I therefore decline to interfere.

S.N./R.K. *Petition dismissed.*

1. (1873) 19 W R 3 Cr.

A. I. R. 1918 Madras 594 (2)

AYLING AND SRINIVASA AIYANGAR, JJ.

Sethurama Aiyangar—Appellant.

v.

Subbiah Pillai and *another*—Respdts.

Second Appeal No. 1323 of 1915, Decided on 21st March 1917, against decree of Dist. Judge, Madura, in Appeal Suit No. 199 of 1914.

Madras Estates Land Act (1908), Ss. 26 and 112—Suit to set aside sale—Question of validity of contract under which raiyat claims to hold at rent less than ordinary rent can be gone into by Revenue Court.

Section 26 assumes that the contract for rent between the landlord and tenant except as affected by the provisions of the section is valid. If the existence or validity of the contract is questioned the Court must first determine it before the provisions of the section can be applied. [P 595 C 1]

In a suit therefore by a tenant contesting his landlord's right of sale under S. 112, the Revenue Court has jurisdiction to decide objections to the validity of a contract under which a raiyat claims to hold the holding entered into with the defendant's predecessor at a rent less than the ordinary or the lawful rent payable on the land. 12 *I. C.* 430, *Expl* and *Dist.* [P 595 C 1]

A. Krishnaswami Aiyar—for Appellant.

C. S. Venkatachariar—for Respondents.

Judgment.—The question which arises for decision in this appeal is whether a Revenue Court exercising jurisdiction under the Estates Land Act is entitled to decide objections (other than those specified in S. 26 of the Act), to the validity of a contract under which a raiyat claims to hold the holding at a rent less than the ordinary or the lawful rent payable on the land. The landlord is an office holder in a temple and the lands or rather the revenue constitutes the manyam attached to the office. A predecessor of his received Rs. 200 from the raiyat and agreed to allow him remission of five-eighths of the assessment in perpetuity. The present office-holder claims the full rent, declines to be bound by the agreement and contends that his predecessor who owned the manyam as an office-holder cannot bind his successor by such an agreement. The question arises in a suit brought by the tenant contesting the landlord's right of sale under S. 112 of the Act. The learned District Judge in appeal declined to go into the question as he thought that that question was competent only to an ordinary civil Court.

We are unable to agree with him. For deciding whether the landlord is entitled

to sell the holding the Court must find whether any arrears of rent are due and for this purpose, it must decide what the rent or rate of rent is. The rent or rate of rent cannot be determined without considering for the purpose of the suit whether the contract granting the remission is valid. S. 26 assumes that the contract except as affected by the provisions of the section, is valid. If the existence or the validity of the contract is questioned that must be first determined before the provisions of S. 26 are applied. If the Court has jurisdiction to determine a matter, it must have jurisdiction to decide all questions necessary for that determination. If a previous judicial rescission is necessary before the contract could be repudiated, it may be that the Revenue Court would be bound to give effect to the contract subject only to the provisions of S. 26 but the landlord in this case was not a party to the contract and denies the authority of his predecessor to bind the successor.

In *Mahipati Surya Rao* v. *Sreerama Charyulu* (1) the Raja of Pittapur sued a raiyat in the ordinary civil Court and prayed for declaration (i) that the contract of his predecessor granting remission to the raiyat was not binding on him, (ii) that the proper rent was Rs. 500 a year and prayed for the recovery of arrears of rent. Objection was taken to the jurisdiction of the civil Court to entertain the suit on the ground that a suit to determine the rent and for recovery of arrears was exclusively cognizable by the Revenue Court and that the declaration as to the invalidity of the contract was only ancillary to the main reliefs. This contention prevailed in the first Court but in appeal here the plaintiff withdrew his last two prayers, and this Court held that the prayer for declaration of the invalidity of the agreement was not ancillary but was substantial relief and on that ground held that the civil Court had jurisdiction. No doubt was entertained that the Revenue Court would have jurisdiction to decide on the validity of the contract if the matter arose incidentally, for determining the rate of rent. We must therefore reverse the decree of the lower appellate Court and remand the appeal for disposal according to law. Costs to abide.

S N./R.K. *Appeal allowed.*

1. (1911) 12 I C 430.

** A. I. R. 1918 Madras 595
Special Bench

WALLIS, C. J., OLDFIELD AND SESHAGIRI AIYAR, JJ.

Hussain Sahib and *others*—Defendants—Appellants.

v.

Hassan Saib and *others*—Plaintiffs and Defendants—Respondents.

Letters Patent Appeal No. 175 of 1915, Decided on 23rd February 1917, against judgment of Sadasiva Aiyar and Tayabji, JJ., reported as 31 *I. C.* 927.

** (a) **Hindu Law—Applicability — Mahomedans adopting Hindu manners and customs—Joint family trade—Suit for partition is governed by principles of Hindu Law.**

Where a Mahomedan trading family so far conformed to Hindu customs that they lived as members of a joint family, purchased properties indiscriminately in the names of the members and showed themselves averse to division and conducted themselves as a Hindu family for many years :

Held : that a suit for partition would lie and the shares would be allocated according to the principles of Hindu law ;

Held further : that the fact that the parties belonged to the class of Nawayats who, many years ago, married Konkani women and largely conformed to Hindu manners and usages, may be taken into account with the rest of the evidence for the purpose of explaining the footing on which they lived and traded for so many years. [P 598 C 2]

* (b) **Evidence Act (1872), S. 115—Estoppel—Action and conduct of parties when acts as estoppel explained.**

Actings and conduct of parties might give rise to estoppel, when such actions and conduct have produced alteration of circumstances so great that without great loss and inconvenience the parties cannot be put back in their original position : 42 *Cal.* 801, *Foll.* [P 598 C 2]

B. Sitaram Rao—for Appellants.

J. L. Rosario and *H. Balakrishna Rao*—for Respondents.

Wallis, C. J.—This is an appeal from the prevailing judgment of Sadasiva Aiyar, J. affirming the judgment of the District Judge of South Canara, Tyabji, J. dissenting. The parties are Mahomedans and the suit was brought by the plaintiff for partition of the suit properties which, he alleged, belonged to the joint family of the plaintiff and the defendants. The parties are descendants of one Abdul Razak, whose four sons executed a partition deed in 1818. Their family residence was at Manki in North Canara, but the third brother Hussain Sahib with the assistance of the 4th brother Hammed Sahib started business at Souda in South Canara. That business has been carried on down to the present

time by the two brothers and their descendants. Various properties had been acquired in the name of one or other of the senior members of the family and all the members of the family have been maintained out of the income of properties and the profits of the business. The accounts which have been preserved show that during the lifetime of Hassan, who died in 1870, accounts were kept in his name, and that since that time, they have been kept in the name of representatives of the senior and junior branches. In the course of years the descendants of the younger brother Hammed became more numerous than the descendants of the elder brother Hassan and the family have now four residences at Manki, three of which are occupied by descendants of the junior brother. If this were all the evidence in the case, the conclusion would naturally follow that the two brothers of the family were living and trading together on equal terms. It is quite common for the descendants of a Mahomedan trader to live and trade together for more than one generation and to acquire property in the names of one or other male members of the family, and in such a case the property is understood to be held for the several members of the family in the shares to which they are entitled under Mahomedan Law in succession to the common ancestor.

Such a case recently came before this Court in a suit for the partition of properties of one of the leading Mahomedan firms in Madras. The present case however is not so simple. The contesting defendants rely on the partition of 1818 and on a document Ex. 16 which is said to have been executed by Hassan, the senior brother, in 1845 before starting on a pilgrimage to the holy places and purports to be in the handwriting of the younger brother Hammed and to be written with his full consent. The evidence of the aged witnesses who were called to speak to its execution is practically worthless, as was pointed out by the District Judge. But other witnesses speak to the handwriting of some of the attesting witnesses and one of the plaintiff's witnesses speaks to a recognition of the document by some of the junior branch. It is also admitted by some members of the junior branch in their written statement in this case. Ex. 16 has been accepted by the District Judge and the two learned Judges who heard the appeal and we are not prepared to differ from them. It recites that Hassan had carried on business and had acquired property of the value therein mentioned, and states that deducting Rs. 500 which he took on starting for Mecca the balance had been distributed into eight shares, of which his younger brother Hammed Sahib, who had been with him till then doing such acts as he was directed to do and who was to remain when he started for Mecca, was to have one; another share was to go to his wife and the remainder to his son Moiddin Sahib, who was to pay his two sisters Rs. 1,000.

It has been found by the District Judge and by the two learned Judges who heard the appeal that this document was never acted upon. Hassan Sahib returned from the pilgrimage and the business was carried on without any division. Tyabji, J. was further of opinion that in the events which happened no effect could be given to it. He however relied strongly on the recitals which it contained, that the business and properties therein referred to belonged to Hassan, the senior brother, as was admitted by the junior brother, and in these circumstances he was inclined to think that the business continued to belong to Hassan until his death in 1870. This was also the position taken up by the appellants in their ground 23 of appeal, where they say that "the lower Court ought to nave held that members of Hammed's branch were only servants, assistants and managers, and payments made to them were either by way of wages or as charity."

On the hearing of the appeal it was realized that this was too extreme a position, and Mr. K. Srinivasa Iyengar who appeared for the appellants conceded that they should be entilled to a one-eighth share, and acting on this concession Tyabji, J., in his judgment awarded them a 1/8th share down to death of Hassan in 1870. As to the subsequent period he considered that an agreement between the two branches to share equally in the future profits of the business might be inferred from the fact that the subsequent accounts stood in the names of members of both branches. On the other hand, Sadasiva Aiyar, J., was of opinion that the conduct of the two brothers and the members of the family after Hassan's return from the pilgrimage about 1848 was such as might be expected from brothers

who considered themselves equal partners in the business and equal co-owners of all their properties, and he accordingly agreed with the District Judge that the two branches were entitled to partition in equal shares. On the whole I have come to the conclusion that this is the right conclusion to be derived from the evidence as a whole. I fully appreciate, if I may say so, the force of Tyabji, J.'s observations as to the danger of attaching too much importance to the fact that in a trading family like this a son or junior brother has been allowed to take part in the management and been maintained out of the profits. I have often had to try cases in which claims to a partnership or a share arising out of facts like this have been made and failed. Every case, however, must stand on its own circumstances. In this case the plaint was presented in January 1909 and we have to draw inferences from the course of conduct pursued for over sixty years by both branches. Assuming that properties of the value mentioned in Ex. 16 belonged to Hassan in 1845 it is not shown that the younger brother who got a share on the partition in 1818 had no other property of his own. Exs. 18, 20 and 19 show that three items of the suit properties were acquired in his name in the years 1844, 1846 and 1849. Exs. 26, 27 and 95 show properties acquired in Hassan's name in 1836, 1848 and 1854. Hammed admittedly managed the business during his brother's absence on pilgrimage.

There is nothing in the evidence to suggest that after his return they agreed to go on trading on the basis that Hammed and his family should be entitled only to a one-eighth share on the basis of Ex. 16. There is no direct evidence of any specific agreement as to the terms on which they were to carry on the business and all that we can do is to draw the appropriate inference from their subsequent conduct. It is not suggested that during Hassan's lifetime or subsequently, the members of the junior branch were treated in any way less favourably than the senior branch. On the contrary, owing to their larger numbers, much larger expenditure was incurred on them. When the junior brother Hammed died in 1866 the properties, Exs. 18, 19 and 20 which stood in his name and which the contesting defendants suggest were held by him benami for the elder brother Hassan, were transfered not to Hassan's name but to the name of his eldest son Dodda Moidin. But this may be explained on the ground that he was then looking after the properties at Manki. The transfer, as Ex. A shows, was made with the consent of his son Abdul Razak. Hassan died in 1870 and his eldest son Moidin died in 1889. Ex. B is the genealogy prepared by the village officers on that occasion and shows the family as consisting of the two sons of Abdul Razak, namely, Hassan and Hammed and their descendants. And Ex. C is the application for the transfer of registry of the properties standing in his name. It describes the descendants of Hassan as near heirs and the descendants of Hammed as distant heirs and is signed by both branches. The persons described as near heirs were the persons entitled to succeed under the Mahomedan law and the mention of the others shows that they were regarded as having an interest in the properties. These properties, referred to in Ex. C, were the properties in North Canara. The properties in South Canara were transferred to the name of Abdul Razak of the junior branch who was managing the business at Souda. On his death the properties standing in his name were registered in the name of his half brother Sanna Hassan. In 1897 both Dodda and Sanna died within a day of each other. Ex. D is a genealogy prepared on that occasion. It is signed by the members of both branches and states that

"all the heirs mentioned herein (that is to say, all the surviving members of both branches) belong to an undivided family. Besides these there is no other near heir."

The question was settled by a compromise. Some of the properties were registered in the name of defendant 9 of the senior branch and the rest in the name of Mahomed Siddiq of the junior branch, Exs. F 1 and F 2. Ex. E 1 is the statement taken from the contesting defendant 9 in this suit. He says:

"The deceased and I are elder and younger brothers and there are heirs of the second branch and being members of an undivided family, not only the management of the lands but all remaining affairs are conducted as a whole by our household."

This is a very significant statement. He goes on to say that, as senior member of the senior branch, he alone was the hukdar or manager and that it would not be convenient that the property should

be registered in the name of the widow. And in another statement, Ex. E 2, he says:

"Now I being the chief heir of the deceased and moreover I being the heir according to law and Mahomedan Shastras, I state that the kudtala may be entered in my name. In the undivided family of the two branches and in our household my father looked after the management until his death and all the members of the family are supplied with necessaries from our household. The kudtala should be transferred to my name as stated by me."

Exhibit E 3 by defendant 22 stated that they were the members of an undivided family but that the registry should be in the name of the wife of the deceased. Ex E 4, a statement from the plaintiff's father, stated that

'the members of this family as well as the members of the family of Moidin Sahib were undivided up till now. We are living together as members of an undivided family,"

but that he had no objection to the kudtala being transferred to the widow's name. Ex. E 5 is the widow's statement. She also stated that

"the deceased, my husband and his brothers and all the heirs shown in the annexed genealogy are members of an undivided family. No division has been made up to this time."

This is clearly a statement that they were all interested in the properties. Ex. E 7 is a statement of Alli Sahib, a member of the junior branch, which objected to some of the properties being transferred to the name of Hammed Sahib, son of the deceased, on the ground that he remained in Manki village, whereas the kudtala of the properties in Souda had therefore been transferred to the names of persons who remained there to look after the management of the properties. These statements, made by members of both branches in Ex. E series that both branches were members of an undivided family and interested, as heirs, in the properties to be registered, are, I think, very important evidence of the terms on which the two branches lived and carried on business for 60 years, before the institution of this suit. It seems to me to amount to an admission on the part of the senior branch that the junior branch were interested in all the properties as well as in the business; and when with this we consider the facts that the business was carried on since 1870 in the names of members of the senior and junior branches and that the junior branch, admittedly, were dealt with on terms of perfect equality with the senior branch and owing to their numbers had three establishments maintained for them at Manki as against one for the senior branch, the proper inference, I think, is that for a very long series of years the two branches lived and traded together on the footing that they were entitled to equal shares in all the properties as well as in the business; in other words, that they acted as if the business had been carried on from the first by the two brothers Hassan and Hammed without any division between them. Something is said in the judgments of the learned Judges about the fact that the parties belong to the class of "Navayats" or newcomers, who, many years ago, married Konkani women and as found in *Khatija* v. *Ismail* (1) conformed to Hindu customs and manners to a very great extent and were not over-fond of division.

It is not the plaintiff's case here that the family is in any way bound by the rules of Hindu law. But I think that the fact that they belong to this class of Navayats may be taken into account with the rest of the evidence, for the purpose of explaining the footing on which they lived and traded for so many years. Lastly, I think there is great force in the observation of Sadasiva, Aiyar, J., as to the application to this case of the recent ruling of their Lordships of the Judicial Committee in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) that

"actings and conduct of parties might give rise to estoppel, where such actings and conduct have produced alterations of circumstances so great that without great loss and inconvenience the parties cannot be put back in their original position."

For these reasons I agree with the judgment of Sadasiva Aiyar, J., and would dismiss the appeal with costs.

Oldfield, J.—I agree and have nothing to add.

Seshagiri Aiyar, J.—I agree. I confess that it is only the absence of reliable evidence as to what took place between 1845 and 1870 and the failure of the parties to concentrate their attention upon the nature, the extent and the object of the drawing from the partnership accounts that have led me to hold with Sadasiva Aiyar, J., and the District Judge that the two branches of the family of Hassan and Ahmed should divide the properties equally. Mr Rosario has

1. (1889) 12 Mad 380.
2. (1915) 42 Cal 801=42 IA 1=28 IC 930 (PC).

drawn our attention to all the weak points in connexion with Ex. 16. It is true that there is no satisfactory evidence as to the custody of this document. It is also true that this document has never been referred to in any of the subsequent documents. At the same time it must be remembered that the parties did not seriously question its genuineness in the lower Court. There is evidence in support of its execution. The District Judge has acted on that evidence and the two learned Judges who heard the appeal have come to the conclusion that the document is genuine. Under these circumstances I agree in thinking that we must start with the conclusion that Ex. 16 was executed by Hassan in 1845 prior to his departure for Mecca, that it is in the handwriting of Hammed and that the statement that the document has his consent was written by him. This undoubtedly is a weighty circumstance in favour of the contention advanced by Mr. Sitarama Rao that the assets of the partnership in the year 1845 belonged wholly to Hassan.

As against this we have the fact that in the year 1844 Hammed did acquire property which after his death in 1866 was transferred to Dodda Moideen, the son of Hassan. We have the further fact that from 1845 to 1848 the business was solely managed by Hammed. It is clear that Hassan contemplated the possibility of his not returning to India at the end of the pilgrimage. But as a matter of fact he did come back in 1848. There is nothing to show what was the position of affairs in that year. No doubt the business continued to stand in the sole name of Hassan until 1870. There is nothing to indicate the exact position occupied by Hammed during this period. From 1870 onwards the accounts of the firm stood in the names of two people, one from each branch of the family. In the kudtala transfer proceedings, we find statements to the effect that both the branches lived as a joint family (vide Ex. E series). In Exs. C and D there is a column in which the members of both the branches are mentioned as heirs. It is true that the members of the senior branch are there styled as near heirs, and those of the junior branch as distant heirs.

That is because the form of the document contained these two columns. Under Mahomedan law there can be no question of a distant heir. What the recording authorities meant was that the members of Hassan's branch were heirs under the Mahomedan law, and that those who were called distant heirs were persons who being the heirs of the co owner were entitled to property which stood in the name of Hassan. As was pointed out long ago in this Court in *Khatija* v. *Ismail* (1), Nawayats while regulating their succession according to Mahomedan law follow the Hindu law as regards their mode of living and of dealing with each other. They originally belonged to the Hindu community and were living among Hindus, whose business habits they apparently found convenient to adopt in their trade concerns. It is clear that except for business purposes the members of this family did not regard themselves as in any way coming under the Hindu law. Therefore the fact that in the proceedings relating to the transfer of registry, both branches of the family were mentioned as heirs is a strong indication of co-ownership. There is the further fact that the junior branch possesses a larger number of dwelling-houses than the senior branch. They seem to have drawn more money from the partnership than the senior branch. Such a state of affairs is inconsistent with the suggestion that the junior branch acted either as servants, agents or managers of the business and had no proprietary interest in the concern. These facts also are inconsistent with the theory that all the members of the junior branch were entitled to was only an eighth share in the business. It is clear that Ex. 16 was never acted upon. Hassan might have intended that it should be given effect to in case he did not return. On his return apparently, the document was ignored altogether. In the subsequent accounts kept by the partnership, there is nothing to indicate that the junior branch was to have only an eighth share in the business.

The position of affairs, therefore, is this : the senior of the two brothers had some exclusive property which he brought into the business early in 1818. Soon after he was joined by his younger brother. In 1845 he estimated the amount due to him to about Rs. 25,000 and was willing that under certain circumstances an eighth part of this amount should goto

his younger brother. From 1845 to 1870 the business was solely managed by the younger brother. From 1848 to 1870 the business was managed by both the brothers, although the business stood in the name of the elder brother alone. From 1870 to the date of the suit the accounts stood in the joint names of two members of the family, one from the senior and another from the junior branch. Moneys were drawn out indiscriminately by both the branches, a larger amount being drawn by the junior branch than by the senior branch. Each branch had large establishments; all their common expenses were met from the partnership funds. The members of each of the branches recognized the other as being co-heirs with them in the proceedings relating to the transfer of registry. There was at no time any settlement of accounts or ascertainment of profits. Properties were purchased indiscriminately in the names of the members of both the branches of the family. The members stated before responsible officers of Government that they lived together as members of a joint family. In my opinion the true inference to be drawn from these facts is that both the branches regarded themselves as equally entitled to the profits of the business, and to the properties purchased from the business, and that consequently the conclusion come to by the District Judge, that it should be divided half and half, is right. This appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 600

SPENCER AND SESHAGIRI AIYAR, JJ.

Rama Thanthri— Plaintiff — Appellant.

v.

Secy. of State and *others*—Defendants —Respondents.

Second Appeal No. 1466 of 1915, Decided on 17th July 1917, against decree of Dist Judge, South Kanara, in A. S. No. 298 of 1914.

(a) Evidence Act (1872), S. 116—Tenant cannot deny landlord's title however defective.

Under S. 116, Evidence Act, a tenant is estopped from denying his landlord's title, however defective it might be, so long as he fails to deliver possession to him. 12 *Mad.* 422, *Dist*; 37 *All.* 557 (*P. C.*), *Foll.* [P 600 C 2]

(b) Ownership—Cutting leaves on land is not evidence of title.

The acts of cutting leaves for manure, etc., are worthless as evidence of any proprietary title in the land. 28 *Mad.* 257, *Foll.* [P 600 C 2]

B. Sitaram Rao and *K. Yegnanarayana Adiga*—for Appellant.

V. Ramesam—for the Crown.

Judgment. — We consider that the plaintiff is entitled to a declaration of title against defendants 5 and 6 in respect of plots 1, 1-A and 1-B, subject to the Government's right to levy assessment on the land, and that the District Judge was in error in supposing on the strength of *Subbaraya* v. *Krishnappa* (1) that they were not estopped from denying his title. That case proceeded on the assumption that the land in dispute was kumaki waste land and that the person, from whom defendant 1 got possession, had himself derived his title from Government. Under S. 116, Evidence Act, these defendants were estopped from denying the plaintiff's title, however defective it might be, so long as they failed to surrender possession to him: vide *Billas Kunwar* v. *Desraj Ranjit Singh* (2).

As regards plot 7-A the District Judge was right in thinking that the plaintiff, having admitted that it was assessed waste by accepting a patta from Government, could not afterwards set up any other kind of ownership. The District Judge has found that the other plots were not at any time cultivated and that there had been no exercise of acts of ownership other than those of cutting leaves for manure, etc., and such acts of occupation as were held in *Secy. of State* v. *Manjeshwar Krishnayya* (3) to be worthless as evidence of any proprietary title in the land. This finding is sufficient to dispose of the plaintiff's case in respect of these items. The decree of the lower Courts will be modified as above stated in respect of items 1, 1-A, and 1 B and he will be given proportionate costs throughout against these respondents. With this exception the second appeal is dismissed with costs of respondent 1.

S.N./R.K. *Appeal partly allowed.*

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1 (1889) 12 Mad 422.
2. (1915) 37 All 557=30 I C 299=42 I A 202 (P C).
3. (1905) 28 Mad. 257.

* A. I. R. 1918 Madras 601
Full Bench

WALLIS, C. J., OLDFIELD AND KUMARASWAMI SASTRI, JJ.

Kolandai Velu and *another*—Accused.

v.

Rev. J. Dequidt—Complainant.

Criminal Revn. No. 544 of 1916, taken up No. 21 of 1916, Decided on 17th April 1917.

*** (a) Christian Marriage Act (15 of 1872), S. 68—Hindu solemnizing marriage between Hindu and Christian according to Hindu mode commits offence under S. 68.**

A Hindu by religion, performing a marriage according to the Hindu mode between two persons either of whom is a Christian, commits an offence under S. 68, Christian Marriage Act.

[P 603 C 2 ; P 605 C 1]

(b) Christian Marriage Act (15 of 1872), S. 4—Applicability—Act applies to marriage where one party is Christian.

The Christian Marriage Act was intended to apply to the marriages of all Christians in India, including marriages where one of the parties is a Christian : 17 *Mad.* 391 and 20 *Mad.* 12, *Foll.*

[P 603 C 2]

T. R. Ramachandra Aiyar—for Accused.

M. D. Devadoss—for Complainant.

Public Prosecutor—for the Crown.

Order of Reference.

Napier, J.—The records of this case have been called for by the High Court on its own motion, owing to a doubt whether the case relied on by the Sessions Judge to convict the accused is good law. The facts are that a Hindu by religion, a purohit among the Valluvas (Hindu Pariahs), performed a marriage in the Hindu mode between a Hindu Valluva and a Christian girl, aged eleven, belonging to the same commuuity. The priest has been convicted under S. 68, Christian Marriage Act, 15 of 1872, and the father of the girl has also been convicted under the above S. 68 read with S. 114, I. P. C., and the Sessions Judge has very properly followed the decision of this Court in *Queen-Empress* v. *Yohan* (1), which follows another decision in *High Court Proceedings, dated 21st March* 1871 (2). In my opinion, these decisions are wrong and should be reconsidered. The Christian Marriage Act is a Code repealing and embodying the provisions of several prior Acts which were taken from the numerous English Marriage Acts. The preamble states:

"whereas it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion."

Section 4 provides that

"every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section ; and any such marriage solemnized otherwise than in accordance with such provisions shall be void."

Section 5 provides that

"marriages may be solemnized in India by any of the five different persons, (1) persons who have received ordination ; (2) clergymen of the Church of Scotland ; (3) Ministers of religion licensed under the Act; (4) Marriage Registrars appointed under the Act ; and (5) persons licensed under this Act to grant certificates of marriage between Native Christians";

and in addition it provides that marriages may be solemuized in the presence of a Marriage Registrar appointed under this Act. The offence charged here is that the accused "solemnized" a marriage in the absence of the Marriage Registrar. Now it is not suggested that the Marriage Registrar is authorized to attend Hindu marriages and it is to be noted that no person can be appointed a Marriage Registrar other than a Christian (vide S. 7). If, therefore, a Hindu does marry a Christian girl according to the customs of his caste, both he and the officiating priest render themselves liable to imprisonment or transportation for 10 years. It seems to me that this cannot be the intention of the Act. The object of S. 68 with its highly penal consequence is to punish persons for the serious offence of purporting to solemnize a marriage between two persons who honestly believed that they were being married, the consequences of such a void marriage being intensely serious. The English Act never contemplated marriages in forms other than those suitable for Christians and, in my opinion, the Indian Act intended to go no further. The use of the word "solemnized" is, in my view, indicative. It is true that the marriage provided for under the Act need not in all cases be of a religious character just as in England persons can go through a civil ceremony before a Registrar; but the word "solemnized" is never used in this country with reference to a Hindu marriage ceremony. S. 10 provides that "every marriage under this Act shall be solemnized betwean the hours of six in the morning and seven in the evening."

Section 42 provides that where the marriage is solemnized in the presence of a Registrar, one of the parties must

1. (1894) 17 Mad 391.
2. (1870-71) 6 M H C R App. 20.

take oath that there is not any impediment of kindred or affinity or lawful hindrance to the said marriage. S. 51 provides that in some part of the ceremony each of the parties shall make a declaration of absence of lawful impediment and shall say to the other:

"I call upon these persons here present to witness that I, *A B*, do take *C D* to be my lawful wedded husband (or wife)."

Such sections are, on the face of them, inapplicable to Hindu marriagss, and the forms in the Schedule are all such as are applicable to Christian marriages. It seems to me that the whole Act has reference to nothing but marriages which purport to be solemnized in accordance with usage among Christians, and we would read S. 4 as meaning "Every marriage purporting to be a Christain marriage shall be solemnized, etc." If this section is not to be so read, it would follow that the legislature in 1872 has declared void all marriages according to caste custom between a Hindu and a Christian, with the necessury result that the children are illegitimate and cannot acquire rights of property. I very much doubt whether the legislature intended to interfere in this manner with Hindus among whom marriages are regulated by caste customs. There are, as already stated, the decisions reported as *High Court Proceedings, dated 21st March* 1871 (2) and *Queen-Empress* v. *Yohan* (1), and in addition, there is a later case reported as *Queen-Empress* v. *Paul* (3). The decision in *High Court Proceedings, dated 21st March* 1871 (2), was on the language of S. 56, Act 5 of 1865, and the Court decided the point on the strict language of the Act. The case was, however, not argued on either side. *Queen-Empress* v. *Yohan* (1) purported to follow the decision in *High Court Proceedings, dated 21st March* 1871 (2). In *Queen-Empress* v. *Paul* (3) the only point taken was that the word "solemnized" could only have reference to a religious ceremony, and the Court, having pointed out that the civil marriage is also solemnized under the Act, thought that this point settled the matter. In my opinion, the question raised is of serious importance in view of the large number of Christians among the lower castes, and I, therefore, think it right to refer to a Full Bench the question whether a Hindu by religion performing a marriage according to the Hindu mode between two persons either of whom is a Christain commits an offence under S. 68, Christian Marriage Act, 15 of 1872.

Sadasiva Aiyar, J.—I confess that I was at first not inclined to reopen the question, which my learned brother's order just now pronounced refers to a Full Bench, as that question had been considered in three cases, *High Court Proceedings, dated 21st March* 1871 (2), *Queen-Empress* v. *Yohan* (1) and *Queen-Empress* v. *Paul* (3), at sufficient intervals of time, and might, in a manner, be deemed to have been settled. But I have been much impressed by the arguments and considerations put forth from the Bench by my learned brother in the course of the hearing of these cases and as set out in his above order, and I cannot say that the judgments in those cases deal so fully and exhaustively with all the aspects of of the question as to preclude its authoritative reconsideration by a Full Bench. For instance, as regards the meaning of the word "solemnize" in S. 68, the decision in *Queen-Empress* v. *Paul* (3) says that it only means "conduct, celebrate or perform," and one of the reasons given is that in a marriage "solemnized" before a Marriage Registrar "no ceremonies are necessary." But a Marriage Registrar cannot be the professor of any other religion than the Christian religion (see S. 7 Christian Marriage Act) and two ceremonies or ceremonial declarations have to be made before him by each of the parties to the marriage under S. 51 of the Act. Those declarations are:

"I do solemnly declare that I know not of any lawful impediment why I, *A B*, may not be joined in matrimony to *C D*." "I call upon these persons here present to witness that I, *A B*, do take thee, *C. D*, to be my lawful wedded wife (or husband)."

I do not see why these four indispensable solemn declarations (two by each party) required to be made only before a professing Christian, recognized as such by the Government and authorized to record those solemn declarations, should not be called "necessary ceremonies" required to validate the marriage. I am inclined to think that solemnization in S. 68 indicates the performance of marriages "according to rules, rites, ceremonies and customs" of a Christian Church or after complying with the cere-

3. (1897) 20 Mad 12.

mony of the four solemn declarations prescribed for celebrating marriages before the Christian Marriage Registrar. I think the making of those declarations before the Christian Marriage Registrar means the observance of certain "particular forms and ceremonies" of solemnization and that that is one of the several definite modes of the "solemnization" of marriages contemplated by the Act. In Halsbury's Laws of England, Vol. 16, S. 581, p. 301, the declarations above mentioned are described in the margin as coming within "Forms and ceremonies." If the word "solemnize" as used in the Act merely means "celebration" (including celebration with Hindu or Mussalman rites), the Act cannot be said not to violate the principle of religious neutrality followed almost without exception by the Indian legislature, a violation which visits followers of religions other than the Christian with very severe criminal penalties for doing acts not prohibited by those other faiths. A construction which credits the legislature with such violation should, if, possible, be avoided.

A Sunni Mussalman male and a male of one of several of the Shiah sects can validly marry according to his law in the permanent form and with Mahomedan rites a kitabia (that is a Jew or a Christian or the follower of any other religion revealed in a kitab or sacred book, provided she is not a fireworshipper or idolatress). According to some other Shiah sects, he can validly marry her in muta form: see Ameer Ali, Vol. 2, p, 320. If S. 68 Christian Marriage Act, be interpreted as widely as has been done in *Queen-Empress* v. *Yohan* (1) and *Queen-Empress* v. *Paul* (3), a Kazi who performs a marriage between a Mussalman male and a Christian female according to Mussalman rites is liable to the punishment of transportation for ten years. Whereas a Christian Minister or Marriage Registrar, who performs a marriage with Christian rites or the declaration ceremonies mentioned in S. 51 between a Mussalman male and a Christian female, is not subjected to any such penalty and performs a perfectly lawful and valid act. It may be said that when S. 4 declares that a marriage "solemnized" otherwise than in accordance with S. 5 between two persons though one of them alone is a Christian is void, the legislature does interfere with the Mussalman religion and the additional imposition of, criminal penalties of a severe nature on such solemnization by the later S. 68 does not, in principle, carry the interference further. But if the meaning of the word "solemnize" is confined to (1) the celebration with the marriage rites and ceremonies of a Christian Church and (2) the ceremonies of declaration prescribed to be followed before the Christian Marriage Registrar appointed by the Act, neither of the sections interferes with the tenets and marriage rules of other religions than the Christian. The Full Bench decision in *Queen-Empress* v. *Fischer* (4) does not deal directly with the interpretation of the word "solemnize."

However, as I said in the beginning, I have had some hesitation in the matter (especially as the first Christian Marriage Act of 1852 was based on the provisions of English Statutes 14 and 15 Victoria Ch. 10 and other Statutes which did not probably care for the principle of religious neutrality and treated religions other than the Christian with somewhat scant consideration). While, therefore, I do not think it necessary to express a final opinion on the matter, I do not think it undesirable to have the matter reconsidered by a Full Bench. I accordingly join in the reference proposed by my learned brother.

Opinion

We are of opinion that the decisions in *High Court Proceedings, dated 21st March* 1871 (2) and *Queen-Empress* v. *Yohan* (1) which were accepted in *Queen-Empress* v. *Paul* (3), were rightly decided. In our opinion the Act was intended to apply to the marriages of all Christians in India, including marriages where only one of the parties is a Christian. S. 4 expressly says that:

> "any marriage between persons one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void,"

and S. 68 merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act. Offences under the section may vary very widely in gravity and it has been considered necessary as in England to provide a very heavy maximum sentence which would be wholly inapplicable in such a case as the present but that does not show that cases

4. (1891) 14 Mad 342.

such as the present do not come within the section. Nor does the use of the word "soiemnize," which is referred to in the order of reference of Napier, J., give rise in our opinion to such an inference. That word which is now invariably used in this connexion has a history which may usefully be referred to. The general law of the medieval Church, which regarded marriage as a sacrament as well as a contract did not regard the presence of a priest in orders as essential to the validity of the marriage. The parties might themselves enter in the contract and the issue born of the marriage would be legitimate though such a marriage was regarded as clandestine and irregular as contrasted with a marriage in facie ecclesiae, and did not carry with it all the incidents of such a marriage, Bracton, in a passage cited in *Reg* v. *Millis* (5), whilst upholding the validity of such clandestine marriages, says that they did not confer on the wife a right to dower. On the other hand he says that a wife married in facie ecclesiae was entitled to dower "propter solemnitatem" which we may translate "because of the solemnization of the marriage or the performance of the marriage in solemn form."

A solemnized marriage is thus a marriage effected in a solemn and regular manner as opposed to an irregular and clandestine marriage. The question whether there was a stricter rule in England requiring the presence of a priest in orders arose in the great case of *Reg* v. *Millis* (5) and was answered in the affirmative in accordance with the view of the Irish Court owing to the Lords being equally divided. To put an end so far as it could to clandestine marriages, the Council of Trent decreed that in future all marriages must be celebrated "coram parocho," that is, in the presence of the parish priest and also in the presence of witnesses. Its decrees were not received in England or Scotland but Lord Hardwicke's Act, which was passed in 1754 with the same object put an end to clandestine marriages in England by requiring all marriages to be celebrated in the Parish Church. This was considered a hardship by Roman Catholics and Non-conformists and in 1837 they were allowed to be married at their own places of worship if the marriage was attended by the Registrar, and provision was also made for the solemnization of marriages before the Registrar himself.

As regards Christian marriages in India, it was held by Sir Erskine Perry in *Maclean* v. *Cristall* (6) that the rule in *Reg* v. *Millis* (5) as to the presence of a priest in orders had never been applicable in India. The legislature however considered it necessary to legislate in India on the same lines as in England against irregular and clandestine marriages among Christians and dealt with the subject in Acts 25 of 1864, 5 of 1865 and 15 of 1872 the Act now in force. Under that Act all marriages of Christians including marriages where only one of the parties is a Christian must be preformed on pain of nullity in one of the prescribed forms. The Act makes no distinction between Native Christians and other Christians, except that by S. 9 it provides for the issue of licenses to perform marriages between Native Christians to Christians who are not ministers of religion to meet the case of an insufficiency of ministers of religion and that it directs that the registers of the marriages of Native Christians shall be kept separately from the registers of other Christian marriages, a provision dictated by administrative convenience. The provisions of S. 9 have no bearing on the question now before us as they only apply where both the parties are Native Christians, as expressly declared by Act 2 of 1892; and therefore, marriages of Christians with persons who are not Christians must be solemnized in one of the other manners provided in the Act. The general effect of the Act is as already stated to require that every marriage, where one of the parties is a Christian, must, as a condition of validity, be solemnized in one of the prescribed forms excluding the form prescribed by S. 9 unless both the parties are Native Christians. The Act, however is only concerned with the forms in which the marriage is to be solemnized, and does not deal with objections to the validity of the marriage. As pointed out in *Lopez* v. *Lopez* (7), where tha history of this legislation is carefully examined, it requires one of the parties to the proposed marriage to make

5. (1844) 10 Cl & Fin 534.

6. Perry's Oriental Cases 75.

7. (1886) 12 Cal 706.

a declaration that there is no impediment of kindred or affinity or other lawful hindrance and also requires that the minister of religion or registrar should be satisfied that there is no lawful impediment, but it provides in S. 88 that "nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into.

We answer the question in the affirmative.

S.N./R.K. *Reference answered in the affirmative.*

A. I. R. 1918 Madras 605

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

T. A. Chidambaram Chetty and *another* —Defendants—Appellants.

v.

M. L. M. Ramanathan Chetty—Plaintiff—Respondent.

Original Side Appeal No. 67 of 1916, Decided on 25th January 1917, from order of Coutts-Trotter, J.

Civil P. C. (1908), S. 44—Transmission of decree for execution to Native State is illegal— Long practice cannot justify such transmission—Ex parte order for transmission can be set aside within time prescribed by Limitation Act (1908), Art. 182.

Section 44 does not sanction the transmission of a decree of a Court in British India to a Court of a Native State : 12 *Bom* 230 and 29 *Cal.* 400, *Foll.* [P 605 C 2]

Long practice cannot be relied on to justify such a transmission, for, where want of jurisdiction is established, long practice will not avail. [P 605 C 2]

An ex parte order for tranmission as aforesaid is liable to be vacated at the instance of the party aggrieved within the time prescribed under Art. 182, Limitation Act. [P 606 C 1]

S. Srinivasa Aiyangar and *G. Krishnaswami Aiyar*—for Appellants.

A. Krishnaswami Aiyar and *M. Subbaraya Aiyar*—for Respondent.

Judgment.—In Original Suit No. 111 of 1915, the respondent obtained a decree on the original side of the High Court against the appellant for a large sum of money. In November 1915, an application was made for concurrent execution of this decree in Madras, Burma, Tanjore and Puducottah. As the decree was passed within a year of the application, it was granted without notice to the appellant. The decree was transmitted to the Chief Court of Puducottah on 23rd November 1915 for execution. On 19th October 1916, an application was made to Coutts-Trotter; J., for the cancellation of the order transferring the decree to Puducottah. The application was dismissed, on the ground apparently that it was in accordance with settled practice. Hence this appeal.

Section 39, Civil P. C., provides for the transmission of decrees for execution to Courts within whose jurisdiction either the judgment-debtor resides or his property is situate. S. 40 deals with the transmission of decrees to another Province in British India. S. 43 provides for a decree being sent to a Court established by the Governor-General in Council outside British India under the Foreign Jurisdiction Act. As supplementary to S. 43, S. 45 lays down that in the Courts so established, the rules which are observed in the execution of decrees in Courts in British India shall be followed. S. 44 deals with decrees of what are known as favoured Native States. That section provides that decrees of the Courts of any Native Prince or State in alliance with His Majesty may be executed in British India as if they were passed in British India. There is no converse provision that decrees passed in British India can similarly be executed in Courts established by the authority of a Native Prince or State. The absence of such a provision seems to be conclusive upon the question. Further, it is a well-known principle of jurisprudence that no country can legislate for the procedure to be followed in a Foreign State. Therefore, it seems to us that the order transmitting the decree for execution is not sanctioned by the Code. There is the positive authority of *Kasturchand Gujar* v. *Pursha Mahar* (1) in favour of this view. The case of *Ratan Mahanti* v. *Khatoo Sahoo* (2) also enunciates the same principle. As regards the suggestion that a long practice should not be departed from on a question of procedure, it is enough to say that where want of jurisdiction is established, long practice would not avail: *Palmer* v. *Hutchinson* (3) and *Rajah of Ramnad* v. *Seetaram Chetty* (4).

Mr. Krishnaswami Aiyar for the respondent drew our attention to the fact that no appeal was preferred against the order transmitting the decree for execu-

1. (1888) 12 Bom 230.
2. (1902) 29 Cal 400.
3. (1881) 6 A. C. 619.
4. (1903) 26 Mad 120.

tion, and argued that it is not open to us to question its validity at this stage. We are of opinion that as the order was passed ex parte and was without jurisdiction, the appellant is entitled when it comes to his notice, to apply to vacate it within the time limited under Art. 182, Limitation Act. As it relates to the execution of the decree which was sent to Puducottah in November 1915, there is no bar of limitation : see *Ajant Singh* v. *Sundar Mall* (5). We must therefore hold that the order transmitting the decree was made without jurisdiction and must be set aside. We make no order as to costs.

S N./R.K. *Order set aside.*

5. (1912) 16 I C 567.

A. I. R. 1918 Madras 606

SPENCER AND SESHAGIRI AIYAR, JJ.

Ganesa Sethuram and *another*—Defendant—Appellant.

v.

Ramaswami Servai and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1860 of 1915, Decided on 24th July 1917, against decree of Temporary Sub-Judge, Trichinopoly, in Appeal Suit No. 544 of 1914.

(a) Contract Act (1872), S. 213—Agent's duty, stated—Agent is liable to pay interest on money not paid by him on demand.

It is the first duty of an agent to be constantly ready to render his accounts when they are demanded. If no demand is made on him he simply retains the money which he ought to pay over, but which he has not been required to pay. If however on demand he denies his liability and refuses to pay, he is liable to pay interest on the sum from the date of the demand. [P 606 C 2]

(b) Contract Act (1872), S. 213—Retention of money by agent is not fraud.

An agent by retaining the money due from him cannot be held to have committed a fraud. [P 606 C 2]

(c) Trustees—Secretary of fund is not trustee but is agent only.

A Secretary of a fund is only an agent and not a trustee, even where he recovers moneys from subscribers and is himself one of the directors of the fund. [P 606 C 2]

K. V. L. Narasimham and *K. S. Ganesa Aiyar*—for Appellant.

T. V. Muthukrishna Aiyar—for Respondents.

Judgment.—The plaintiff is the liquidator of a Company incorporated under the Companies Act. Defendant 3 whose legal representative has preferred this second appeal was the Secretary of the Company. Under the Articles of Association he was entitled to be Secretary until removed from office. The Company was voluntarily wound up in January 1911; on the 4th March of that year, the plaintiff was appointed liquidator. He made a demand on defendant 3 on 12th August 1911 for the moneys in his hands: see Ex. 5. Defendant 3 denied liability. Thereupon this suit was instituted. Defendant 3 died during the course of the suit and defendant 8 was brought in as his legal representative. The Courts below have held, and we think rightly, that defendant 8, the son, is bound to pay the moneys found to have come into his father's hands. The only question on which we feel bound to differ from the Courts below is as regards the award of interest. Mr. Ganesa Aiyar, for the appellant, contended that as there is no allegation of fraud in the plaint, the Subordinate Judge was wrong in treating the claim as one founded on misappropriation. If the right to interest was based on the ground of fraud there ought to have been a specified issue on the question: see *Johnson* v. *Rex* (1). Further as was pointed out in *Turner* v. *Burkinshaw* (2), an agent by retaining the money due from him should not be held to have committed a fraud. Lord Chelmsford's observations in that case are in point:

"It is the first duty of an agent—as Sir Thomas Plumer said in *Pearse* v. *Green* (3), quoting the words of the Lord Chancellor in *Hardwicke* (*Earl of*) v. *Vernon* (4)—to be constantly ready with his accounts. But this must mean that the agent must be ready to render his accounts when they are demanded. If no demand is made upon him, it is the simple case of an agent retaining money which he ought to pay over, but which he has not been required to pay; and there is no case, of which I am aware, where, under such circumstances, without anything more, the agent has been made to pay interest."

Mr. Muthukrishna Aiyar, for the respondent, realized the force of these observations, and contended that the Secretary of a fund is something more than an agent. We are unable to agree with him. There is no reason for regarding a Secretary as a trustee. It is true that the evidence in this case shows that he recovered the moneys from the subscribers, and that he was also one of the directors of the fund; but he is sued as Secretary and, in our opinion, he has no higher responsibilities than as agent. The further

1. (1904) A C 817.
2. (1867) 2 Ch Ap 488.
3. (1819) 1 J & W 135.
4. (1808) 14 Ves Jun 504.

contention of the learned vakil, for the respondent, was that the Interest Act on which reliance was placed for the appellant saves by the proviso claims to interest based on the law of the land. It may be conceded that if interest is payable otherwise, the Interest Act will not prevent its recovery, although there may be no written demand. S. 235, Companies Act 7 of 1913, was quoted to show that in proceedings taken under the Act, the officers of the defunct fund are bound to pay interest. But the present suit is not a proceeding of the nature contemplated by S. 235. Consequently the question is not affected by that special rule. We must, therefore, hold that the plaintiff is not entitled to interest up to the date when the liquidator made a demand. By his denial of liability, however, in answer to the demand, defendant 3 must be deemed to have retained the money illegally. Until demand he ought to have been ready to pay up.

After demand, if he kept back the money, it would amount to unlawful detention. As pointed out in *Turner* v. *Burkinshaw* (2), the liability to pay interest accrues from this moment: see also *Collector of Ahmedabad* v. *Lavji Mulji* (5). The decision in *Abdul Rahiman* v. *Rangiah Gounden* (6), to which the learned vakil for the respondent drew our attention, is consistent with liability being laid only after the retention becomes unlawful. Moreover, in that case, the learned Chief Justice implied an user of the money which we do not find in the present case. The decision if interpreted as contended for, would be opposed to *Kamalammal* v. *Peeru Meera* (7) and *Subramania Aiyar* v. *Subramania Aiyar* (8). In the result, we modify the decree of the lower appellate Court by directing that interest upon the principal sum decreed should run from 12th August 1911, and not from 1909. We see no reason to interfere with the rate of interest. On the amount decreed interest will be at 6 per cent. from the date of the decree till payment. Parties will pay and receive proportionate costs in this and in the lower appellate Court. The order of the 1st Court as to costs will stand.

S.N./R.K. *Decree modified.*

5. (1911) 35 Bom., 255=10 I C 818.
6. A I R 1914 Mad 145=22 I C 597.
7. (1897) 20 Mad 481.
8. (1908) 31 Mad 250.

A. I. R. 1918 Madras 607

ABDUR RAHIM AND KUMARASWAMI SASTRI, JJ.

Narayana Iyer—Petitioners—Appellants.

v.

Singaraveloo Vannian and *others*—Respondents.

Second Misc. Appeals No. 53 of 1913 and 32 of 1914, Decided on 1st August 1917, against the order of Dist. Judge, Tanjore, in Appeal Suits Nos. 559 of 1912 and 601 of 1913.

(a) Civil P. C. (1908), S. 48—Mortgage decree directing sale of property and payment of deficiency—Limitation runs from date when remedy against mortgaged property is exhausted—Limitation—Mortgage.

The twelve years' period of limitation under S. 48, Civil P. C. for recovery of the deficiency after a sale under a mortgage decree runs from the date when the remedy against the mortgaged property is exhausted, 37 *I. C.* 741; *Foll.* [P 608 C 2]

(b) Transfer of Property Act (1882), S. 90—Mortgage decree directing payment in case of deficiency—Separate order under S. 90 is not necessary.

A mortgage decree was passed in 1903. It was a combined decree directing the defendants to pay a certain sum on or before a certain date, directing a sale of the mortgaged properties in default of payment and also decreeing that the defendants do pay any deficiency that might arise if the sale proceeds proved insufficient to satisfy the amount decreed, with interest and costs. The sale took place on 12th January 1903, and was confirmed on 7th February 1903. The sale proceeds were insufficient to satisfy the amount decreed, and the decree-holder filed an execution application in 1905, on which execution was ordered after notice to the judgment-debtors. It has ultimately dismissed for default, and subsequent applications were put in, the last of which, made in 1912, was dismissed by the lower appellate, Court as barred by time.

Held; (1) that as the decree specifically decreed that the defendants were to pay any deficiency that might arise, it was not necessary to obtain another separate decree or order under S. 90, T. P. Act. *A I R* 1915 *Mad.* 452 *Rel. on.* [P 608 C 1]

(2) that though the decree was irregular, it was not open to the judgment-debtors to raise the question in execution proceedings; 12 *I C* 32 *Mad.* 534 and 17 *I. C.* 263; *Rel. on* [P 608 C 1]

(3) that the order on the application of 1906 was final and that it could not be contended in subsequent execution proceedings that the decree was not executable owing to the want of a final decree. 14 *M. L. J.* 103, *Rel. on* [P 608 C 1]

(4) that the application of 1912 was not barred by time, inasmuch as the remedies against the mortgaged properties were exhausted only in February 1903, when the sale of the mortgaged properties was confirmed by the Court, and the decree-holder had, therefore, twelve years from that date to enforce his claim for the deficiency by execution. [P 608 C 2]

G. S. Ramachandra Aiyar—for appellants.

N. Ragagopalachari—for Respondents.

Judgment —The decree sought to be executed is a mortgage decree passed before the present Code of Civil Procedure came into force. It is in the form (then usual) of a combined decree directing the defendants to pay a certain sum on or before certain date, directing a sale of the mortgaged properties in default of payment, and also decreeing that the defendants do pay any deficiency that might arise if the sale proceeds proved insufficient to satisfy the amount decreed, with interest and costs. The decree was passed on 8th October 1898. The mortgaged properties were sold on 12th January 1903 and the sale was confirmed on 17th February 1903. As the sale proceeds were insufficient the decree holder filed several applications in execution between 1903 and 1912. He filed an execution application in 1906 and execution was ordered after notice to the judgment-debtors. This order is final and it cannot be contended in subsequent execution proceedings that the decree was not executable owing to the want of a final decree: *Lakshmi Ammal* v. *Subramania Pillai* (1). It was ultimately dismissed for default of the decree-holder's appearance. Subsequent applications were put in, the last of which was allowed by the District Munsif, who was of opinion that it was not barred by limitation. On appeal the District Judge took the contrary view and dismissed it as barred.

Though the decree was irregular, having regard to the provisions of the Transfer of Property Act, we do not think it is open to the judgment-debtors to raise the question in execution proceedings. *Rajah of Kalahasti* v. *Venkata Perumal* (2) and *Abbakki* v. *Krishnayya* (3) and *Dinabandhu Nandi* v. *Mashuda Khatun* (4) are clearly in point. As the decree specifically decreed that the defendants were to pay any deficiency that might arise, it was not necessary to obtain another separate decree or order under S. 90, T. P. Act. *Periasami Kone* v. *Muthia Chettiar* 5). The only question that remains is whether execution of the decree is barred under the provisions of S. 48, Civil P. C. It is clear that the remedies against the mortgaged properties were exhausted only in February 1903, when the sale of the mortgaged properties was confirmed by the Court. The decree-holder has, therefore, twelve years from that date to enforce his claim for the deficiency by execution. The recent Full Bench decision in *Aiyasamier* v. *Venkatachela Mudali* (6) concludes the question, as the view taken by the referring Judge and the majority of the Judges composing the Full Bench is that the twelve years' period of limitation under S. 48, Civil P. C., for recovery of the deficiency runs from the date when the remedy against the mortgaged property is exhausted. We do not think that the order of the District Munsif directing the decree-holder to apply formally for a decree absolute, which was under the circumstances of the present case wholly unnecessary, would render the previous execution application useless for the purpose of saving limitation. We reverse the order of the District Judge with costs in this and the lower Court. We set aside the order of the District Munsif and direct him to dispose of the application for payment according to law. Costs to abide.

S N./R.K. *Appeal allowed.*

1. (1904) 14 M L J 103.
2. (1911) 12 I C 689.
3. (1909) 32 Mad 534=4 I C 1120.
4. (1912) 17 I C 263.
5. A I R 1915 Mad 452=38 Mad 677=23 I C 515.
6. (1917) 37 I C 741.

* A. I. R. 1918 Madras 608

ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

Secy. of State—Defendant—Appellant.

v.

Palaniyappa Pillai and *another* —Plaintiffs—Respondents.

Appeal No. 400 of 1914, Decided on 11th January 1917, against decree of Sub-Judge, Tinnevelly, in Original Suit No. 60 of 1911.

*** Riparian owner—Channel irrigating mittas—Each upper owner is entitled to sufficient storage and subject to this must allow water to flow freely on to lower tank—Government committing trespass on private properties can be restrained for controlling distribution of water—Specific Relief Act (1877), S 54.**

In systems of connected tanks in different mittas or villages supplied with water by or through a permanent or artificial channel, each upper owner is entitled in the flood season to fill his tank, which in general is of sufficient storage capacity for the ayakat, and, subject to this, is

bound to allow the water to flow freely on to the lower tank till the last of them is supplied. Whatever may be the means adopted to let out the surplus, the owner of the tank, in such cases has no right to increase the storage capacity of his tank beyond what it was at the time the channel was dug, which, in many cases, can only be proved by the customary flow of water into the tank. [P 614 C 2; P 615 C 1]

Where Government is found to have no right to water supplied to tanks in a mitta by an artificial channel passing through the village, the revenue officers, as agents of the Government, are not entitled to go on the mittadar's land against his wish to regulate the supply or distribution of water to his mitta and other ayan villages or to execute repairs. Such a right can only be exercised without violating the proprietary rights of others and by the use of lawful means. [P 611 C 1]

Government can be restrained by an injunction from committing trespass on the properties of private owners for controlling the distribution of water for purposes of irrigation. [P 611 C 1]

V. Ramesam—for Appellant.

J. L Rosario, E. S. Chidambaram Pillai and *P. N. Marthandam Pillai*—for Respondents.

Abdur Rahim, J.—The respondents (plaintiffs) are the proprietors of Kunnakudi Mitta. The southern boundary of it is a small river called Harihara Nadhi. A channel called Kunnakudi Kal takes off from a point in the river, goes a little distance towards the north and then to the east (or rather south-east), feeds a tank called Kunnakudi Periakulam which discharges its water at the other end through a weir; from here the channel continues and feeds a smaller tank called Kunnakudi Pettaikulam; and thereafter it goes on till it discharges itself in Sivalaperikulam. The villages on the north and and north-east of the channel are raiyatwari villages held of the Government and named Kuthukkalvalasai and Tenkasi. Sivalaperikulam derives its name from the village of Sivalaperi, also a raiyatwari village in Tenkasi Taluk. At the source of the channel, a short distance from the river, there is a head sluice situate in the mitta. Further on also within the boundaries of the mitta is one of the points in dispute, what is called outlet No. 2. This outlet or calingula is on the southern bank of the channel; it has a vent in the middle, a masonry wall on each side, with wing walls in the eastern and western bunds.

The head of the vent before the interference of the revenue authorities was half a foot lower than that of the channel. There was opening between the stones in the vent to admit of wooden planks being inserted and these used to be put in when it was found necessary, in order to carry water into the tank; in times of flood the planks would be removed so that water might flow down to the river to the south. The mittadars claim that they are entitled to the whole of the water which comes into the channel and through the channel into the two tanks mentioned above within the Kunnakudi Mitta; and if any surplus water is left after irrigating all the lands that they want to cultivate, that is drained off into the Sivalaperi tank. On behalf of the appellant, the Secretary of State for India in Council, it is stated that the channel is a common source of supply created for the benefit of the plaintiff's mitta tank, i. e., Periakulam tank and the Ayan Sivalaperi tank. He does not recognize Pettaikulam as a tank in which plaintiffs are entitled to store water and says that the Sivalaperi tank is entitled at all times to two-fifths of the water in the channel which the raiyats have a right to take in seasons of good supply through the open vents in the surplus weir of the Periakulam tank, and in times of low supply through a madai or sluice called Pulavadaimadai at the western end of the Periakulam tank. In the alternative, he says that the Sivalaperi tank is entitled to all the water of the surplus weir of Periakulam as the weir stood in 1859.

The defendant also alleges that until 1892 the waterspread of the Periakulam tank was 7·50 acres of mitta land and 10·39 acres of Government poramboke lands on the north, that since that date the mittadars by inserting permanent wooden shutters in the vents of the weir, which till then used to remain open, increased the full tank level and caused permanent submersion of 13 acres of Government wet land on the foreshore of this tank. He contends that this act of the mittadar is unlawful and that the F. T. L. (Full Tank Level) of Periakulam should be reduced by one foot. The defendant then states that the Kunnakudi channel was in a dangerous condition and needed repairs and for his purpose he found it necessary, as guardian of public interests, to convert outlet No. 2 into a calingula, sent notice and estimates to the mittadars calling upon them to pay their contribution, and that as they would not agree he began doing the works himself. The calingula

is constructed with dam stones with their top as their full sluice level and so made as to work automatically without endangering the channel bank or diminishing the supply in the channel or the tank. As for Pettaikulam the case of the defendant is that it is only a portion of the channel below the surplus weir of Periakulam and that it was converted by the mittadars into a supplemental tank in 1871 by constructing a masonry dam across the channel.

He wants that the dam should be removed. The defendant claims that the Government, as such, has a right to do all the necessary repairs in the channel partly from contributions from public funds and partly from contribution made by the mittadar and the ayan raiyats. It is denied that the plaintiffs have any right to execute repairs to any of the works in the channel or tank without the defendants' permission.

The Kunnakudi channel is an ancient channel. It does not appear when it was dug and at whose cost. It lies almost entirely within the Kunnakudi Mitta and there cannot be the slighest doubt that whoever dug it, it was intended mainly for irrigatiug the lands of that mitta. The mitta is a portion of the old Chockkampatti zemindari. The zemindari was sold for arrears of peishcush or revenue payable to Government in 1835—1836. It was under the management of the Government till 1859 when it was granted to the successor of the original zemindar and afterwards again sold and divided into parcels. One of these parcels is the Kunnakudi Mitta. During the period that the zemindari was under the management of the Government they executed repairs and improvements in the channel and it was after such improvements had been effected that the grant of 1859 was made to the predecessor-in-title of the mittadar. On the other hand by the muchilika executed at the time, the then zemindar undertook to keep tanks and channels in repair according to the ancient custom of the zemindari, and there was no limitation imposed on the right of the zemindar to use the water of the channel and the tank for purposes of irrigating the zemindari land. The question of the respective rights of the mittadars and the Government with respect to the user of the water of the channel was raised between them in Original Suit No. 69 of 1894 on the file of the Court of the Subordinate Judge of Tinnevelly (Original Suit No. 26 of 1896 on the file of the Court of the Temporary Subordinate Judge of Tinnevelly), the Government alleging that the water stored in the mittadars' tank belonged to them, as it was obtained from an artificial channel maintained by the Government and situated in Government land; and they claimed the right to levy water-cess (fasli jasthi) in respect of the second crop raised by the mittadars by irrigating the land with the channel water. The claim of the Government was disallowed by all the Courts, the Court of trial, the District Judge in appeal and by the High Court in second appeal: *Secy. of State* v. *Perumal Pillai* (1). It was found that the whole of the water in the tank supplied by the channel belonged to the grantee (i. e., the mittadar) and not to the Government, and that the Government was not entitled to increase the peishcush on the ground that the mittadars had increased wet cultivation and made other improvements in the lands of the zemindari. Bnt at the end of the judgment of the High Court, it was observed that their finding and decision:

"should not be understood as determining any question between the grantee and those who may be entitled to the surplus water of the tank according to established usage."

It is this reservation that is relied upon by the defendant in support of his present claim put forward on behalf of the Sivalaperi and Kuthukkalvalasai raiyats. But instead of instituting a proper suit to obtain determination of the right to the surplus water of the Periakulam tank which the raiyats in the ayan villages in question may have according to "established usage," the Government took upon itself the responsibility of forcibly entering upon the mittadars' land and asserting the right claimed by them to regulate the distribution of water to the mittadars and to the raiyats of the Government villages. Mr. J. L. Rosario, appearing on behalf of the mittadars, has strongly protested against this action of the revenue officers. On the other hand, the learned Government Pleader urges that it is the paramount right and also duty of the Government in this Presidency to distribute and control the distribution of water for purposes of irrigation and that the revenue officers acting on behalf of the

1. (1901) 24 Mad 279.
2. (1909) 32 Mad 141=2 I C 325.

Government were, therefore, justified in going upon the mittadars' land without their permission and in spite of their protests. He relies upon the ruling in *Robert Fischer* v. *Secy. of State* (2). That case instead of helping him contains an observation which is opposed to his contention. It is stated:

> "it could not, of course, be suggested that, for the purpose of exercising their right of control, Government would be warranted in committing an act of trespass,"

and no other authority is cited in support of such a prima facie untenable proposition, that the Revenue Officers as agents of the Government are entitled to go upon people's land in this Presidency against their wishes for the exercise of any right that the Government may possess to regulate the distribution of water of rivers and channels. Such a right however in my opinion can only be exercised without violating the proprietary rights of others and by the use of lawful means and there can be no doubt therefore that the defendant was rightly restrained by injunction from going upon the plaintiffs' land against their wishes to regulate the distribution of water to the channel and the tank.

Mr. Rosario then contended that we should not go any further and declare the rights of the parties in the water of the channel and says that this should be done only when the raiyats concerned institute a proper suit for the purpose. But having regard to the fact that so much evidence has been taken on the various issues raised in connexion with the question and that the dispute has been going on for a very long time, it is not desirable that the matter should be left again in an unsettled condition, in so far as it can be determined now. The first question is, what are the respective rights of the mittadars and the Sivalaperi raiyats.

The history of the disputes relating to this channel goes back upon the record to 1820. It appears from Ex. 17 (a) of 1822 that the right of the raiyats of Sivalaperi to irrigate the lands under the Sivalaperi tank with water drawn from the Kunnakudi channel according to mamool or usage was recognized by the then zamindar. As regards the exact extent of that right, it was claimed on behalf of the Sivalaperi raiyats that they were entitled to two fifths of the water in the channel (the zamindar being entitled to three-fifths) in times of scarcity through a sluice in the channel called Pulavadimadai at the western end of the Periakulam tank, and in times of full supply over the weir at the eastern end of the tank. It is also evident from Ex. 17 (b) that even in 1882 there was obstruction on the part of the zamindar to the exercise of this alleged right by the Sivalaperi raiyats. In so far as can be gathered from the documentary evidence in the case which is the most reliable evidence available the claim of the Sivalaperi raiyats to take water through Pulavadimadai was never recognized by the zamindar or successfully established against him. It is not even shown that there is any defined channel by which water is taken to Sivalaperi lands through the Pulavadimadai. It is however clearly established that the Sivalaperi tank has been deriving its supply from the water that flows over the surplus weir of the Periakulam tank at the eastern end. This is proved by documentary evidence going as far back as 1820. In fact it is the main, if not the sole, source of supply for the Sevalaperi tank ; and this has been recognized by the proprietor of Kunnakudi Mitta from time to time.

The mittadar, his agents and lessees have in fact asked for and obtained contribution from the Sivalaperi raiyats towards the repairs executed to the channel, and when the repairs were done by the Government the mittadar paid what was accepted by him as his proper share, the rest being borne by Government and the Sivalaperi raiyats. The proportions in which the expenses were met have sometimes amounted to nearly three fifths by the mittadar and two fifths by the Government and its raiyats at Sivalaperi. These facts are borne out by documents dating from 1870, viz., Exs. 5, 9, (b) 9(a) 9(j) 9 m, 16 series, etc. This evidence would therefore seem to indicate to some extent that tha division of water in the channel between the mittadars and the ayan raiyats used to be made in the proportion of three-fifths and two-fifths. In the absence however of more definite evidence on this point and in view of the fact that the right of defendant to take water through Pulavadimadai in times of scarcity is not established, I am not prepared to hold that the Sivalaperi raiyats are entitled to two fifths of the entire water

in the channel and the plaintiffs to three-fifths. The division of the expenses of repairs in such proportion only indicates in a rough way the amount of the benefit which the parties respectively derived from the channel It would appear that the supply of water in the channel, if it is not allowed to run waste through want of repairs in the channel or otherwise, is ordinarily abundant and it seldom happened that it was not found to be sufficient for the needs both of the mittadars and the defendant. It should also be borne in mind in this connexion that the plaintiffs are entitled to irrigate the lands as they always have been doing through sluices in the channel as well as in the tanks, and it cannot be said that the plaintiffs' rights of irrigation are confined to any particular acreage or to a single crop.

The next important question for decision is whether the plaintiffs are entitled to store water in the Pettaikulam tank and if so, what are the extent and limits of that right. The case of the defendant is that the Pettaikulam is a new tank altogether and so is the dam at its eastern end, and it is claimed on his behalf that the Pettaikulam should be filled up in so far as it exceeds the width of the channel as it goes down from the Pettaikulam Weir. The evidence as to the Pettaikulam tank is somewhat obscure. But evidently there is allusion to a dry pottai tank in a report by the Revenue Officer made in 1822 (Ex. 17). Ex. P, which is the delivery warrant issued to a purchaser of Kunnakudi village in a civil suit of 1866, makes distinct mention of Kunnakudi Pettaikulam from which the marugal channel is stated to be running to Sivalaperi tank. It is possible that it is nothing but a natural depression as stated in Mr. Brandt's Memorandum of 1873 (Ex. 6). It is not suggested that it was dug by any one and the appearance of it as described by Mr. Brandt rather tends to negative the supposition that it is an artificial tank. If that is so, there can be little doubt that it was originally a part of the channel itself.

It lies entirely within the limits of the mitta and the mittadar is in my opinion entitled to all the water that is stored there, and the surplus that flows over into the channel continued at the eastern end is what the raiyats of Sivalaperi are entitled to. The first dispute that arose over the Pettaikulam was in 1870 or thereabouts and related to a sluice on the south and to a dam across the channel at the eastern end of this tank. It was distinctly asserted at the time in the memorandum of appeal filed on behalf of the mittadar to the Collector that at first the madai or sluice in the Pettaikulam was made of palmyra trunks and that subsequently it was replaced by an earthenware sluice or nazbimadai. It was also stated that the old madai had got blocked for a time and that by changing its material no harm was caused to the Sivalaperi raiyats and that in fact it prevented waste of water. The Collector Mr Puckle held reversing the order of the Sub-Collector, that the zamindar had an undoubted right to use whatever water was stored in his tank to the best advantage and the Sivalaperi raiyats, whose tank (i. e., the Sivalaperi tank) was only entitled to the surplus drainage, had no cause to complain as long as the surplus channel was left open. It appears however from a Memorandum of Mr. Brandt (Ex. 6) and from Ex. 8, which is a letter from Mr. Puckle, who had heard the appeal of the mittadar, to the District Engineer, that the new dam that had been put up at the Pettaikulam tank was regarded as objectionable by the revenue authorities. Orders were passed in 1874 requiring the then mittadar to remove the dam but he apparently did not feel himself bound to comply with the requisition.

There can be no doubt that the mittadar is entitled to take water through the sluice on the south of Pettaikulam. The point for decision is whether he is entitled to retain the dam. It is alleged that by this dam, obstruction is caused to the flow of water into the channel leading to the Sivalaperi tank according to usage, and in fact the claim of the defendant goes further for he wants that the Pettaikulam tank should be removed or filled up. The evidence on behalf of the plaintiffs is that by the masonry dam which they have put up no alteration is effected in the supply of water to the Sivalaperi tank. In my opinion, the plaintiffs are entitled to put up a proper weir at the eastern end of Pettaikulam, provided they do not thereby cause any detriment to the supply of water to Sivalaperi, which the raiyats have been accustomed to get before the con-

struction of the new dam. It would appear from Ex. 7, a report made in 1874 by the Government Tahsildar to the Collector, that the masonry weir at Pettaikulam was constructed under the orders of the Range Officer and that it was sanctioned by the Collector himself. The evidence is not clear upon the materials available as to how and to what extent, if any, damage has been caused to the Sivalaperi raiyats by this construction. I think it must be left to the ayan raiyats themselves to seek their proper remedy by a separate proceeding, if, in fact, they have suffered any injury. That the defendant is not entitled to have the Pettaikulam tank itself removed, is to my mind abundantly clear.

Then with reference to the Periakulam tank, the question that we have to decide is, what is the extent of water which the plaintiffs are entitled to store in it, or in other words, what is the proper ayakat of this tank. The evidence furnished by the Settlement Register shows that part of the Survey No. 262 amounting to 10 acres, 9 cents of Government raiyatwari land in Kuthukkalvalasai is a portion of the waterspread of Periakulam. This is also borne out by other documentary evidence. The same is the effect of the evidence of P. W. 14, Mr. Vaikuntam Ayyar, an Executive Engineer, who prepared a map showing the waterspread of this tank at different levels. There can be little doubt that the proper waterspread of this tank is represented by what is called the 3rd contour which corresponds to the sill level of the vents in the calingula. Taking the crest of the surplus weir at 100, the 3rd contour represents 97.34. The plaintiffs are not entitled to raise the full tank level above this point, whether by the use of wooden shutters or otherwise; for the result of increasing it would be that more raiyatwari land on the north would be submerged than is justified and there would be less water to flow over the surplus weir into the channel leading from Pettaikulam to the Sivalaperi tank.

The next point for consideration refers to outlet No. 2, the construction made by the defendant in the channel not far from the head sluice. The evidence of Mr. Vaikuntam Ayyar, which I find no reason for discrediting, shows that by raising the sill level by 1 foot, damage is likely to be caused to the channel. It would seem that the natural result would be that the silt that comes into the channel with the drainage from the north, would not be discharged to the same extent as before into the Harihara Nadhi, but would accumulate into the channel itself and gradually get carried into the Periakulam tank. As regards the rest of the construction, I do not think it can be said that any harm will be caused to the channel or to the interest of the mittadars.

It should, therefore, be declared (a) that the channel, so far as it lies within the boundaries of the mitta, belongs to the plaintiffs; (b) that the defendant's officers are not entitled to enter upon the mitta land in order to execute any work in connection with the channel with a view to regulate the distribution of water to the Periakulam and Sivalaperi tanks or for any other purpose, if such entry and execution of works is objected to by the mittadars; (c) the plaintiffs are entitled to store water in the Periakulam tank to the level indicated by contour No. 3 delineated on the plan prepared by the 14th witness for the plaintiffs marked as Ex. E and they will be restrained from increasing that level; (d) the plaintiffs are also entitled to the water that comes into the Pettaikulam tank but are not entitled to store more water than what used to be contained in it before the date of construction of the new masonry dam, i.e., before 1871; if this new dam has caused any injury to the raiyats of Sivalaperi, they will be at liberty to pursue such remedy as they may have by a proper suit; (e) the plaintiffs are entitled also to take water through the sluices already existing in the channel and in the Periakulam and Petaikulam tanks; (f) the plaintiffs must keep the channel and the works in connection therewith in proper repair and efficient condition, the costs thereof to be borne by them and the Government in the proportion of three-fifths and two-fifths; (g) the plaintiffs must not obstruct the flow of surplus water over the weir at Periakulam at the level indicated by contour No. 3, and the overflow of water from the Pettaikulm tank as it existed before 1871. The defendant will bear the cost of this appeal. Time for payment will be three months.

Srinivasa Aiyangar, J.—This appeal arises out of a suit brought by the proprietors of the Kunnakudi mitta against the Government for certain declarations in

respect of an irrigation system, the Kunnakudi channel and its connected tanks, and for an injunction restraining the Government from in any way interfering with it. The Kunnakudi channel which takes off from the Harihara river, a natural stream, first empties itself into the Kunnakudi Periakulam (big tank) at its western end and after filling it flows out through a weir at the lower and eastern end of the tank, fills a small tank called Pettaikulam lower down, flows out over a dam placed in the channel contiguous to the eastern bund of that tank and finally flows into the Sivalaperi tank which belongs to the Government. There is a dam in the river to lead the water into the channel, a head sluice which was constructed in the channel about a furlong off from the off-take to regulate the flow and an outlet No. 2, called Chakkilichimadai, still lower down in the channel to discharge the excess water in times of flood. The channel has been in existence from time immemorial and was evidently formed for the irrigation of the mitta Kunnakudi lands and certain lands under the Sivalaperi tank in Teakasi, a Government village. Kunnakudi mitta formed part of the ancient Zamindari of Chokkampatti which was purchased by Government in 1835 for arrears of revenue, remained in amani management till 1859, when it was regranted to a representative of the original family for whose debts it was sub-divided and sold in 1861 in Court auction. There have been constant disputes between the proprietors of Kunnakudi and the raiyatwari owners of the lands under Sivalaperi from about the year 1820 as to the rights of irrigation through the Kunnakudi channel, which have not yet been settled by any final adjudication by a civil Court.

The main points of difference are the following: (i) as to the right to the water in the channel in times of scarcity, (ii) as to the full tank level of the Periakulam, i. e., the height to which the proprietor of Kunnakudi is entitled to impound and store the water flowing in the channel, (ii) as to his right to store water in the Pettaikulam. There is a certain amount of irrigation through sluices in the channel, of which the most important, for the present purpose, is through a sluice known as Pulavadimadai at the western end of the tank at the place where the channel enters the tank. Through this sluice water in times of scarcity flows out of the main channel into a small channel along the southern bund of the tank (purakal) and irrigates the lands of the proprietor. The raiyatwari owner under Sivalaperi claims a right to lead water into his tank through this channel and says that he is entitled to two-fifths of the water flowing in the main channel and only the remaining three-fifths belongs to the mittadar.

There are some general assertions of this right and it also appears that the cost of the repairs and other works executed in the main channel has been divided in the proportion of three-fifths to the proprietor and two-fifths to the Government and their raiyatwari pattadars; but there is no reliable evidence except vague oral evidence that the Sivalaperi tank ever had a supply through the purakal or side channel. It is remarkable that in 1820 the request made by the raiyatwari owner under the Sivalaperi tank to the zamindar was to take water through Pallathumarugal, i. e., the surplus weirs at the lower end of the tank (Ex. 17-c). Though orders appear to have been passed in 1822 and in 1835 that the Sivalaperi tank should get two-fifths of the water through the Pulavadimadai in seasons of scarcity and through Pallathumarugal in ordinary seasons, so early as 1873, it was stated that Sivalaperi was getting water only through the surplus weir (Ex. 6). The claim was revived in 1874 and supported by the Tahsildar again in 1893 and suported by the Revenue Inspector, but nothing came of it. In these circumstances, without much better evidence than we have in this case, it is not possible to come to any other conclusion than what the lower Court arrived at on this point.

The next question is as to the right of the mittadars to appropriate the water in the chanel. According to them they are entitled to use and impound as much of the water of the channel as they like and let out the surplus on to the lower owner who can make such use of it as he wants when he gets it, but that the lower owner is not entitled as of right to any flow in the channel; in effect the plaintiffs claim a right of drainage without being under any obligation to let the water flow on in the channel to the Sivalaperi tank. This obviously is not their right. In these systems of connected tanks supplied with

water by or through a permanent artificial channel, each upper owner in the flood season is entitled to fill his tank, which, in general, is of sufficient storage capacity for the ayakat and subject to this, is bound to allow the water to flow freely on to the lower tank till the last of them is supplied. In a considerable number of cases, before the introduction of modern engineering appliances, this was managed by having an automatic escape at the lower end of the tank, especially if the soil was hard or rocky, approximately at a level with the full tank level of the tank. These escapes were called thambogis. But whatever may be the means adopted to let out the surplus, the owner of a tank in such cases has no right to increase the storage capacity of his tank beyond what it was at the time when the channel was dug, which in many instances can only be proved by the customary flow of water into the tank. In this case there is some evidence that the escape Pallathumarugal, which, there is no reason to doubt, always existed in the lower end of the tank at the place where the weir now is, was not paved with stones till about the year 1888, when probably the mittadar began 2nd crop cultivation systematically (see Exs. 10 and 14), that the level was below the full tank level probably in consequence of scouring, and that it was usual to block it with turf which was opened to let out the water into the channel lower down, when water was low: Ex. 17 series.

There is also some evidence that the mittadar introduced two vents in the weir and put up plank shutters in 1892 or thereabouts and raised the bunds of his tank to increase the storage capacity. On the other hand, the mittadar has adduced evidence to prove that his tank has remained in the same state for about 50 years. Apart from this conflict of testimony, there is other reliable data in the case to fix with sufficient accuracy the F. T. L. of the plaintiffs' tank. Admittedly, the tank water in the north submerged some lands of the Government village of Kuthukkalvalasai alias Jagaveeraramaperi, when water stood in the tank at the F. T. L. Ex. 4a is the Settlement Register of that village prepared after the first revenue survey in 1874 and shows a part of Survey No. 262 (262N in the new survey) of about 10 acres odd in extent as the waterspread of the tank. There is no reason to doubt the accuracy of this statement. P. W. 14, a retired Engineer from the Travancore service, prepared a plan and has drawn contours of the waterspread of the tank at various levels, one of them being the sill level of the surplus weir as it exists now. That is the 3rd contour at 97. 34 level, taking the crest as the datum (100), and it will be seen that that submerges just about the extent mentioned in 4a. The adangal accounts of Kuthukkalvalasai prove that after 1893, when the mittadar began to block up the vent way of the surplus weir with plank shutters thereby raising the level of the water in the tank, about. 13-25 acres more of the lands are submerged so as to render them unfit for cultivation. We may fairly conclude that the present sill level of the weir is the full tank level of that tank and that the plaintiffs were bound to keep the weir open without any obstruction to the outflow from the tank at the lower end.

There is one further question on this part of the case. The mittadar says that a small tank called Pettaikulam further down the channel is entitled to a supply, and, at the best, Sivalaperi is only entitled to the water which overflows a dam placed across the channel at the eastern end of the tank. That this so-called tank was not one of the original system is quite clear; it is not referred to in the earlier documents or disputes. Mr. Brandt who saw the place in 1872-1873 says that

> "it has not the appearance of a tank, it has merely the appearance of a slight widening of the channel".

It appears from the careful memorandum prepared by him (Ex. 6) that the mittadar, taking advantage of a depression there, put up or heightened the bund, managed to get the consent of the Range Officer of the Public Works Department to construct a masonry dam across the supply channel, to retain the water in the newly formed tank, and also introduced a sluice to let out water for irrigation. This took place in about the year 1869 and the Sivalaperi raiyats at once complained to the revenue authorities. The Sub-Collector directed the closing of the sluice and directed that such orders as might be passed as to the masonry work after reference to the Range officer should be carried out; but on appeal by

the mittadar the Collector modified the order of the Sub-Collector by allowing the retention and use of the sluice. Finally, the Sub-Collector and Collector ordered the removal of the dam. Though the mittadar was asked to remove the dam which was the real impediment to the flow of the water in the channel, he did not do so and he has managed to keep it on ever since.

There is a Pottaikulam referred to in an early document of 1822, but that is not this tank; the word Pottaikulam (blind tank) is used there as a common name probably in the sense of a tank without a sluice or a weir and, therefore, not useful for irrigation and it is remarkable that the tank now in question had originally no ayakat under it. However that may be, there can be very little doubt that the masonry dam in the channel below Pettaikulam was newly put up in 1871 and that the mittadar was not entitled to do so. As we know when it was put up and as 60 years have not elapsed, so as to give the mittadar a right by prescription against the Government, and as it is quite clear that no right to dam the channel and obstruct the flow of water at that place was granted to the mittadar, he is bound to remove all obstruction to the flow of water as it was flowing before the dam was put up. Whether in seasons of scarcity or draught the Sivalaperi raiyats are entitled to a division of the water flowing in the channel into three-fifths and two-fifths is difficult to determine on the materials before us If once the water reaches the Periakulam there is now no means of letting it out to Sivalaperi till the water overflows the weir which is quite unlikely when water is low in the channel and the flow scanty. Though proposals were made in 1874 and 1894 for constructing a channel in Government land to draw off two-fifths of the water before the Kunnakudi channel flows into the Periakulam, no such channel has been constructed. The question of three-fifths and two-fifths can only arise if such a channel is constructed, and we need not, therefore, determine it now.

There is one other question in the case which is of great importance in determining the exact reliefs which the parties are entitled to in this case. The suit, as already said, was instituted by the plaintiffs for, among other things, an injunction restraining the Government from entering their lands for doing any repairs or making any alterations in the channel system within the limits of the mitta. The learned Government Pleader contends broadly that if it is found that the Government are entitled to any portion of the water flowing in the channel their paramount right to distribute all unappropriated water in the public interest gives them a right to enter on the lands of a private owner through which the channel flows and make such repairs or execute such works as may be necessary to ensure a proper distribution of the water between the mittadar and their own raiyats. *Robert Fischer* v. *Secy. of State* (2), the only authority cited by him in support of his contention is really against him, for the learned Judges at p. 156 of the report observes as follows:

"it could not of course be suggested that for the purpose of exercising their rights of control, Government would be warranted in committing an act of trespass."

In *Ambalavana Pandara Sannathi* v. *Secy. of State* (3), where also an inamdar sued for an injunction restraining the Government from entering on his land and executing any repairs in an irrigation channel within the limits of his village, the learned Judges apparently assumed that a right to another man's land was not implied in the Government function of the conservation and control of the irrigation channels. They had, therefore, to decide whether the channel was granted to the inamdar or remained the property of the Government.

The Government Pleader also contends that the facts proved in this case establish that the Government were the owners of the channel. It is proved that the Government constructed the head sluice in the channel in 1886, repaired the dam in the river in 1870 and 1885 and levied contribution from the mittadar. On the other hand, there is evidence that the mittadar executed some repairs in the channel himself and obtained contribution from the Sivalaperi raiyats. The greater portion of the channel lies within the mitta limits and the channel, as its name implies, was primarily intended for the irrigation of Kunnakudi;

3. (1905) 28 Mad 539.

at any rate the ayakat under the Kunnakudi tank is much larger than under Sivalaperi. The grantee of the zamindari in 1859 also covenanted to keep the tanks and channels in repair according to the ancient custom of the zamindari. This covenant, though intended primarily for the benefit of the inhabitants of the zamindari, cannot be ignored in coming to a conclusion as to whether or not the channel was included in the grant.

In these circumstances the fair inference to be drawn is that the channel within the limits of the mitta belongs to the mittadar. This conclusion is materially strengthened by the conduct of the Government. In 1869 the Tahsildar drew the attention of the mittadar to the estimate made to close a breach in the Kunnakudi dam, said that the mittadar was bound to keep the dam in repair as it was within his jurisdiction and warned him that he will be held responsible for any loss to the ayan nanja lands (Ex. N). In 1873 and 1874, though peremptory orders were issued to the mittadar to remove the masonry dam placed in the channel at the lower end of the Pettaikulam, when he did not do so, the Government did not feel at liberty to enter on the channel at that place and remove the dam. All that the Collector could do was to advise a civil suit by the Sivalaperi raiyats. Again when the mittadar shut up the vent way by planks and raised the level of the water in the tank so as to obstruct the supply to Sivalaperi and also to submerge the Government lands in the north, the Government felt themselves unable to abate the nuisance and unsuccessfully resorted to the indirect means of imposing fasli jasthi. After the final disposal of the litigation in respect of the fasli jasthi against the Government, the matter of submergence was again considered in 1903 and all that the Collector could say was that the raiyats should be left to protect themselves; and in 1907 when the loss to Sivalaperi by the obstruction of the water-course was again brought to the notice of the Collector, the only proposal made was to construct a dam and dig a new channel to Sivalaperi in Government lands. In fact, till 1910 nobody imagined that the Government had the right to enter on the channel within the mittadar's limits. It is scarcely likely that the Government would have allowed the mittadar to set them at defiance if the channel belonged to them. I therefore think that the Government are not entitled to enter on the lands of the mittadar against his wish and the plaintiffs are entitled to an injunction restraining the Government from doing so either for the purpose of altering or repairing the channel or tank or executing new works.

Mr. J. L. Rosario strongly urged that if we came to the conclusion that the Government are not entitled to go on his land, we should not determine any question as to the irrigation rights between the mittadar and Sivalaperi raiyats or Government but should leave the matter at large for a subsequent litigation by the Government or their raiyatwari pattadars. As those rights have been the subject of issues and elaborate inquiry in this suit and as the whole matter has been fully argued before us and as it is further impossible to give adequate relief to the plaintiffs or frame a proper decree without declarations as to the substantive rights of the parties in the irrigation system, I think we ought to declare the rights of the parties, more especially as it is not suggested that any more materials are available for a decision on those questions.

I have not hitherto referred to the works done by the Government in outlet No. 2. Owing to the wastage of water through that outlet when water was required for irrigation, and its insufficiency to protect the channel during floods, the Government made certain alterations in the outlet which they considered to be an improvement. The mittadar does not like it and has prayed for a mandatory injunction directing the Government to restore the outlet to the old state. I am not satisfied that the alterations made will in any way prejudicially affect the mittadar's rights. But in the view that I take, viz., that the mittadar is entitled and is bound to keep the channel efficient and the tanks in good repair, so as to prevent waste of water in his limits and allow the flow of water in the channel, subject to his right to fill his tank up to the present sill level of the weir, it is unnecessary to grant a mandatory injunction. I agree therefore to the decree

and order for costs proposed by my learned brother.

S.N./R.K. *Appeal Partly allowed.*

A. I. R. 1918 Madras 618

ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

Panchapakesa Odayan and *another*—Defendants—Appellants.

v.

Kanaka Ammal and *another*—Plaintiffs—Respondents.

Appeal No. 121 of 1916, Decided on 8th January 1917, against decree of Sub Judge, Kumbakonam, in Original Suit No. 35 of 1914.

Hindu Law—Maintenance—Permanent concubine is entitled to, against family property.

A permanent concubine is entitled under the Hindu law to maintenance as against the family property of the person keeping her. [P 619 C 2]

T. Rangachariar——for Appellants.

S. T. Srinivasagopalachariar and *T. R. Venkatarma Sastri*—for Respondents.

Judgment.—Appellant 1, defendant 1 in the suit, is an undivided brother of one Venkataramana Odayan who died in October 1908 and respondent 1, plaintiff 1, claims to be the permanent concubine of Venkataramana Odayan and respondent 2 (plaintiff 2) is a child by plaintiff 1 and claims to be the illegitimate son of Venkataramana Odayan. The suit was one for maintenance. The Subordinate Judge has given a decree awarding as maintenance Rs. 20 a month to plaintiff 1 for life and Rs. 20 a month to plaintiff 2 till he attains majority. Mr. T. Rangachariar appearing on behalf of the appellants has contended that it is not proved that plaintiff 1 was the permanent concubine of Venkataramana, or that plaintiff 2 was his son. Plaintiff 1 is a daughter of a dancing girl who was also in the keeping of a member of the appellant's family—a man called Sivaswami Odayan—and her case was that she was brought up in the family and after she attained majority, her nuptial marriage, as it is called, was performed by the deceased Venkataramana and that ever since she lived with him as his concubine and had nothing to do with anybody else. There were five children, two sons and three daughters, born to her between 1897 and 1907. Plaintiff 2 is the second son, the first son having died when he was only one month old, of the daughters, two of them are living though they are not parties to the suit. It is not alleged on behalf of the appellants that Venkataramana had no intimacy with plaintiff 1. What is denied is that she was in his exclusive keeping.

It is suggested that she was kept at sometime or other by two other men. But it cannot be said that the evidence on that point is either very clear or such that one must accept it. In fact Mr. Rangachariar did not think it worth his while to refer to any positive evidence in this connection, beyond the suggestion made to plaintiff 1 herself in cross-examination. She denied that she had anything to do with either of these men. The evidence is quite clear on the other hand that Venkataramana met the expenses of the birth of all the five children that were born to plaintiff 1. The doctor who attended upon her during confinement on all these occasions has been examined and he says he was called in at the request of Venkataramana who paid his charges. There is no reason whatever for throwing any doubt on the testimony of this gentleman. The evidence also shows that Venkataramana had a house at Kumbakonam and there he lived with plaintiff 1 whenever he happened to come to the town on business. This is borne out by the evidence of the doctor and all the other witnesses some of whom were in the service of the appellants, and there is really no evidence to the contrary which would lead us to think that plaintiff 1 lived with her mother and not with Venkataramana. She also used to go to the native village of Venkataramana and live there in a separate house, but during the time she stayed there, she was on visiting terms with the females of the house. The evidence seems to be conclusive that this woman was in the exclusive keeping of Venkataramana and that during the time when she was in such keeping, all the children including plaintiff 2 were born.

Much stress has been laid on the facts that in the birth register, the father's name, that is Venkataramana, is not mentioned and that on one occasion at least, plaintiff 1 described herself as a dasi. It is hardly likely, having regard to the position in life that Venkataramana occupied, that his name should have been recorded in the register as being the father

of plaintiff 1's children, and the fact that plaintiff 1 is described as a dasi is in no way inconsistent with her being the exclusive mistress of Venkataramana. Our attention was also drawn to the fact that all the children of plaintiff 1 were born in her mother's house. That is only natural, because at the time of confinement her mother would be the proper person to look after plaintiff 1. Comment has also been made by Mr. Rangachariar on the fact that plaintiff 1's sisters followed the profession of dancing girls. We do not think that is of any sufficient significance in the face of the evidence in support of the plaintiff's case. We, therefore, agree in the conclusion of the Subordinate Judge that plaintiff 1 was in the exclusive keeping of Venkataramana until his death and that plaintiff 2 is his son. We ought to observe, however, that in dealing with the evidence of a witness for the defence, the Subordinate Judge has thought fit in his judgment, para. 15, to make certain observations regarding the witness of an entirely personal character which must be characterised as wholly improper. Such remarks are not fit to be made by any Judicial Officer and this must be pointed out to the Subordinate Judge.

On the question of law that arises in the suit, Mr. Rangachariar had to admit that so far as plaintiff 2's right to maintenance is concerned, all the authorities are against him, the latest on the point being *Subramanya Mudali* v. *Velu* (1), following a number of earlier decisions on the subject. But he has strenuously argued before us that a concubine is not entitled under the Hindu law to maintenance as against the family property of the person keeping her. But it would seem that all the authorities on this question are opposed to Mr. Rangachariar's contention. We have a series of decisions of the Bombay High Court, *Khemkor* v. *Umashankar* (2), *Vrandavandas Ramdas* v. *Yamunabai* (3), *Yashvantrav* v. *Kashibai* (4) and *Ningareddi* v. *Lakshmawa* (5), all of which recognised the right of a permanent concubine to maintenance from the estate of her deceased paramour. There is one reported case of this Court also which recognises a similar right, *Ramanarasu* v. *Buchamma* (6). In this last case, the question for decision was whether a concubine who is kept by a Hindu has a right of maintenance against him during his lifetime. That claim was negatived but it was assumed as indisputable that, if till his death the woman was in his keeping, she would be entitled on his death to maintenance as against his property. The original authorities which are referred to in these judgments supported this view. But it is argued on behalf of the appellants that although a concubine with whom the relations were of a permanent character is entitled on the death of her deceased paramour to maintenance from his estate, that right does not extend as against the family property of which his paramour was a coparcener. But we do not think that this distinction is sound. At any rate in one Bombay case, *Vrandavandas Ramdas* v. *Yamunabai* (3), maintenance was allowed as against the undivided nephews of the person who kept the woman. In *Yashvantrav* v. *Kashibai* (4), which was a decision of Sir Charles Sargent, C. J., and Nanabhai Haridas, J., it was held that the word "woman' in the text had been interpreted by commentators and judicial authorities as including a "concubine." In the text of Mitakshara, Ch. 2, S. 1, the relevant placita bearing on the point are placita 7, 27 and 28. In placitum 7, the right of a widow to maintenance as against her husband's brother who takes the property is established. The word used in that placitum is "stri". But in placitum 28 it is expressly stated that in the text of Narada which is quoted in placitum 7, the word "stri" includes "concubine". Mr. Rangachariar, however, suggests that as placita 27 and 28 deal with the case of escheat to the Crown in default of heirs to a deceased Hindu, we must read the explanation of Narada's text as given in placitum 28 as being confined to those alone. But there seems to be no sufficient reason why we should put that restrictive interpretation. At any rate all the authoritative writers of text-books on Hindu law have understood the text of the Mitakshara as interpreted by the Bombay High Court: see Strange's Hindu Law, Vol. 2,174, 1 West and Buhler, 92, 93 and Mayne's Hindu law, 620. There seems to be no reason,

1. (1911) 34 Mad 68=5 I C 919.
2. (1873) 10 B H C R 381.
3. (1875) 12 B H C R 229.
4. (1888) 12 Bom 26.
5. (1902) 26 Bom 163.
6. (1900) 23 Mad 282.

therefore, for accepting a view which is contrary to all judicial authorities and the text-writers.

The appeal must, therefore, be dismissed with costs.

The memorandum of objections raises a question as to the amount of maintenance. The property belonging to the family is very large and valuable, yielding an income of about Rs. 40,000 a year. Venkataramana left two widows and the other coparcener is the appellant 1. The Subordinate Judge has allowed Rs. 20 a month to the son for maintenance till he attains majority. He will attain majority in about a year's time. But the plaintiff 1 has to maintain not only herself but two young daughters aged about seven and nine years, and it seems to us that Rs. 20 is hardly adequate provision for her. Having regard to the value of the family property, we think we will be justified in increasing the allowance in her case to Rs. 40 a month. We may mention that the daughters are not parties to the suit and we do not decide any question as to their right of maintenance, if they have any, against the estate in the hands of defendant 1. The respondents are entitled to proportionate costs of the memorandum of objections both here and in the lower Court. The last plaintiff is entitled to recover arrears of maintenance at Rs. 40 a month.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 620

AYLING AND KUMARASWAMI SASTRI, JJ.

Masilamani Mudaliar—Appellant.

v.

Sethuswami Aiyar and *another*—Respondents.

Appeal No. 30 of 1916, Decided on 30th April 1917, against appellate order of Temporary Sub-Judge Tanjore, in Appeal Suit No. 203 of 1915.

(a) Limitation Act (9 of 1908), Sch. 1 Art. 182—Step-in-aid—Oral application for execution to be step-in-aid — Essentials of, stated.

In order that an oral application may be effective as a step-in-aid of execution, the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that, if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application or by reason of the Code or the rules requiring some further acts to be done before the main reliefs prayed for in the execution application could be granted or enforced. [P 622 C 1, 2]

(b) Limitation Act (9 of 1908), Art. 182—Application for execution — Notice ordered to issue—Failure to pay process—Fresh application within three years of order of issue of notice—Oral application held could not be presumed to have been made — Oral application was superfluous and could not operate to save limitation.

An application for execution of a decree by attachment and sale of the judgment-debtor's property was first made on 13th July 1911. Notice was ordered to issue for 12th August 1911. On that day the judgment-debtor did not appear and an attachment order was issued. The decree-holder failed to pay batta within the time allowed and the petition was dismissed on 26th August 1911. A fresh execution petition was presented on 12th August 1914?

Held: that the utmost that could be presumed in such circumstances was that the decree-holder was present in Court on 12th August 1911 either in person or by pleader and intimated his decree to proceed with the execution and not that he made any oral application for further attachment, [P 621 C 1]

(2) that even if he made an oral application on that date it must be presumed to be an entirely superfluous petition and could not operate to save limitation. [P 621 C 1]

K. R. Subramania Sastri—for Appellant.

K. Ramchandra Aiyar — for Respondents.

Ayling, J. — Respondent 1 in this case is the assignee decree-holder in O. S. No. 379 of 1906 on the file of the Court of the District Munsif of Kumbakonam, and the sole question for disposal is whether his execution application (Execution Petition No. 526 of 1914) presented on 12th August 1914 was barred by Art. 182, Lim. Act, 1908 (Sch. 1). The next previous application of which there is record was Execution Petition No. 385 of 1911, presented on 13th July 1911 but the decree-holder relies on the following circumstances to save limitation: (1) an oral application in aid of execution presumed to have been made on 12th August 1911 in the course of the hearing of Execution Petition No. 385 of 1911; (2) an alleged payment towards the decree on 17th August 1911. As regards the first, the facts are simple. In Execution Petition No. 385 of 1911 the decree-holder applied for attachment and sale of the judgment-debtor's moveables after issue of the preliminary notice required by O. 21, R. 22, Civil P. C. Notice was accordingly issued to the judgment-debtor for 12th August 1911. On that date as the judgment-debtor did not appear, attachment

order was issued but as the decree-holder failed to pay batta within the time allowed the petition was dismissed on 26th August 1911. The Subordinate Judge says:

"It seems to me, looking to the liberal spirit in which acts done by a decree-holder are viewed by the Madras High Court to operate as step-in-aid of execution: [vide *Abdul Kadir Rowther* v. *Krishna Malamal Nair* (1)], it will not be wrong to hold that the decree-holder should be presumed to have made an oral application for issue of a warrant of attachment on 12th August 1911 and this was a step-in-aid of execution."

Now, in my opinion, the utmost that can be presumed is that the decree-holder was present in Court on 12th August 1911, either in person or by pleader, and intimated his desire to proceed with execution. He had already asked for attachment in his written application; and assuming that he repeated his request by word of mouth in Court, I am unable to see any ground for viewing this as a fresh step-in-aid of execution. The point is, not that the application was oral, but that it was the merest repetition, and entirely superfluous repetition, of an application, which he had already made in writing, and which was pending orders of the Court. None of the cases relied on by respondent 1's vakil seem to me to be of use to him. In the Calcutta Full Bench case: *Ambica Pershad Singh* v. *Surdhari Lal* (2), there was an application to issue proclamation nearly a year after the attachment, which indeed the judgment-debtor claimed to be no longer subsisting; and the judgment of Garth, C. J., makes it quite clear that he held that, without such a fresh application, no further action should have been taken by the Court. In *Vijiaraghavala Naidu* v. *Srinivasalu Naidu* (3), the batta memorandum was accompanied by a written application; and the Court lays stress on the fact that the proclamation would not have issued if the batta memorandum had not been put in. *Abdul Kadir Rowther* v. *Krishna Malamal Nair* (1) is a case in which Sadasiva Aiyar and Spencer, JJ., held that an oral application by a decree-holder for an adjournment to enable him to adduce evidence was a step-in-aid of execution. This is a view, in which, speaking with all deference, I find it impossible to concur; and, if the facts of that case were similar to those of the present case, I should be inclined to make a reference to a Full Bench. Fortunately they are not: and with the general principle enunciated I have no quarrel, i. e., if even an oral application is for an order which is really a step-in-aid, it may be treated as within the scope of Art. 182, Lim. Act. I am inclined to think, however, that such applications will be rare.

The most recent case *Varadaraja Mudali* v. *Murugesam Pillai* (4), is cited chiefly for the proposition that Art. 182, Lim. Act, 1908, should receive a fair, liberal and not too technical construction so as to enable the decree-holder to obtain the fruits of his decree. I quite agree; but it seems to me that the danger is, not of too technical construction of the article, but that the Courts, in their anxiety to prevent justice being defeated by technicalities, may introduce so much uncertainty, that it will be most difficult for any party to know whether execution of a decree is barred or not. Where the starting point is the recorded date of presentation of a formal application, we are on sure ground; but if any unrecorded oral intimation of the decree-holder's desire to proceed may be treated as such, the ascertainment of the period will be beset by extraordinary difficulties. I feel confident that nothing of the kind was contemplated by the legislature and that there is nothing in the Act to support such a construction. I would, therefore, hold that the presumed oral application of 12th August 1911 does not save limitation. It then becomes necessary to consider the second point regarding which the Subordinate Judge decided against the decree-holder on the ground that the payment was not certified to the Court, and, therefore, under O. 21, R. 2, Civil P. C., could not be taken into account.

The payment is set forth in Col. 5, Execn. Petn. No. 526 of 1914, which was presented within three years of the date of the alleged payment. I see no reason why this should not be accepted as a certificate of payment under Cl. (1), of the rule; for nothing is prescribed in the rule as to the time within which or the manner in which the decree-holder must certify payment: vide

1. A I R 1914 Mad 384=38 Mad 695=23 I. C. 533.
2. (1884) 10 Cal 851.
3. (1905) 28 Mad 399.
4. (1916) 39 Mad 923=30 I C 707.

Rajam Aiyar v. *Anantharatnam Aiyar* (5) and *Lakhi Narain* v. *Ferlamani Dasi* (6)]. No doubt a Court will do well to carefully scrutinize evidence of payment reported in such circumstances, where the fact of payment is denied; but there is no reason why, if proved, such a payment should not be considered in the light of S. 20, Lim. Act. I would, therefore, call for a finding on the following issue from the Court of the Subordinate Judge after taking evidence:

"Is the alleged payment of Rs. 25 by the judgment-debtor on 17th August 1911 true? and does it operate to save limitation under S. 20, Lim. Act?"

Two months will be allowed for submitting the finding and seven days for filing objections.

Kumaraswami Sastri, J.—I agree and have little to add. I do not think that the mere oral repetition of a request contained in the execution application is a step-in-aid of execution. Where however several reliefs are prayed for in the execution application, which the Court is not bound to grant concurrently, or where an application to the Court is made, asking it to exercise its discretion in matters where it is not bound to grant the prayer asked for in the execution application as a matter of course, the fact that the relief asked for orally is already contained in the execution application would not prevent the oral application from being effective as a step-in-aid of execution. O. 21, R. 11, Civil P. C., 1908, after providing for an oral application for execution at the time of the passing of the decree requires a written application containing the particulars specified in the order and specifying the mode in which execution is sought. R. 176 of the Civil Rules of Practice, 1905, only enables a party to apply orally for orders which are necessary to give effect to or work out the prayers contained in the execution application without the necessity for putting in an application in writing for every small step necessary for realizing the fruits of a decree. When the Code requires a written application for execution, it cannot be contended that a mere oral application would be a step-in-aid of execution, and where a written application is filed as required by the Code, an oral application to the same effect is a mere superfluity.

In order that an oral application may be effective as a step-in-aid of execution the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that, if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application, or by reason of the Code or the rules of practice requiring some further acts to be done before the main reliefs prayed for in the execution application could be granted or enforced. As regards the payments acknowledged in the execution application the decision of this Court in *Rajam Aiyar* v. *Anantharatnam Aiyar* (5) is clear, and I do not think that the payments can be ignored as not certified if they were as a matter of fact made. I agree with the order proposed by my learned brother.

(In compliance with the above order, the Temporary Subordinate Judge of Tanjore submitted the following)

Finding.—I am directed to record a finding after taking evidence on the following issue: "Is the alleged payment of Rs. 25 by the judgment-debtor on 17th August 1911 true? And does it operate to save limitation under S. 20, Lim. Act?

I consider that the payment set up is not true and find the issue accordingly.

(This appeal coming on for final hearing after the return of the findings of the lower Court upon the issues referred by this Court for trial, the Court delivered the following)

Judgment.—We accept the findings and as a result, set aside the order of the Subordinate Judge, and direct that the petition be dismissed with costs throughout.

S.N./R.K. *Appeal allowed.*

5. (1915) 31 I C 318.
6. (1915) 27 I C 11.

A. I. R. 1918 Madras 622

SADASIVA AIYAR AND SPENCER, J.

K. Parthasarathy Ayyangar and *others* —Plaintiffs —Appellants.

v.

Authari Peria Kuppa Naicken and *others*—Defendants—Respondents.

Second Appeal No. 75 of 1915, Decided on 16th January 1917, against the decree of Dist. Judge, Chingleput, in Appeal Suit No. 365 of 1913.

Deed—Construction—Grant of fishery right to "gramattars" —"Gramattars" held to be members of village community holding land under Government — Exclusive claim by mirasidars held untenable—Government was proper party to suit — Civil P. C. (1908), O. 1, R. 3.

By the terms of a pattah Government leased a right of fishery for a term of five years to the 'gramattars' of a village. The plaintiffs filed a a suit for a declaration of their exclusive right to the fishery as the mirasidars of the village and for damages for wrongful enjoyment of the right by the defendants, who were only Government raiyats:

Held: (1) that the term 'gramattars' neither meant mirasidars alone, nor all the inhabitants of the village irrespective of whether they owned lands in the village or not, but meant those of the village community who held lands under the Government; (2) that plaintiffs' claim for exclusive right was untenable; (3) that the Government was a necessary party to the suit.

[P 623 C 2]

L. A. Govindaraghava Aiyar and *L. S. Veeraraghava Aiyar*—for Appellants.

Advocate-General and *N. Rajagopalachariar*—for Respondents.

Sadasiva Aiyar, J. — The plaintiffs are the appellants before us and their suit was based on their alleged exclusive right in two tanks in a village in the Chingleput District. The Special Settlement Officer leased the right of fishery for a term of five years to the "gramattars" in 1916, reciting and reserving in the pattah (Ex F) full powers to refuse a renewal of the lease at the expiry of the term. The plaintiffs claim in their plaint two reliefs, one of which is a declaration of the right of the mirasidars of the village to the exclusive right to the fishery in the plaint tanks. I do not think that in this suit to which the Government has not been made a party, such a relief (which assumes that nobody including the Government has any right to prevent the enjoyment of the fishery by the plaintiffs at any time) can be granted. The other relief claimed in the plaint is the recovery of pecuniary damages from the defendants who enjoyed the fishery rights in the years 1909, 1910 and 1911 without the permission of the plaintiffs, who brought this suit on behalf of all the mirasidars of the village against the defendants as representing those inhabitants of the village who belonged to the Vanniah caste and who are not mirasidars, whether they do or do not own lands, and hold pattahs as Government ryots.

The District Judge's finding (as I understand his judgment) is that the plaintiffs have not proved (a) that the fishery right belonged to the mirasidars alone or (b) that the lease of 1910 to the "gramattars" meant a lease in favour of the mirasidar land-owner alone. On these findings he held that the claim for damages put forward by the plaintiffs as representing the mirasidar landowners alone cannot be sustained. He, therefore, dismissed the plaintiffs' suit. Several very interesting questions were ably argued before us on both sides, but it is necessary to deal with only a few of them for the disposal of this second appeal. "Gramattars" means no doubt literally "all the inhabitants of the village," but it is difficult to hold that every man, woman and child in the village, whether owning lands or not, was intended to be given a share per capita in the fishery right under the patta Ex. F. I think that in Ex. F, the word means those only of the village community who held lands in the village under the Government and that under Ex. C these alone were intended to be given the fishery lease right, each such landowner having a share in that right proportionate to the revenue paid on his holding to the Government. That "gramattars" included only the mirasi landowners and did not include the pattahdars or raiyats who held lands under Government without mirasi rights is the contention of the plaintiffs, but I am not satisfied that the District Judge misconstrued any documentary evidence when he arrived at the conclusion that the plaintiffs have not proved their above contention.

If so, the defendants, so far as they are landowners and pattadars though not mirasidars were co-lessees with the plaintiffs (representing the mirasidar landowners) and this suit for damages on the allegation that none of the defendants had any right in the lease (the suit being not a suit for contribution) was, in my opinion, rightly dismissed by the lower appellate Court. I would, therefore, dismiss this second appeal with costs. I might notice, in conclusion, that the learned Advocate-General for the respondents contended that the village was not a mirasi village at all and that there were no landowners in it owning the mirasi right in ten shares as alleged in the plaint. The above allegation in the plaint, however, though traversed in the written statement, seems not to have been

seriously disputed by the defendants afterwards and some of the defendants' own witnesses speak of share and mirasidars. Of course, the Government is not bound by the plaintiffs' allegation or the defendants' implied admissions, but I think that so far as this litigation is concerned it should be decided on the basis that there is a distinction in this village between mirasi landowners and ordinary ryoti landowners.

Spencer, J.—I entirely agree. The plaintiffs set up exclusive fishery rights on behalf of the mirasidars of their village whom they claim to represent. The defendants denied the plaintiffs' exclusive rights and set up exclusive rights on behalf of the Vanniah resident. The District Judge, reversing the first Court's judgment, found as a fact that the plaintiffs had not established an exclusive permanent right in themselves as mirasidars. I think we must accept this finding. Ex. A, which is produced by plaintiffs, itself shows that the Government have reserved a right to suspend the issue of pattas to fish after the expiration of five years from 1910. It negatives the existence of private rights beyond the period to which it relates. The other Exhibits filed on behalf of plaintiffs do not make it clear whether the persons who enjoyed the fishing in previous faslis were mirasidars or pattadars of the village or merely residents. The names given in these documents are merely the names of those who paid the assessment on behalf of the community. The case moreover did not depend solely on the interpretation to be put on the documentary evidence. A number of witnesses were examined. It is unnecessary to refer to the oral evidence, as the issue decided by the District Judge was really an issue of fact with which we cannot in second appeal interfere. The fact that the defendants set up an exclusive right in themselves as Vanniahs did not absolve the plaintiffs from the necessity of proving their own title and the title of the class of persons whom they claim to represent to the exclusion of others. There is no other point of law. I agree that the second appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 624

WALLIS, C. J. AND OLDFIELD, J.

Kolta Tholasingam Chetty — Defendant—Appellant.

v.

G. Vedachalla Aiyah and *others*—Plaintiffs—Respondents.

Original Side Appeal No. 64 of 1916, Decided on 19th July 1917, from judgment of Coutts-Trotter, J., D/- 13th September 1916.

(a) Limitation Act (1908), S. 10 — Suit against trustees failing to get in trust property—S. 10 does not apply.

A claim against a trustee for failure to obtain possession of the corpus and income of trust property is governed by the ordinary law of limitation and does not fall within the scope of S. 10, Lim. Act. [P 626 C 1]

(b) Limitation Act (1877), S. 10—Scope of.

Section 10 did not save from the bar of limitation cases where it was sought to render a trustee accountable not for property which had come into his hands but for property which but for his wilful default or neglect would have come into his hands. [625 C 1,2]

(c) Limitation Act (1908), S. 10—"For account of such property or proceeds"—Effect of, on liability of trustee stated.

The effect of introducing the words "or for an account of such property or proceeds" in S. 10, Lim. Act 1908, has not been to make a trustee liable for an indefinite time and without bar of limitation for breaches of trust consisting in failure to get in trust property. [P 625 C 2]

V. S. Govindachariar and *V. S. Kallabiran Aiyangar*—for Appellant.

C. P. Ramaswamier and *M. Subbaraya Aiyar*—for Respondents.

Wallis, C. J.—In this case a trustee was ordered to be removed by Bakewell, J., and an account was directed to be taken against him. That decision was confirmed on appeal and the case went to the learned official referee. But the learned official referee was of opinion that certain questions of fact involved should be decided by the Court itself and the case therefore came before Coutts-Trotter, J., sitting on the original side and we have now to deal with an appeal from his decision. The question argued before us on appeal relates to item 11, certain house property to which the trust became entitled in the time of the former trustee, some ten years before the accession to the office of trustee of the defendant in this suit, so that the defendant had two years in which he could have taken steps for recovery of the property. It is stated by the learned Judge, and the case proceeds upon that basis, that neither the present defendant nor his pre-

decessor did anything to recover the property and, therefore, it became lost to the trust by reason of the law of limitation. There is not much said about limitation in the judgment under appeal, but the learned Judge said at the close of the judgment that it would be open to the defendant, when the case went back to the official referee, to show, if he could, that he was not accountable for the income but only for the corpus.

Before us it has been argued that on the facts stated and under the present law of limitation the remedy against the taustee is barred both as to the corpus and income, the suit having been instituted some nine years after the property was finally lost to the trust by the operation of the statute of limitation. The question of the interpretation of S. 10 as amended in the Act of 1908 is one of considerable importance and we have had it fully argued before us. As is well known, the statutes of limitation were not applied to claims against trustees. There was a provision in the Judicature Act which specially excepted from their operation suits for following trust property, and that section of the Judicature Act was very closely reproduced as S. 10, Lim. Act 1877. It provides:

"No suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property shall be barred by any length of time."

There was some variance of opinion as to the scope of this section, and there were some cases which held that a claim for an account of property which had actually come into the hands of the trustee was not saved from the bar of limitation unless the property still continued in the hands of the trustee, in one case it was said in specie whereas a more liberal view was taken in some other cases that the section saved from the bar of limitation claims to property which had come into the hands of the trustee and for which he had become accountable. But we have not been referred to any case, and I am not aware of any, in which it was held that the bar of limitation under the old section was saved as regards cases where it was sought to render a trustee accountable not for property which had come into his hands but for property which but for his wilful default or neglect would have come into his hands. Scott, J., in *New Fleming & Spining Weaving Co. Ltd.* v. *Kessowji Naik* (1) expressly ruled that such claims were within the operation of the ordinary law of limitation. The next thing we observe is that the English Legislature in 1888 departed from the policy hitherto pursued as regards trustees and afforded them the benefit of the operation of the statute of limitation except in two specific cases, that is to say, except where a claim was founded on fraud or a fraudulent breach of trust or — these are the important words—was

"to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use."

So that, unless the claim is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use, the ordinary provisions of the Limitation Act are to apply in England. It is important to observe that the policy of the English Legislature as shown in that provision clearly was to introduce a fresh protection for trustees by relieving them from an indefinite liability to account, except in cases of fraud or fraudulent breach of trust property or the proceeds thereof still retained by the trustees or previously received by them and converted to their own use. That brings us now to the recent amendment of the Act of 1877 by S. 10, Lim. Act 1908, which amendment was effected by inserting in that section, after "following in his or their hands such property," the words

"or the proceeds thereof or for an account of such property or proceeds"

Now, it has been contended by Mr. Ramaswamier for the respondent that the effect of introducting the words "or for an account of such property or proceeds" has been to make trustees liable for an indefinite time and without bar of limitation for breaches of trust consisting in failure to get in the trust property. If this be the true construction the Indian legislature has gone far beyond the authority of any Indian case and in direct opposition to the recent legislation in England. It is impossible in my mind to attribute to them such an intention, unless most clearly expressed. It may be said that the words "suit for an ac-

1. (1885) 9 Bom. 373.

count" may cover a suit for an account of the proceeds the trustee had received or might have received but for his wilful default or neglect, that is to say, an account on the footing of wilful default or neglect. But to give that meaning to the words "suit for an account" as introduced into S. 10, Lim. Act, 1908, would be entirely to alter the whole scope of the section and to run counter to the whole tendency of modern legislation. I cannot, therefore, accept that contention. It follows that the present claim both for failure to get possession of the corpus and income of the trust property falls within the operation of the ordinary law of limitation. If that be so it is not suggested that the suit is not barred. In the result, on this ground the appeal must be allowed with costs of this appeal and any extra cost incurred in the proceeding before the learned Judge which is now under appeal payable out of the temple funds.

Oldfield, J.—I agree.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 626

ABDUR RAHIM AND NAPIER, JJ.

Janaki Ammal—Petitioner.

v.

Narayanaswami Aiyer — Opposite Party.

Civil Misc. Petns. Nos. 460, 461 and 922 of 1917, Decided on 12th April 1917.

Civil P. C. (5 of 1908), O. 45, R. 15—"Certified copy of decree"—Meaning explained—Plain print copy with affidavit is sufficient.

Rule 15, O. 45, Civil P. C. should not be construed as restricting the only possible evidence of an Order in Council to the certified copy, but as directory words with the object of ensuring that proper information on the subject of an Order in Council should be supplied to the Courts in India: 9 *Cal.* 482, *Foll.* [P 626 C 2]

Where, therefore, along with an application for execution of the decree of the Privy Council a plain print copy of the decree was filed and in support thereof an affidavit was filed, to show that it was the decree passed by the Privy Council:

Held: that it must be deemed to be the true copy of His Majesty's Order in Council within the meaning R. 15, O. 45, Civil P. C. *A. I. R.* 1915 *All.* 434, *Dist.* [P 626 C 2]

C. A. Seshagiri Sastri—for Petitioner.

T. R. Ramachandra Aiyar and *G. S. Ramchandra Aiyar*—for Opposite Party.

Judgment.—The first objection taken to the transmission of the decree of the Privy Council for execution is that the Original Order in Council has not been filed in this Court and, therefore, there is no 'certified copy' which should accompany the application for execution as required by O. 45, R. 15, Civil P. C., 1908. The facts set out in Civil Miscellaneous Petition 460 of 1917 and the affidavit of the petitioner explain how the original order has miscarried and has not yet reached the petitioner. The order was passed about the end of July 1916 and since the successful appellant before the Privy Council has not yet received the original order, he has put in a plain print copy of the Order in Council along with his petition and asks us to transmit the decree for execution to the lower Court. We think the principle of the decision of the Privy Council reported as *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (1) applies to a case like this. As pointed out there, the provisions of S. 610, old Civil P. C., which correspond to R. 15, O. 45, present Code, should not be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that proper information upon the subject of any Order in Council should be supplied to the Courts in India. No doubt, the Order in Council in that case was in possession of the opposite party and he neglected to file it. But the principle applies to the present case and we are satisfied upon the affidavit and other materials placed before us that the plain print copy filed along with the petition is a true copy of His Majesty's Order in Council. In fact this is not denied. The case of *Janaki Ammal* v. *Narayansami Aiyar* (2) has also been reported in the authorized Law Reports, 39 *Mad.* 634, where the decree is given in the same terms as in the plain copy. We have been referred to a case in the Allahabad High Court, *Damodar Das* v. *Birj Lal* (3). But there it appears that there was no copy of the "Order in Council" at all before the executing Court, but only the judgment or recommendation of their Lordships of the Privy Council. That is not the case here.

Another objection has been urged by the learned pleader for the respondent

1. (1883) 9 Cal 482=10 I A 4 (P C).
2. A I R 1916 P C 117=39 Mad 634=37 I C 161=43 I A 207 (P C).
3. A I R 1915 All 434=30 I C 77=37 All 567.

that the Registrar did not give notice to him at the time of taxing the costs. We have, however, heard what objections he has to urge as regards the costs as taxed, and his principal objection is that no pleader's fee should have been allowed in this Court because no certificate of fees was filed within seven days as required by the rules. But then the order of this Court as regards costs was that each party was to bear his own costs and, therefore, it was not expected that the pleader would file any certificate of fees. That order has, however, been reversed by their Lordships of the Privy Council. We think in the circumstances the Registrar was right in accepting the certificate of fees. Civil Miscellaneous Petitions 460 and 461 of 1917 are, therefore, allowed. Civil Miscellaneous Petition 922 of 1917 is dismissed with costs.

S.N./R.K. *Order accordingly.*

A. I. R. 1918 Madras 627

ABDUR RAHIM AND NAPIER, JJ.

Aiyasami Iyer—Appellant.

v.

Aiyasami Iyer—Respondent.

Civil Misc. Appeal No. 331 of 1916, Decided on 22nd March 1917, against order of Dist. Judge, Tanjore, in O. P. No. 442 of 1916.

(a) Criminal P. C. (1898), S. 195 — Advisability of starting prosecution—Fitness of case must be considered before ordering sanction.

A Court, in granting sanction under S. 195, should not narrow down its enquiry to the question whether a prima facie case exists for prosecution of the person against whom sanction is asked. It should also decide whether it is a fit case for prosecution in the interests of justice.

[P 627 C 2]

(b) Penal Code (1860), S. 199 —Making false statement in declaration — Statement made in haphazard manner and corrected immediately is not covered by S. 199.

Section 199 contemplates that a statement, in order to come within the purview of the section, must be one which is either false to the knowledge of the person making it or which he ought to have known to be false or could not have believed to be true. Statements made in a reckless and haphazard manner, though untrue in fact, do not constitute an offence under the section when the person making them immediately admits the mistake and corrects them.

Per *Napier, J.*—It is the function of a Court which grants sanction to consider the whole of the circumstances of the case and decide whether it is in the interests of justice and the purity of judicial proceedings that the person who has made the statement should be prosecuted.

[P 628 C 2]

T. R. Venkatrama Sastri—for Appellant.

R. Kuppuswamy Iyer—for Respondent.

Abdur Rahim, J.—The petitioner, who is a pleader practising in the District Munsif's Court of Shiyali and a senior member of the profession, was party to a suit in which he was the plaintiff. He obtained a decree and the defendants deposited the amount of costs in Court. The petitioner for the purpose of drawing this amount from Court made an affidavit, and in that affidavit he stated that the property which he gave as security according to the order of the Court was subject only to one encumbrance and was not subject to a mortgage in favour of one Vaidynatha Aiyar. This apparently was not correct. When an amin was deputed to enquire whether the mortgage in favour of Vaidyanatha Aiyar did actually subsist, the petitioner admitted that he had made a mistake and that, as a matter of fact, there was this encumbrance also on the property. The learned District Munsif who heard the application made by one of the unsuccessful defendants in the suit for sanction for the prosecution of the pleader, considered all the circumstances and came to the conclusion that it was not a proper case for prosecution. Having regard to the position and character of the petitioner and the nature of the statement made by him and the fact that, when the amin was sent, he admitted the mistake, the District Munsif was of opinion that it was not a proper case for prosecution for making a false declaration under S. 199, Penal Code. The learned District Judge has reversed that order, holding that since there was a prima facie case of making a false statement, all the other circumstances must be left for consideration at the trial.

This, in my opinion, is a wrong view of the law. When sanction is asked for, for the prosecution of a person for making a false statement in the course of a judicial proceeding or for any other offence of a like nature, it is the duty of the Court to which the application is made, not only to see that there is a prima facie case, but also to decide whether it is a fit case for prosecution in the interests of justice. The Court ought not to forget that statements, which in fact are false, are often made by men through the merest inadvertence or slip of memory.

It is, no doubt, true that when a person makes an affidavit he ought to be extremely careful to see that every statement that is made there, is strictly accurate. At the same time S. 199, Penal Code, contemplates that a statement, in order to come within the purview of the section must be one which is either false to the defendant's knowledge or which he ought to have known to be false or could not have believed to be true. Here there were facts upon which the District Munsif was justified in saying that although the statement in question was made in a rather reckless manner, it was not a fit case for prosecution. The position and character of the petitioner, the fact that the property even with both the mortgages was sufficient security and that other circumstances in which the statement was made, were matters which the District Munsif was entitled to take into consideration in coming to conclusion whether there ought to be a prosecution or not. I am of opinion that the order of the learned District Judge granting sanction should be set aside.

Napier, J.—I agree. The learned District Judge in his order states as follows :

"His pleas and his previous character are matters which would be more relevantly taken into consideration by the trying Court."

This statement of the law I consider to be incorrect. S. 195, Criminal P. C., states that no Court should take cognizance of certain offences except with the previous sanction of Court, but does not state on what materials that sanction is to be based. Speaking for myself, I have always held that the view largely prevailing in this Court that the important matter to which a Court should direct its attention is whether there was a prima facie case, is incorrect. To my mind, that is not the function of the Court granting sanction. That is the function of the Magistrate who hears the case. It is the function of the Court which grants sanction to consider the whole of the circumstances of the case and decide whether it is in the interests of justice and purity of judicial proceedings, that the person who has made the statement should be prosecuted. The Munsif has come to the conclusion that this statement was made not deliberately and intentionally to gain a benefit, but, as he puts it, in a reckless and haphazard manner that makes the petitioner liable to blame of a reprehensible character. That seems to be exactly the right manner in which to view the action of the vakil in this case. It is further pointed out by the Munsif that he is a gentleman of respectability and position and he obviously thinks that although he has been grossly reckless and may have brought himself within the mischief of S. 199, Penal Code, he cannot have intended deliberately to mislead. That being so, I think the District Munsif very properly refused sanction and I would set aside the order of the District Judge.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 628

SADASIVA AIYAR AND SPENCER, JJ.

T. Krishnamacharlu and *others*—Defendants—Appellants.

v.

Appan Govinda Ramanuja Pedda and *another*—Plaintiffs—Respondents.

Second Appeal No. 977 of 1915, Decided on 13th March 1917, against decree of Dist. Judge, North Arcot, in A. S. No. 516 of 1913.

(a) Civil P. C. (1908), O. 1, R. 8—Suit on behalf of persons having same interest—Common right, if negatived, suit should be dismissed.

Where a suit is brought under O. 1, R. 8, Civil P. C., by some persons on behalf of a class alleged to have the same interest as the plaintiffs and such common right is negatived by the Court the suit should be dismissed. [P 631 C 1]

(b) Civil P. C. (1908), O. 1, R. 8—Suit on behalf of persons having same interest—Individual rights should not be declared—Decree, form of.

In a suit it is not competent to the Court to declare the rights of certain individuals alone who are quite distinct in legal conception from the class of persons on whose behalf the suit is brought, as for example, where the decree is in favour of persons not included in that class or of persons not ranged on either side as a party to the suit. It is open to the Court, however to pass a decree in favour of persons who form a small number out of a larger class ; 9 *M L J* 355, *Dist.* [P 631 C 2, P 632 C 1]

T. Narasimha Aiyangar and *C. Padmanabha Aiyangar*—for Appellants.

R. Sadagopachariar and *C. Narasimhachariar*—for Respondents.

Sadasiva Aiyar, J.—The defendants are the appellants. If I understand the pleadings aright, they have been made by the plaintiffs to represent the Vadagalai Brahmin community in India. The two plaintiffs who originally brought the suit are Tengalai Vaishnava Brahmins resid-

ing in Tirupati and they brought the suit in the very beginning of 1905 (more than 12 years ago) with the permission of the Court under S. 30 of the old Civil P. C., on behalf of the Tengalai Sri Vaishnava Brahmins who are permanent residents of Tirumalai (that is, upper Tirupati), Tirupati (that is, lower Tirupati) and of Tiruchanoor (a village a few miles distant from lower Tirupati). The plaint alleged that the Tengalai Brahmins who were the permanent residents of those places were all entitled to the mirasi office of Adhyapakam in the Vaishnava temples in the two Tirupatis mentioned in Sch. A of the plaint and that the Vadagalai Brahmins represented by the defendants obstructed the performance of the dutites of the Adhyapakam miras in those temples.

Now the duty of the Adhyapakam office is to recite the Tamil Tirvoimoli Prabandham on certain occasions in these temples. But just before the recital proper, two preliminary recitals take place in such Vaishnava Temples. The first preliminary recital is made by the Pedda Jiyangar (plaintiff 1 and after his death plaintiff 4 have been the Pedda Jiyangars) and it is a Tamil phrase meaning "please instruct." Then those who are entitled to do the Adhyapakam duties perform the second preliminary recital which is a short Sanskrit Anushtup sloka called "pathram." This "pathram" is an invocation of either the Vadagalai sub-guru Vedanta Desikar or the Tengalai sub-guru Manavala Mahamuni. The first quarter of the former "pathram" sloka is "Ramanuja Daya Pathram" and the first quarter of the second sloka is 'Srisailesa Daya Pathram." The plaintiffs' case is that it is Srisailesa Daya Pathram that is recited before the Adhyapaka Tamil verses are begun. The defendants' case is that both the pathra slokas are simultaneously recited by the Vadagalais and Tengalais respectively. The defendants further denied that all the permanent Tengalai residents of the three places mentioned in the plaint are entitled to the mirasi office of Adhyapakam. Various other defences were raised in the written statements, each of which written statements consisted of 37 paragraghs. As many as 18 issues were framed in the case in the District Court. I shall only set out the principal issues, namely issues 4, 10, 12 and 16 as follows :

"(4) Whether the plaintiffs and all the Tengalai Sri Vaishnava Brahmins referred to in the plaint are an ill-defined uncertain and fluctuating body; and if so, whether the office or right claimed can be acquired by them? (10) Whether the Tengalai Sri Vaishnava Brahmins of Tirumalai, Tirupati and Tiruchanoor are exclusively entitled to the mirasi office of Adhyapakam as alleged in para. 5 of the plaint? (12) Whether the plaintiffs are entitled to have the Thodakkam performed by the Pedda Jiyangar or others as alleged in para. 7 of the plaint and whether such a right can be enforced by law? (16) Whether the defendants as persons connected with the temple and as ordinary worshippers are entitled to recite the Stothrapatam and exercise the other rights mentioned in para. 31 of the written statement?

The suit was then transferred from the District Court to the file of the Subordinate Judge's Court. The Subordinate Judge found the following facts established:

Paragraph 24. (1) That the Pedda Jiyangar has the right and duty to do Adhyapakam in the Tirupati and Tirumalai temples and he does it along with the Acharyapurushas and Adhyapakas, and the Sri Vaishnava assembly in front of the deity when the God goes out in procession; (2) that the rights and duties of the Chinna Jiyangar and Ekangi are the same as those of Pedda Jiyangar, they being only his deputies; (3) that the Yemunathorai service people, the descendants of one of the sharers in which defendant 3 is, must perform Prabandha Sevakalam along with the Jiyangar in the Tirumalai and Thirupati temples during the daily worship; (4) that of the 7 Acharyapurushas of the temples, all but the Tholappachar, including the Vadagalai Dharmapuri man do Prabandha Sevakalam in front of the deity, when the God goes out in procession; (5) that there are Adhyapakas as distinguished from the above 'Acharyapurushas and the Jiyangar and his deputies, who have to do Prabandha Sevakalam in the daily worship and also Utsavam of the temple; (6) that the right of both the Vadagalais and Tenagalais to do the Adhyapakam in all the plaint temples of Tirumalai and Tirupati except those of Vedanta Desikar and Manavala Mahamuni wherein the Vadagalais and Tengalais are entitled to

exclusive right respectively) has been recognized by the temple authorities from the earliest times; (7) that the Tamarupu family has been claiming to be one of the Mirasi Adhyapakas of the Tirumalai and Tirupati temples since before the year 1838 and had according to plaintiff's own case, been doing Adhyapakam service as well at least till 1861 A. D., when the Pedda Jiyangar claims to have dismissed defendants 1 and 2's ancestor, Srinivasachari; (8) that there had been no instance of any Adhyapaka being appointed by the Pedda Jiyangar prior to the year 1846; and (9) that even subsequently he has been appointing his Adhyapakas only for the Tirupati temple, and their service extends to the Tirumalai only on the occasion of the Brahmotsavam and Adhyayanotsavam there, but not in respect of the daily worship in the temple there: and (10) that the Vadaglais and Tengalais who are entitled to do the Adhyapakam do so after uttering, each sect, their own "patram;" (11) the right to the recital of the Stothrapatam when that has to be recited follows the right to the Prabandha Sevakalam. Further, there is no dispute about the "patram" in connexion with the recital of it with the words "Sreeman Venkata Madharya," which is common to both the Vadagalais and Tengalais.

It will be seen from the above that one Acharyapurusha who is a Vadagalai, namely, the Dharmapuri man, is entitled to do Prabandha Sevakalam and hence the plaintiffs, the Tengalai residents of the three places, cannot support their alleged exclusive claim to do the Prabandha Sevakalam. Again it appears from the evidence of the plaintiffs' own witness that a Tengalai Acharyapurusha is entitled to Prabandha Sevakalam, though he is not a permanent resident of any of the three places. Hence also the plaintiffs' suit, to which this gentleman has not been added as a party and which claims exclusive right in the permanent Tengalai residents alone of these places, has to fail. Again it is clear (and both Courts have found) that every permanent Tengalai Brahmin resident is not and cannot be entitled to the Adhyapakam office claimed in the plaint, including (I suppose) the minor Brahmin Tengalai boys. Only 5 or 6 Tengalai Acharyapurushas (who hold other offices), one of whom is not a resident, the Jiyangar and his deputies and certain persons appointed by the Jiyangar and a Vadagalai Acharyapursha have the duty of performing the Adhyapakam recitals. The learned Subordinate Judge, therefore, dismissed the plaintiffs' suit as the right sought to be established was not sustained. In concluding his judgment the learned Subordinate Judge says:

"The plaintiffs' vakil argued that even on those findings, a decree may be given in favour of the persons who are found entitled to the Adhyapakam miras in suit, as was done in *Srinivasa Thathachariar* v. *Srinivasa Aiyangar* case (1), but I do not think it can be done in this case, because the persons who have been found entitled to the Adhyapakam in question are not on record in this suit, unlike in *Srinivasa Thathachariar* v. *Srinivasa Aiyangar* (1), so far as the Tengalais at least are concerned. I say they are not on record because the persons who had been found entitled to the office along with the Vadagalais have been so found entitled to it, not as permanent Tengalai residents of Tirumalai, Tirupati and Tiruchanoor who alone are the real plaintiffs, but persons occupying some other capacity. Further, when the claim sought to be made out has failed, and that set up by the defendants has been found for them, I do not think that any decree should be given for plaintiffs according to the defence case."

On appeal to the District Judge, he found 10 (a) that according to the custom of the temples, the Srisailesa Daya Patram should alone be recited just before the Prabandha Sevakalam. He generally agreed with the other findings of the Subordinate Judge. But he considered that even on those findings a decree should be granted to the plaintiffs and he accordingly passed a decree as follows:

"that it be declared that the Acharyapurushas and persons duly appointed to Adhyapaka service are exclusively entitled to the Adhyapaka office in the temple mentioned in Schedule A hereto, (b) that the Pedda Jiyangar and his deputies the Chinna Jiyangar and Ekangis are exclusively entitled to perform the Thodakkam in the words 'Sayitharula' and that the Acharayapurushas and Adhyapakas are bound to use only the Tengalai patram and perform the Prabandha Sevakalam and recite the Stothrapatam in accordance with the Tengalai ritual before the deity on all occasions when such Prabandha or Stothrapatam is recited in the said temples mentioned in Schedule A and in processions of the deity inside and outside the temples, (c) that the members of the Vadagalai sect represented by the defendants be restrained by a perpetual injunction from interfering with the exercise of the exclusive right of the plaintiffs and other holders of the said office to the performance of the duties of the said Adhayapaka office by pronouncing the Vadagalai patram before the deity in the temple or the procession of the deity inside or outside the said temples either separately or in a goshti."

1. (1899) 9 M L J 355.

It is apparent that there are some errors both positive and negative in the learned Judge's decree. Firstly, he gives the right to the Adhyapakam office to all the seven Acharayapurushas, though one of them (Tholappachar) has no right to the Adhyapakam service. Secondly, he gives a decree to a person who is not at all represented in the suit either on the side of the plaintiffs or on the side of the defendants namely, the Purisai Acharyapurusha, P. W. 5. Thirdly, he has omitted to consider issue 16 and to protect the rights of the Vadagalais to join in the recitals as ordinary worshippers (excepting, of course, the Thodakkam recitals). It is unnecessary to consider for the purpose of deciding this second appeal whether the finding which I have numbered as 10 or that given by the Subordinate Judge which I have numbered as 10 (a) (that is, on the question of patram) is the more correct finding. I think that the suit must fail for the reasons which are mentioned by the learned Subordinate Judge in para. 45 of his judgment and which I have already quoted. The two plaintiffs who originally brought the suit professed to represent the common rights of all the Tengalai Vaishnava Brahmins in the three villages mentioned in the plaint and those rights only. The two plaintiffs who now remain on the record as respondents were brought in after the death of the original plaintiffs and two succeeding plaintiffs as again representing only the same common rights of all the Tengalai Brahmins of the three places. Such alleged common rights on which the suit was based have been negatived by the lower Courts and the only course thereupon was to have dismissed the suit which sought to declare the said alleged rights. The particular individual rights which the original two plaintiffs or the present two plaintiffs along with a few others enjoy cannot be said to be the subject-matter of the suit as brought.

As regards the case of *Srinivasa Thathachariar* v. *Srinivasa Aiyangar* (1) relied upon by the respondents, the allegations in the plaint in that case were in the first place slightly different. The allegation there was that the plaintiff, the remaining Thirthakars, and the other Tengalai Sri Vaishnava Brahmins, who were connected with the plaintiffs and who were the permanent residents of Srivilliputtur, had the exclusive right to the Adhyapakam Miras in the said temples. As the plaintiffs and the remaining Thirthakars were indicated in the plaint as forming a special class apart from the other Tengalai Sri Vaishnava Brahmins. the learned Judges seem to have considered that there was no objection to declaring the rights of the plaintiffs and the Tirthakars forming a distinct separate class, though the other ill-defined remaining class was not proved to have any right to the Adhyapakam office jointly with the first class. Further, all the remaining Thirthakars were parties to the suit in that case either as plaintiffs or defendants. Lastly, no objection seems to have been taken on the part of the defendants in that case to the modification of the decree of the lower Court so as to confine its scope to the Thirthakars, and no contention seems to have been raised that the whole suit ought to be dismissed. In the present case no distinction was made in the plaint between the two plaintiffs who brought the suit and the other members of the ill-defined Tengalai Vaishnava community in the three places. Secondly, the decree of the District Judge declares the right (1) of a person not a party to the suit, (2) of Vadagalai Acharyapurushas, and (3) of Vadagalais appointed to the Adhyapakam office by the Jeer, who were not admitted in the plaint to be entitled to the office (whereas in the Srivilliputtur case, the plaint admitted that the Thirthakars in whose favour the decree of the High Court was passed were entitled to the office). Lastly, the objection to the passing of the decree in favour of certain specified individuals alone found to be entitled to perform the duties was taken in this case in the first Court itself.

It is no doubt regrettable that all the labour of the Courts over his suit during the last 12 years and more has to be thrown away without the establishment of rights and facts which would be binding on a few persons at least, so as to prevent further litigation as between them in respect of those rights and facts. But it is clear to me that the decree given by the District Judge cannot be said to be in favcur of persons who form a small number out of a larger class. It is in favour of certain persons quite distinct on legal conception from the class of persons on whose behalf the suit was brought, such legal distinctness being conclusively

established by the decree being in favour of some persons not included in that class and even of a person not ranged on either side as a party to the suit. I might here add that the District Judge seems to have fallen in error in holding that the Adhyapakam servants to be appointed by the jeer must necsssarily belong to the Tengalai community.

In the result, I would set aside the District Judge's judgment and restore the decision of the Subordinate Judge with costs on the plaintiffs in all the Courts. The memorandum of objections is dismissed with cots.

Spencer, J.—I agree.

S.N./R.K. *Appeal allowed.*

A. I. R. 1918 Madras 632

SADASIVA AIYAR AND SPENCER, JJ.

Appala Raja and *others*—Respondents—Petitioners.

v.

Rangappa Naicker and *others*—Appellants—Opposite Parties.

Civil Misc. Petn. No. 2358 of 1916, Decided on 13th February 1917, against decree of High Court in Second Appeal No. 1198 of 1913.

(a) **Civil P. C. (1908), Ss. 109 and 110—Easement right negatived by final decree of High Court—Real value of right for purposes of appeal can be ascertained only on basis of detriment which party claiming right would sustain by its being negatived.**

Where the subject-matter of a suit is an alleged easement right, which is negatived by the final decree of the High Court, the real value of that right, for the purpose of an appeal to the Privy Council under para. 1, S. 110, Civil P. C., can be properly ascertained only on the basis of the detriment or injury which the party claiming the right would sustain by its being negatived. And where the actual detriment or injury caused does not amount to Rs. 10,000, it is not a fit case for the grant of a certificate under para. 1, S. 110, Civil P. C. [P 633 C 1]

(b) **Civil P. C. (1908), S. 110, Para. 2—Suit must involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards.**

Paragraph 2, S. 110, is intended to extend the privilege given by para. 1 only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly, though not directly. Para. 2 means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards, not that the rights affect properties whose value is Rs. 10,000 and upwards. [P 633 C 1, 2]

(c) **Civil P. C. (1908), S. 110, Para. 3—Case must involve question of general interest or importance.**

Under para. 3, S. 110, the case must involve a question of law of general interest or importance and not the application of the law to the particular facts of the case. [P 634 C 2]

(d) **Civil P. C. (1908), S. 110, Para. 2—"Property," Meaning of.**

Per *Sadasiva Aiyar, J.*—The word "property" in para. 2, S. 110, means rights in property inferior to full ownership where such inferior rights alone are the subject-matter in dispute. [P 633 C 1]

(e) **Civil P. C. (1908), Ss. 109 and 110—Subsidiary interest such as easement of inconsiderable value, attached to property of great value, in dispute—Value of property affected should determine right of appeal.**

Per *Spencer, J.*—When some subsidiary interest, such as an easement of inconsiderable value attached to property of great value, is in dispute, the value of the property affected rather than the value of the subject-matter of the suit should determine the right of appeal. The claim must be one "to or respecting property" of Rs. 10,000 in value, not a claim merely affecting property of such value. [P 634 C 2]

T. R. Venkatarama Sastri and *M. S. Vaidyanadha Aiyar*—for Appellants.

V. Ramesam and *A. S. Viswanadha*—for Opposite Parties.

Sadasiva Aiyar, J.—This is an application by the plaintiffs (who were respondents before us in Second Appeal No. 1198 of 1913) for leave to appeal to the Privy Council against the judgment of this Court which reversed the decision of the Subordinate Judge of Sivaganga and dismissed the plaintiffs' suit. The application for leave is based on the ground that the decree of this Court relates to a subject-matter whose value was Rs. 10,000 or upwards, in the Court of first instance and the subject-matter in dispute on appeal to His Majesty in Council is also of the same value and that, therefore, the application fulfils the requirements of para. 1, S. 110, Civil P. C. It is further alleged that the decree involves directly or indirectly some claim or question to or respecting property of like amount or value, and hence it further or in the alternative, satisfies the requirement of para. 2, S. 110, Civil P. C. It is finally contended that even if neither of the above requirements is fulfilled, the application satisfies the conditions of para 3, S. 110, Civil P. C., namely, that there is a substantial question of law involved in the suit on which it is advisable that there should be a pronouncement by their Lordships of the Privy Council.

It may be remarked that in the plaint, the subject-matter in dispute in the suit is valued at Rs. 300 for purposes of jurisdiction. The court-fee paid on the plaint is Rs. 11-8-0 which would cover a

subject-matter of a value of about Rs. 140 only. No doubt, the value for the purpose of calculation of court-fees and the value fixed for the purpose of jurisdiction in respect of claims for declarations and injunctions do not afford in all cases the proper criteria for finding out the value of the subject-matter in dispute for purposes of ascertaining whether the requirements of para. 1, S. 110 are satisfied. Now the subject-matter in dispute, in this case is the right of the plaintiffs to have the water of the Thalaigidanga pond and of the channel B for the irrigation of their fields. The real value of that right can be properly ascertained only on the basis of the detriment or injury which the plaintiffs would suffer if that right is negatived as it has been. The affidavit in support of the application for leave mentions in paras. 14, 15 and 16, that the plaintiffs have suffered (either by the decreased value of the lands or by the decrease of the annual average income) an injury whose pecuniary equivalent amounted to very much more than Rupees 10,000. But the finding of the District Munsif, to whom this question was referred by this Court for his opinion (which we accept) is that the actual detriment or injury caused to the plaintiffs does not amount to Rs. 10,000 and is negligible so far as pecuniary value is concerned. It seems to me, therefore, that so far as para. 1, S. 110, is concerned, this case does not fulfil the requirements thereof.

Then Mr. Venkatarama Sastriar argued that the requirements of para. 2 are fulfilled because though the subject-matter of the suit and the subject-matter in dispute on appeal to His Majesty in Council may be less than Rs. 10,000 in value, the decree of this Court involves a claim "respecting" irrigation of lands which lands are worth more than a lakh of rupees. If the word "property" in para. 2, S. 110 be given the widest meaning and if the word "respecting" is also given a very wide interpretation, the above argument has no doubt much force. But in construing the word "property" in para. 2, we cannot lose sight of para. 1, S. 110, to which the second is an alternative. I think "property" in para. 2, S. 110 means rights in property inferior to full ownership where such inferior rights alone are the subject-matter in dispute. Hence para 2 means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards. I am fortified in this view by the decision of Sir Lawrence Jenkins, C. J., and Russel, J., in *De Silva* v. *De Silva* (1). The case in *Ajuas Kooer* v. *Mt. Luteefa* (2) also lends support to this view as being the only reasonable view of the law on this point. No doubt the provisions of para. 2, S. 110 had not been enacted on the date of that decision, but I think para. 2 only intended to extend the privilege given by para. 1 (in so far as it enabled an appeal to be filed even though the dispute directly involved in the litigation sought to be taken up to the Privy Council was less than Rs. 10,000) only to cases where a claim regarding rights of Rs. 19,000 or upwards in value is involved indirectly, though not directly. Whether directly or indirectly involved, on the question, however, as to what is the thing which should be Rs. 10,000 or upwards in value so as to justify an appeal to the Privy Council, I think that the case in *Ajuas Kooer* v. *Mt. Luteefa* (2) furnishes an authority which is entitled to great respect.

Coming to para. 3, S. 110, I have considered in the case in *Ayya Raghunatha* v. *Thirumalai Echambadi* (3) the question as to what should be the nature of the substantial point of law of general interest invovled which would justify a certificate being granted under O. 45, R. 3, last clause sub-S. 1 read with S. 109, Cl. (c), and the last paragraph of S. 110. In this case, the only question of law really involved seem to come under a few heads, one of them being whether Oldfield, J., and myself were right in stating in our first judgment in this case that no plea of lost grant was put forward by the plaintiffs. The other questions as to the extent of the right of the Government to regulate the flow of water for irrigation and as to whether the plaintiffs are entitled to a prescriptive right by sufficiently long enjoyment are questions which (so far as they involve questions of law) have been considered in several cases both by the Privy Council and by this High Court and I do not think that any new question is involved in this case which makes it desirable to have a fresh pronouncement from their Lordships of

1. (1904) 6 Bom L R 403.
2. (1872) 18 W R 21.
3. (1915) 31 I C 46.

the Privy Council. Mr. Venkatarama Sastriar argued that the persistence and keen fighting spirit displayed by both his clients and their opponents in this litigation show that large substantial interests are really involved in the suit, substantial both as regards the pecuniary value of the interests and the legal questions of general importance involved. I am not, however, satisfied that the persistence and keenness may not be due more to sentimental considerations and to the not uncommon spirit of factious rivalry between land-holders of neighbouring villages. I would, therefore, refuse this application and dismiss it with costs.

Spencer, J.—On the first point, it is clear that the subject-matter in dispute in this case is not of the value of Rs. 10,000 or upwards. It was found by both the lower Courts, whose decisions of fact are binding on this Court in second appeal, that no material diminution of water supply to which the plaintiffs were entitled had been caused by the defendant's acts, and that no damage had been caused thereby to the plaintiffs' lands. I think that the extent to which the property would be deteriorated in value by the decision of this Court remaining unreversed is the proper criterion by which the value of the subject-matter of this suit should be tested: see *Ajuas Kooer* v. *Mt. Luteefa* (2). Mr. Venkatarama Sastriar, however, argues on the second point that the case falls within the words of part 2, S. 110, Civil P. C., and that the

"decree or final order involves directly or indirectly some claim or question to or respecting property of the like amount or value."

In *De Silva* v. *Silva* (1) an extreme case was suggested of a suit for a share of the value of Rs. 100 in an estate of the value of Rs. 10,000 being taken to the Privy Council. It was considered by the Court that if such an interpretation were placed upon the section, it would defeat the object of the section which is to prevent small claims from going to the Privy Council. I consider that it was not intended by the legislature that claims of trifling value should be taken up to the Privy Council unless the property directly or indirectly involved in the result of the litigation is of Rs. 10,000 in value or upwards, and unless some substantial question relating to the right, title and interest in such property is directly or indirectly decided thereby. I do not think it can have been intended that when some subsidiary interest, such as an easement of inconsiderable value attached to property of great value, is in dispute the value of the property affected rather than the value of the subject-matter of the suit should determine the right of appeal. The claim must be one "to or respecting property" of Rs. 10,000 in value, not a claim merely affecting property of such value. Thirdly, I am not satisfied that any question of law of general interest or importance is involved in this case. What the Judges had to consider was rather the application of the law to the particular facts of the case that was before them. I, therefore, agree in refusing the leave to appeal.

S.N./R.K. *Certificate refused.*

A. I R 1918 Madras 634

SPENCER AND KRISHNAN, JJ.

(K. C.) Nachimuthu Chetty—Plaintiff—Appellant.

v.

Andiappa Pillai—Defendant—Respondent.

Second Appeal No. 1992 of 1916, Decided on 15th August 1917, against decree of Dist. Judge, Madura, in A. S. No. 106 of 1916.

Paper Currency Act (1910), S. 26—Promissory note offending S. 26—Suit on, does not lie—Note is admissible as acknowledgment and plaintiff may amend plaint—Promissory note.

Where a promissory note offends against S. 26, Paper Currency Act, no suit can be maintained on the note itself: 40 *Mad* 585, *Foll.* [P 634 C 2]

But a suit will lie on the original cause of action and the note may be admitted in evidence as an acknowledgment. A plaintiff should, for this purpose, be permitted to amend his plaint. 40 *Mad.* 727 and 40 *Mad.* 585, *Foll.* [P 634 C 2, P 635 C 1]

A. Krishnaswami Aiyar—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondent.

Judgment.—In this case the learned District Judge held that the suit as brought was not maintainable as the note sued on was one which offended against S. 26, Paper Currency Act. That was clearly right: see *Chidambaram Chettiar* v. *Ayyasami Thevan* (1). But we consider that the District Judge should have allowed the plaintiff to amend his plaint as prayed and base his suit on the original cause of

1. (1917) 40 Mad 585=36 I C 741.

action in the circumstances of this case, as no objection was taken to the suit in the First Court. The question as to whether the plaintiff's suit on the original cause of action would not be maintainable in whole or part, having reference to the observations in *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (2) and in *Chidambaram Chettiar* v. *Ayyasami Thevan* (1), and whether his suit will be barrred by limitation, are questions to be decided by the trial Court after evidence. We may observe that there is nothing in law to prevent a note offending against S. 26 being admitted in evidence as an acknowledgment. We set aside the decree of the District Judge and remand the case to the first Court for fresh trial. Plaintiff will have leave to amend his plaint as advised in three weeks from the date of receipt of this order by the first Court. All costs will abide and follow the result.

S N./R K. *Appeal allowed.*

2. (1917) 40 Mad 727=35 I C 219.

A. I. R. 1918 Madras 635 (1)

OLDFIELD AND BAKEWELL, JJ.

Vishvendra Tirtha Swamiar of Sode Mutt—Plaintiff—Appellant.

v.

National Insurance Co. Ltd., Calcutta—Defendants—Respondents.

Civil Misc. Appeals Nos. 95 and 96 of 1916, Decided on 29th January 1917, against orders of Sub. Judge. South Canara, in Original Suits Nos. 88 and 87 of 1914.

Civil P. C. (1908) S. 20 (c)—Suit to recover money due on Life Insurance Policy—Suit can lie at place of death of insured.

A suit to recover money due on a Life Insurance Policy can be instituted in the place where the insured died; for death in such cases is part of the cause of action within the meaning of S. 20. *Read* v. *Brown*, (1889) 22 *Q. B. D.* 128; and *Cailland* v. *Champion*, (1797) 7 *T. R.* 205 *Foll.* [P 635 C 2]

B. Sitarama Row—for Appellant.

T. Rangachariar; *V. Krishnasam* and *A. V. Seshayya*—for Respondents.

Judgment.—The question is whether plaintiff's suit brought to recover on Policies of Insurance issued by Companies having their offices outside South Canara, were properly brought in the District. The lower Court held that they were not. It is argued first that plaintiff could sue in South Canara, because the companies' acceptance of the policy-holder's proposals was completed only by their communication to the plaintiff there. The lower Court did not find on the question where the communication took place, because this contention was not relied on before it. For the same reason we cannot consider it in appeal. Next, it is contended that plaintiff could sue in South Canara, because the policy holder died there, and his death was part of the cause of action in each case. This contention is in accordance with the definition of the term "cause of action" contained in *Read* v. *Brown* (1), which Courts in this country have adopted so frequently that we do not feel at liberty to depart from it. It is, moreover, supported directly by *Cailland* v. *Champion* (2) and is consistent with the reference to a part of the cause of action in S. 20, Civil P. C. We, therefore, accept it.

In these circumstances we do not deal with the alternatve suggestion that the cause of action arose in part where the proposal was made by the insured person to the company, or with the suggestion made in appeal against order No. 96 of 1916, that it was in consequence of a special term in the policy constituted by the payment of the first premium. The appeals are accordingly allowed, the lower Courts' decision being set aside with a direction to accept the plaints on re-presentation and deal with them according to law. Costs in this Court and in the lower Court to date will be costs in the cause and be provided for in the decrees to be passed.

S.N./R K. *Appeals allowed.*

1. (1889) 22 Q B D 128.
2. (1797) 7 T R 205.

A. I. R. 1918 Madras 635 (2)

AYLING AND NAPIER, JJ.

Venkatagiri Pattar and *another*—Plaintiffs—Appellants.

v.

Manavikrama, Calicut—Defendant—Respondent.

Second Appeal No. 632 of 1915, Decided on 28th February 1917, against decree of Sub-Judge, South Malabar, in Appeal Suit No. 457 of 1914.

Malabar Law — Adima or anubhavam tenure.

Inalienability is a characteristic of adima or anubhavam tenure. [P 636 C 1]

C. Madhavan Nair and *P. Appu Nair*—for Appellants.

C. V. Ananthakrishna Aiyar—for Respondent.

Judgment.— Counsel for appellant argues that the lower appellate Court was wrong in holding that inalienability is a condition of adimayavana tenure and contends that the decision in *Ukkandath* v. *Puliyakot Kunhi Kuttan* (1) of Sadasiva Aiyar and Hannay, JJ., relied on by the Subordinate Judge, proceeds only on a consideration of the terms of the particular document in that case. We are clear on a perusal of the judgment and record that this is not so. The decision of the Sudder Court in its proceedings dated 5th August 1856, which is quoted at p. 307 of Moore's Malabar Law, has been referred to as authoritative in two judgments of this Court, *Theyyan Nair* v. *Zamorin of Calicut* (2) and *Achutha Menon* v. *Sankaran Nair* (3) and lays down in unmistakeable terms that inalienability is a characteristic of adima or anubhavam tenure. It has not been seriously argued that any distinction is to be drawn in this respect between tenures termed adimayavana or anubhavam and as shown at pp. 195-6 of Moore's Malabar Law this nomenclature merely varies with the caste of the grantee ; vide, also *Theyyan Nair* v. *Zamorin of Calicut* (2).

The only other point sought to be argued is one of estoppel based on the defendant's receipt of michavaram from plaintiffs. This was not raised in either of the lower Courts and we cannot allow it to be set up in second appeal. The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

1. (1915) 27 I C 10.
2. (1904) 27 Mad 202.
3. (1913) 36 Mad 380=12 I C 1007.

A. I. R. 1918 Madras 636

SADASIVA AIYAR AND SPENCER, JJ.

C. Jagannadha Mudaliar—Plaintiff—Appellant.

v.

Neervoy Audiah and *others*—Defendants—Respondents.

Second Appeals Nos. 1150 to 1165 of 1914, Decided on 28th February 1917, against decrees of Dist. Judge, Chingleput, in A. S. Nos. 293 to 308 of 1913.

(a) Madras Estates Land Act (1908)—Decision in suit for rent under Madras Rent Recovery Act is not res judicata in suit for rent under Madras Estates Land Act—Madras Rent Recovery Act (1865).

The decision and findings of a Revenue Court as to the proper terms of a pattah in suits brought under the Madras Rent Recovery Act, 1865, for releasing attachments madeby the landlord for recovering arrears of rent are not res judicata in a suit for rent under the Madras Estates Land Act. [P 637 C 1]

(b) Landlord and Tenant—Rent—Remission of, is matter of grace.

In the absence of any custom or contract, remission is a matter of grace.

Where a muchilika executed by the tenant contained the clause, "no remission need be given unless it is found that there was savi or beedu without my fault:"

Held : that the tenant was entitled to claim remission for savi when he was not at fault. [P 637 C 2]

(c) Madras Estates Land Act (1908), S. 13 (3)—Tenant—Improvements by—Landlord cannot ask special rate of rent for garden and second crop. [P 637 C 2]

Under S. 13, Cl. (3,), Madras Estates Land Act, a landholder is not entitled to claim special rates for garden and second crops raised on the land with the aid of water obtained by improvements effected by the tanants at their own expense.

Where rents are being paid according to the recognised tarams of the lands in the estate, the landlord cannot, in the absence of any contract to that effect supported by consideration, claim a higher rate of rent for special crops raised by the tenants with the aid of improvements effected by them at their own cost. [P 638 C 1]

S. Srinivasa Aiyangar and *S. Gopalaswami Aiyangar*—for Appellant.

L. A. Govindaraghava Aiyar, *L. S. Veerarararaghava Aiyar*, *M. O. Parthasaradhy Aiyangar* and *M. Devarajulu Naidu*—for Respondents.

Sadasiva Aiyar, J.—These second appeals have arisen out of similar suits brought by the Receiver of the Kalahasti Estate for the recovery of arrears of rent due from the tenants of different holdings in Madanambedu village in the Kachinad Taluk of the said estate in respect of Faslis 1319 to 1321. The legal questions (or questions of construction of documents) arising in these second appeals are : (1) whether the defendants are entitled to remission for Fasli 1319 on account of savi, (2) whether the plaintiff is entitled to charge special rates for garden crops raised by the defendants with the aid of the water of the wells dug at the tenant's own expense, (3) whether the plaintiff is entitled to make any charge for a second crop raised on wet lands by the defendants, and (4) whether in ten of these suits brought against ten sets of defendants, the questions relating to remission for savi, to special rates for garden crops and to the charge for second crop are res judicata in the plaintiff's favour by the decision Ex. B in suits brought in 1901 by the said ten sets of tenants in the Revenue

Court of the Chingleput Deputy Collector under the old Rent Recovery Act of 1865, these suits having been brought for the release of the attachments made by the Kalahasti Estate for recovery of arrears of rent for Fasli 1309, and the suits being based on the grounds (among others) that the pattahs tendered to the tenants were improper as containing terms providing for rents at higher rates for special crops and for recovery of rents for raising second crops, etc., and that no remission was given for savi.

I shall deal with the fourth point first. The findings in the decision Ex. B, were given in suits brought under Act 8 of 1865, which Act did not empower the Revenue Courts to entertain suits for rent. The present suits are suits for rent over which jurisdiction was given to Revenue Courts by the Estates Land Act of 1908. In Second Appeal No. 2574 of 1913 decided by Wallis, C. J., and Ayling, J., it was held that the findings of a Revenue Court as to the proper terms of a pattah in a suit under Act 8 of 1865 were not res judicata in a suit in the same Revenue Court filed under the Estates Land Act for recovery of rent. I must therefore find this fourth point against the plaintiff. As regards the first point (remission for savi), the dispute between the parties is whether remission for savi is a mere matter of grace on the part of the landlord or whether the tenant is entitled to it (wholly or proportionately as the case may be) as a matter of right, where it is established that the crops have become wholly or partly savi without the tenant's fault. The answer to this question has to be based on a consideration of the contract between the parties (as gatherable mainly from the pattas and muchilikas which have prevailed) and the custom of the zamindar. The relevant portion of the muchilikas (see for example Ex. 1) which have been executed by the tenants is as follows:

"Out of the amount realised in respect of the lands in my holding no remission need be given unless it is found that there was savi (or withering of crops) and beedu (waste) without my fault."

Now it cannot be contended by the landlord that if the land was left waste without the tenant's fault, he is not entitled under the terms of the muchilikas to remission. Beedu and savi being placed on the same footing in the muchilikas, I think that according to the true construction of the pattas and muchilikas, the tenant is entitled to remission for savi caused without his fault. Though the clause in question in the muchilikas is worded in the negative, it clearly implies the corresponding positive clause that remission should be given if the opposite state of facts is established. The Deputy Collector says in his judgment:

"The karnam of the village P. W. 2, who has been in the estate service for 20 years, says that it is usual to grant remissions and D. W. 1, who is the manager of the village having an experience of about 50 years, also says that the proprietors used to grant remission. From the evidence on both sides it is clear that there was much savi in fasli 1319 due to want of rains and not to raiyats' negligence."

And then he finds that the raiyats are entitled both according to the terms of the muchilikas and according to custom to claim remission. I think he is right and I decide this first point also against the plaintiff-appellant, though in the absence of muchilikas, it seems to be the law that

"remission is a matter of grace and it would require very strong evidence to show that remission can be claimed as a matter of right: see *Arunachalam Chettiar* v. *Mangalam* (1), quoting *Alagappa Chettiar* v. *Tirunagavalli* (2).

As regards the remaining points 2 and 3, I think that S. 13, Cl. 3, Estates Land Act, as interpreted by the decisions of this Court negatives the plaintiff's right to claim special rates for garden and second crops raised on lands with the aid of water due to improvements effected at the tenant's own expense. The finding of fact in this case is that the cultivation of such crops is due solely to such improvements: see on this point *Paramaswami Iyengar* v. *Pusala Thevan* (3), *Arumugam Chetty* v. *Raja Jaga Veera Rama Venkateswara Ettappa* (4), *Raghava Naidu* v. *Muthiyalu Naidu* (5), *Arumugam Chetty* v. *Jagaveera Rama* (6), *Mallikarjuna Prasada* v. *Vemulapalli Subbaya* (7), *Arunachalam Chetty* v. *Syed Ahmed Ambalam* (8). Of course if there was a contract to the contrary for consideration before the passing of the Estates Land Act, such contract would

1. (1917) 40 Mad 640=35 I C 329.
2. (1903) 13 M L J 377.
3. (1910) 5 I C 911.
4. (1905) 28 Mad 444.
5. (1915) 26 I C 364.
6. (1912) 35 Mad 134=8 I C 330.
7. (1913) 36 Mad 4=10 I C 68.
8. (1915) 31 I C 539.

be valid: see *Govind Doss* v. *Gurram Chinnappa Naidu* (9). No such contract has been established in this case. If at least the lands on which the wells had been dug were poramboke lands at the landlord's disposal, his not charging rent for the sites of the wells dug by the tenants may be taken as sufficient consideration for the agreement to pay enhanced rates for special crops due to the wells: see *Govind Doss* v. *Gurram Chinnappa Naidu* (9). But the evidence of P. W. 2 in this case is as follows:

"The raiyats have dug wells in their dry lands from their funds. It is impossible to raise special crops without well water. There are no zamin wells in the village."

Where, again, the rent claimed does not depend on the classification of the lands held by the tenants into tarams on which fixed money rents according to the area have to be paid, it may be argued fairly that the payment at a higher rate for special crops is not an enhancement. But the evidence in these cases clearly proves that rents have been fixed according to the recognized tarams on the lands in the estate. The right, therefore, to enhance such ordinary taram rent into a special higher rate of rent in respect of special crops raised by the tenant with the aid of his own improvements must be supported by a contract supported by consideration, usage being of no avail: *Paramaswami* v. *Pusala Thevan* (3) and *Fischer* v. *Kamakshi Pillai* (10). In the result, these second appeals are dismissed with costs.

Spencer, J.—I concur.

S.N./R.K. *Appeals dismissed.*

9. (1915) 27 I C 869.
10. (1898) 21 Mad 136.

A. I. R. 1918 Madras 638 (1)

ABDUR RAHIM AND NAPIER, JJ.

Rangasami Goundan and *others* — Accused — Petitioners. In re,

Criminal Revn. No. 819 of 1916, Decided on 20th March 1917, against judgment of 1st Class Sub-Divl. Magistrate, Erode Divn, in Criminal Appeal No. 29 of 1916.

Penal Code (1860), S. 428—Accused cutting off ears of asses at base affecting hearing are guilty.

Where the accused cut the ears of two asses clean off at their base so as to affect the hearing of the animals:

Held: that they were guilty of "maiming" the animals within the meaning of S. 428: 35 *Mad.* 594 and 34 *I. C.* 973, *Foll.* [P 638 C 2]

A. Srirangachari for *T. Rangachariar* —for Petitioner.

E. R. Osborne—for the Crown.

Order. —As regards the conviction under S. 428, I. P. C. we do not think that it is wrong. The accused cut the ears of two asses clean off at their base and it is contended that this act does not amount to "maiming" within the meaning of S. 428. We have a decision of this Court in *Marogowdha* v. *Srinivasa Rangachar* (1), where it was held that the cutting of the ears of a horse amounted to an offence of maiming within the meaning of the Penal Code. That also seems to be the view taken in *Anna Laxman Bhintade* v. *Emperor* (2), although in the latter case, because the animal's ears had not been wholly cut off but only a portion of the ears had been cut, it was held that the offence was not one of maiming. But here the ears have been completely removed and the case falls within the ruling of *Marogowdha* v. *Srinivasa Rangachar* (1). Such an act is likely to affect the hearing of the animal and it certainly amounts to mutilation. The fine of Rs. 50 passed on each of accused 1 and 2 seems to us to be rather heavy. While we uphold the conviction we reduce the sentence of fine to a fine of Rs. 25 each. We do not think we should interfere with the conviction of the accused 4 and 5 for hurt. An objection is now taken that this offence was not committed in the course of the same transaction as the offence under S. 428. This point was not raised before the Magistrate nor is it mentioned even in the grounds of the revision petition. We do not think that an objection of this nature should be allowed to be taken for the first time in revision. The balance of the fines will be refunded if paid.

S.N./R.K. *Fine reduced.*

1. (1912) 35 Mad 594=12 I C 90.
2. (1916) 34 I C 973.

A. I. R. 1918 Madras 638 (2)

KRISHNAN, J.

Chandra Goundan and *others*—Defendants—Petitioners.

v.

Palaniappa Goundan and *others*—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 1087 of 1916 Decided on 11th September 1917.

Civil P. C. (1908), Ss. 115, 148 and 151, O. 9 R. 13 and O. 43, R. 1 (d)—Exparte decree—Order setting aside decree on defendant paying costs by certain date—Court has jurisdiction to enlarge time—Order refusing application for time—Revision lies.

The words of O. 9, R. 13, should not be construed too narrowly. [P 639 C 2]

Where an ex parte decree is set aside on condition of the defendant paying his adversary's costs in Court within a specified time, the Court has jurisdiction to vary the order subsequently by enlarging the time in its discretion. [P 639 C 2]

Such power is vested in Courts by the combined effect of Ss. 148 and 151, *A. I. R.* 1915 *Mad.* 69 and 35 *All.* 582, *Dist.* [P 639 C 2]

The High Court can interfere with an order passed under O. 9, R. 13, refusing to extend the time for payment of costs as a preliminary to the setting aside of an ex parte decree and it is not necessary for the aggrieved party to wait until a formal order is passed dismissing his original petition and then appeal against it. [P 639 C 2]

Obiter.—If a Court passes a final order rejecting an application under O. 9, R. 13, for noncompliance with the terms imposed, it may be that an application by way of review will be required to enable the Court to put it on the file again and pass fresh orders thereon; and an application for extension of time made after the passing of such final order may be treated as an application for review. [P 640 C 2]

On an application to set aside an ex parte decree the Court passed the following order, "I shall restore the suit to file if the defendants pay into Court the entire costs of the plaintiff except the institution fee and also the respondent's costs of this application on or before 7th April 1916." The costs were not paid by that date and the defendants again applied for rehearing of the suit on the merits offering to pay the costs into Court and praying to be excused for the delay. The Court refused to grant the prayer on the ground that it had no jurisdiction to do so:

Held: (1) that the latter application was one virtually for extension of time and that the Court had jurisdiction to entertain it under Ss. 148 and 151, (2) that against such an order a revision petition lay to the High Court. [P 640 C 2]

T. M. Krishnaswami Aiyar—for Petitioners.

G. S. Ramchandra Aiyar—for Opposite Parties.

Judgment.—A decree was passed ex parte against the parties in Original Suit No. 533 of 1915 by the District Munsif, Erode, and they applied to get it set aside under O. 9, R. 13. The Munsif, after hearing the parties, passed an order stating:

"I shall restore the suit if the defendants pay into Court the entire costs of the plaintiff except the institution fee, and also the respondents' costs of this application on or before 7th April 1916."

The costs were not so paid, but on the 1st April petitioners applied again to have the suit restored to the file and re-heard on the merits, stating that they were ready and willing to pay the costs into Court as ordered and that their failure to do so in time was due to their not having known of the order in time. The Munsif has treated this application as, in substance, one for extension of time and though he found that the case was one eminently fit for granting an extension, he held he had no power in law to grant any extension and dismissed the petition. The revision petition to this Court is against this dismissal. Even under the old Code, their Lordships of the Privy Council held in a case under S. 549 of the Code that the Court had power, apparently an inherent one, to grant extension of time to furnish security on application made for it, whether after or before the expiry of the time first fixed: see *Badri Narain* v. *Sheo Koer* (1). They held that the power existed in spite of the words in the section, "the Court shall reject the appeal." The Allahabad High Court has applied this view to S. 10, Cl. (2), Court fees Act, in *Ohunni Lal* v. *Ajudhia Prasad* (2) and this Court has followed that ruling in *Subrahmanyam* v. *Ramasawmy* (3). It follows, therefore, that even if O. 9, R. 13, stood by itself, applying the same principle it must be held the Court had power to grant the extension in the present case; and S. 151, of the Code expressly saves such inherent powers.

The new Code has, however, enacted S. 148, which expressly gives powers to Courts to enlarge from time to time the period originally fixed for the doing of any act prescribed or allowed by the Code. There can be no doubt that the act that the defendants had been directed to do in the present case, viz., to pay the costs into Court, is an act allowed by the Code, for R. 13 says that the Court may impose such terms as to costs, payment into Court or otherwise as it thinks fit. I am of opinion that the words of R. 13, should not be on construed too narrowly and that they are wide enough to cover the present case. The same view was taken in the case of *Jagarnath Sahi* v. *Kamta Prashad* (4) in similar circumstances. The case in *Moideen Kuppai* v.

1. (1890) 17 Cal 512=17 I A 1 (P C).
2. (1897) 19 All 240.
3. (1899) 9 M L J 348.
4. A I R 1914 All 55=23 I C 138=36 All 77.

Ponnuswamy Pillai (5) cited for the respondents is an entirely different one, as the time sought to be extended there was the time fixed in a conditional decree for delivery of property on payment of a sum of money within a certain time. The condition or the act required was one which had nothing to do with the old Code but was prescribed purely by the decree and their Lordships held that S. 148, did not apply. The present case is in no way analogous to it. A similar case in *Suranjan Singh* v. *Rambahal Lal* (6) was distinguished in the same way by the learned Judges in *Jagarnath Sahi* v. *Kamta Prashad* (4), the case above cited. If the Court had passed final orders rejecting the application under R. 13 for non-compliance with the terms imposed, it may be that an application by way of review will be required to enable the Court to put it on the file again and pass fresh orders thereon. If it were necessary to do so, I think the application of the petitioners of the 18th April may well be treated as an application for review. But I am of opinion that in the present case it is not necessary to do so, as I consider that their first application was still pending when they applied again on the 18th. The wording of the first order of the Munsif, viz., "I shall restore" seems to contemplate a further order even for the purpose of setting aside the decree. The order did not go on to say that if the condition was not complied with the application was to stand dismissed. Though dismissal may be the natural result of the failure to comply with the condition imposed, if no other orders are passed before the petition is finally rejected, it does not follow that the petition had been disposed of by the mere noncompliance without final order of rejection being passed. No such order was passed in this case. The petition, therefore, may well be treated as pending on the 18th April when the second application was made and that the Court was still seized of it.

I am therefore, of opinion that the lower Court was wrong in thinking that it had no power to grant further time. Respondents' vakil has urged that even if that be so, I should not interfere in revision and correct the mistake, because he says the order sought to be revised should be treated as one finally rejecting the application to set aside the ex parte decree and is appealable as such to the District Court under O. 43, R. 1, Cl. (d), and he relies upon the same case above cited in *Jagarnath Sahi* v. *Kamtaprashad* (4). In that case, the matter was taken up to the High Court by way of appeal against the formal order which was finally passed rejecting the petition under O. 9, R. 13. Against that order, an appeal clearly lay. In the present case, the revision is against the order which refused in terms only the extension asked for and admittedly there is no appeal against such order. At the time this revision petition was filed no final order rejecting the original application had been passed; it does not appear that any such order has been passed even since then. In these circumstances, I do not think I should refuse to act in revision on the ground that petitioners should have obtained a formal order of dismissal of their original petition and appealed against that to the District Court. They were not bound to get such an order. I am unable to treat the order refusing the extension as an order of dismissal of their original petition for the purpose of getting rid of a revision petition which is clearly well founded. I overrule the objection. In the result, I set aside the order of the lower Court in I. A. No. 689 of 1916 and direct that Court to pass fresh orders on it according to law, giving a reasonable time to the petitioners for the payment into Court of the costs ordered. The respondents will pay the petitioners their costs in this Court. The lower Court will itself dispose of the costs in that Court.

S.N./R.K. *Order reversed.*

5 A 1 R 1915 Mad 69=26 I C 68.
6 (1913) 35 All 582=21 I C 585.

A. I. R. 1918 Madras 640

AYLING AND NAPIER, JJ.

Ramanamma and *another*—Defendants—Appellants.

v.

Bathula Kamaraju and *others*—Plaintiff and Defendant—Respondents.

Second Appeal No. 916 of 1916, Decided on 9th February 1917, against decree of Addl. Temporary Sub-Judge, Rajahmundry, in Appeal suit No. 109 of 1915.

(a) Civil P. C (1908), O. 21, R. 63 and O. 38, R. 8—Order under O. 38, R. 8 is not governed by O. 21, R. 63.

Orders passed under O. 38, R. 8, are not governed by the provisions of O. 21, R. 63; 37 *All.* 575, *not Foll.* [P 641 C 1]

(b) Civil P. C. (1908), O. 38, R. 8—Property released from attachment before judgment under O. 38, R. 8—Suit for recovery is not governed by Lim. Act, Arts. 11 and 13.

A suit to recover property that has been released from attachment under O. 38, R. 8, is not governed by Arts. 11 and 13, Lim. Act; such a suit is not one to set aside an order of a civil Court within the meaning of Art. 13 and the existence of the order releasing the attachment before judgment is no bar to it. [P 641 C 2]

(c) Civil P. C. (1908), O. 38, R. 8—Nature of proceedings—Order passed under R. 8 does not decide ownership.

Order 38, R. 8, only provides for the manner of investigation into claims to property sought to be attached before judgment, and an order passed under it is not final in the sense of determining the ownership of the property in dispute even for the purpose of the suit in connection with which it is made. The effect of the rule is not to incorporate all the provisions of O. 21, and amongst them R. 63. [P 641 C 1]

P. Chenchiah and *S. Narasimha Rao* —for Appellants.

T. Prakasam—for Respondents.

Ayling, J.—Appellants' contention before us is that the suit is barred under Art. 13, Lim. Act. This article is clearly inapplicable in terms, since the plaint contains no prayer to alter or set aside any decision or order of a civil Court. Appellants' Counsel, however, argues that the District Munsif's order dated 6th December 1910, allowing his clients' claim under O. 38, R. 8 (attachment before judgment), is governed by O. 21, R. 63, and unless set aside, will become final; in which case it will preclude any proceedings against the same property in execution of the decree subsequently obtained. Hence, whatever the prayer in the plaint, the suit must be treated as a suit to set it aside: otherwise it will not be maintainable at all. As authority for his proposition that O. 21, R. 63, governs orders passed in investigation under O. 38, R. 8, Mr. Chenchiah relies on a ruling in *Bisheshar Das* v. *Ambika Pershad* (1). This is, no doubt, direct authority in his favour, but with all respect, I am unable to follow it. O. 38, R. 8, simply provides for the manner of investigation into claims to property sought to be attached before judgment: and I can see no ground for holding that, as stated by the learned Chief Justice in the case above quoted, its effect is to incorporate all the provisions of O. 21 and amongst them R. 63.

The manner of an investigation and the finality of the order passed on the same investigation are two totally different things. In the absence of specific provision, I should be most loath to hold that an order passed under O. 38, R. 8, was final in the sense of determining the ownership of the property in dispute even for the purpose of the suit in connection with which it was passed. It would be both unfair and inexpedient to drive a plaintiff into a fresh litigation to establish a defendant's title to property, with a view to attachment, before it is certain that he will secure a decree under which to attach. In my opinion the suit as framed will lie; and the existence of the order releasing the attachment before judgment is no bar to it. It is not time barred. I would therefore dismiss the appeal with costs.

Napier, J.—I agree.

It is urged before us that Art. 13 is a bar to this suit even though it is not in form a suit to set aside an order, the argument being that as an order has been passed releasing the property before judgment, that order must be set aside by suit before any relief can be obtained. The contention is that R. 63, O. 21 is made applicable to investigation of claims under O. 38, by R. 8. The case reported as *Bisheshar Das* v. *Ambika Pershad* (1) is relied on. The dictum in that case does support this contention, but it was not necessary for the decision and I think that the learned Judges, who give no reasons for their view, have not realised the result of their view, which is shortly this that a plaintiff whose attachment has been raised would very likely have to bring a suit for a declaration before he even got his decree in the first suit, and this decree might be useless to him if he never got that decree at all or unnecessary if he could levy execution more easily on other property of the defendant. I cannot imagine a more futile proceeding than such a suit with its first and second appeals going on contemporaneously with the main suits and its appeals. I am quite clear that R. 8 only applies the procedure of investigation in O. 21. A Court dealing with an application under O. 38 has only power to order the property to be placed at the disposal of the Court and conditionally attached, and it can only do this when it is satisfied that the defendant is endeavouring to dispose of the property. Of course it must be

1. A I R 1915 All 275=37 All 575=29 I C 622.

satisfied that it is the property of the defendant and so a third party is allowed by R. 8 to make a claim, but the order passed under O. 38 does not purport to decide conflicting claims but only the right to attach in the circumstances of the case. It is clear that Art. 11, Lim. Act does not apply, because the words 'attached in execution of a decree" prevent that. If R. 63 was intended to apply to prior attachments, one would expect to find Art. 11 worded in such a manner as to include these orders. The suit is one to establish the right which he claims and is not one to set aside an order. If a suit in that form is proper where an order has been made under R. 63, as is clearly indicated by the rule itself, I do not see why it is not the proper form of suit in this case and as the article does not bar it, I see no reason to assume that the order must be set aside, or go to Art. 13 to find a bar. The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Madras 642

ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

Subbaratna Mudali and *others*—Defendants—Appellants.

v.

Balakrishnaswami Naidu—Plaintiff—Respondent.

Second Appeal No. 1291 of 1915, Decided on 3rd April 1917, against decree of Dist. Judge, Trichinopoly, in Appeal Suit No. 256 of 1914.

Hindu Law—Succession—Dancing girls—Maternal grand-uncle's daughter is preferred to maternal grand-uncle's daughter's son.

Succession to the estate of a dancing girl is based more upon usage obtaining in the caste than upon any text of Hindu law, and according to that usage females take in preference to males. 5 *M. H. C. R.* 161; 11 *Mad.* 393: 2 *M. H. C. R.* 56; 12 *Mad.* 214 and 13 *Mad.* 33, *Foll*; 12 *Mad.* 277; 23 *Mad.* 171; 18 *I. C.* 601 and *A. I. R* 1915 *Mad* 63, *Dist.* [P 643 C 1]

Where therefore the succession is to the estate of a dancing girl, a maternal grand-uncle's daughter would be preferred to the maternal grand-uncle's daughter's son. [P 643 C 2]

K. S. Ganesa Aiyar—for Appellants.

T. S. Ramaswami Aiyar—for Respondent.

Judgment.—This appeal raises an interesting question as to the succession to the property of a woman of the dancing girl caste. The deceased woman Palani inherited the property in dispute from her mother Nagu, who inherited it from her mother Mottai, who again inherited it from her father Arunachellam. Arunachellam had two brothers Ramaswami and Mathurbhutham, and the question is whether Mathurbutham's daughter Seethai or Ramaswami's daughter's son Maruda Muthu Mudali is the heir of Palani. All the women appear to have followed the profession of a prostitute. That members of this caste are Hindus is certain though the ancient writers and their modern exponents find some difficulty in fixing them in one of the four castes; but whether they belong to the Sudra or fourth caste or to a separate fifth caste is immaterial. That male members of this caste are usually governed by the Hindu law and usage does not seem to have been questioned, so also when female members marry and have children, as they sometimes do, their family relation is governed by the Hindu law and presumably the ordinary Hindu law of inheritance will govern succession to their properties. At the same time their female children may remain unmarried and become professional dasis without any degradation or stigma attaching to them so long as they observe the caste customs. It is well known that at least in the Southern Districts they are supposed to be married to the idol of some temple and it is a question not beyond dispute whether after such a marriage signified by the tying of a bottu and thali by the archaka or priest they can contract a real marriage with a member of their caste. They are not virgins, are not married women and never become widows.

We are led to make these observations for showing that there is no such thing as a dissolution of the natural tie by relationship between the members of the caste who remain unmarried and follow their trade and their married relations who lead a respectable life. Even in the case of married or unmarried women of other castes, who have becoma degraded by their immoral conduct, it is now settled that the natural relationship is not broken between such common women and their respectable relations and the ordinary rule of the Hindu law of inheritance applies. But it will be seen at once that that law, which is based on a system of legal marriage and consequential relationship cannot be applied at all or at least without very considerable modifications to the property of a woman of this caste,

who except her own children can ordinarily have relations only through females. The rules as to stridhan obviously do not apply to such property and there is no other rule of succession laid down in the Smritis or by the commentators prescribing the devolution of the property of women of this caste except it be the general rule "that to the nearest 'sapinda' the inheritance next belongs." According to Vijnaneswara 'sapinda' connotes merely relationship: see Acharadyaya Vivahaprakatam, pp. 31, 32 and 55 of Setlur's Edition, Translation 1, *M. L. J.* 75. Usage has therefore sprung up in this caste which permits affiliation of daughters and gives preference to females in matters of succession.

This was recognised in one of the early cases in this Court, *Kamakshi* v. *Nagarathnam* (1). There the two daughters of a son inherited the mirasi office of their grandmother. On the death of one of them her daughter was held entitled to her share of the office jointly with the aunt. The learned Judges held that the rules of inheritance applicable to paternal property were applicable to succession to the property of the mother, treating the females as if they were males, as that was necessary from the nature of the case.

It is to be observed that the females so inheriting the property take an absolute interest therein as a male. Apparently the learned Judges thought they were applying the ordinary Hindu law of inheritance, with such modification as they thought necessary to suit the circumstances of the case; but we can find no authority in that law for such a manipulation. We think the correct basis was usage. In *Venku* v. *Mahalinga* (2) Muthuswami Iyer, J., after a review of the previous decisions concluded that the civil rights of the members of this class are to be adjudicated upon, in the absence of a positive rule to the contrary, with reference to the custom of the caste and the analogies of the Hindu law: see p. 399. Apparently on that analogy it has been held that a dancing woman and her daughters may constitute a joint Hindu family, *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (3). In *Muttukannu* v. *Paramesami* (4) the same learned Judge held that by custom plurality of adoptions was recognized in the section of the caste whose practices were in question and that the adopted daughter succeeded in preference to and to the exclusion of the son of another deceased adopted daughter. Evidently the right of representation was not allowed to a daughter's son. In *Narasanna* v. *Gangu* (5) it was held that the sister's adopted daughter was entitled to succeed to a deceased dancing woman's property in preference to her brother. This would be in accordance with the principles governing the devolution of the property of the female members of the caste, but the learned Judges based their decision on degradation being a ground of preference. They followed the decision of *Sivasangu* v. *Minal* (6) which however was not a case of succession to the property of a woman of the dancing girl caste, but of a married woman who became degraded by becoming a prostitute.

This ground of preference to succeed to a prostitute's property is no longer law [*Subbaraya Pillai* v. *Ramasami Pillai* (7), *Mandaram Nammaiya Chetty* v. *Mandaram Thiruvengadathan Chetty* (8), and *Meenakshi* v. *Muniandi Panikkan* (9)], but it is to be observed that these cases leave the law as to dancing girls as it was before. Acting then on the analogy of the cases decided in respect of the devolution of the property of dancing girls, we think Seethai was a preferential heir to her cousin's son. She is nearer in relation to the deceased and the ordinary Hindu law, which excludes females or prefers males to females, has no application to the case of dancing girls. This is also in accordance with the consciousness of the parties, for it is said in the judgment of the District Munsif that the defendants conceded that there was a special custom as regards inheritance to property left by a dancing girl, under which heirs who are also dancing girls take the property of the deceased in preference to male heirs. It is also clear that the ordinary Hindu law of inheritance is not applicable to these parties,

1. (1869-70) 5 M H C R 161.
2. (1888) 11 Mad 393.
3. (1864-65) 2 M H C R 56.
4. (1889) 12 Mad 214.
5. (1890) 13 Mad 133.
6. (1889) 12 Mad 277.
7. (1900) 23 Mad 171.
8. (1913) 18 I C 601.
9. A I R 1915 Mad 63=25 I C 957=38 Mad 1144.